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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0421; Project Identifier MCAI–2022–01360–A; Amendment 39–22435; AD 2023–09–12]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Pilatus Aircraft Ltd. (Pilatus) Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes. This AD is prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as insufficient grounding of the vapor cycle cooling system (VCCS) compressor/condenser. This AD requires inspecting the power return and chassis grounding cable attachment points at frame 37, including the attachment parts, and depending on the inspection results, corrective action. This AD also requires modifying the installation of the VCCS compressor/condenser power return cables and installing an additional isolated VCCS chassis ground cable. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective July 5, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 5, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0421; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the MCAI, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Pilatus Aircraft Ltd., Customer Support General Aviation, CH–6371 Stans, Switzerland; phone: +41 848 24 7 365; email: *techsupport.ch@pilatus-aircraft.com;* website: *pilatus-aircraft.com*.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–0421.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aviation Safety Engineer, International Validation Branch, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Pilatus Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes. The NPRM published in the **Federal Register** on February 27, 2023 (88 FR 12273). The NPRM was prompted by AD 2022–0212, dated October 18, 2022 (referred to after this as ''the MCAI''), issued by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union.

The MCAI was prompted by a reported occurrence of a burning odor coming from the air conditioning vents during the climb phase of a Pilatus Model PC–12/47E airplane. An investigation identified that insufficient grounding of the VCCS compressor/condenser at frame 37 resulted in severe heat damage to the baseplate and adjacent metal support structure. It was determined that this condition may occur on airplanes equipped in production with the large oxygen bottle installed on the right-hand side of the rear fuselage. To address the unsafe condition, the MCAI requires a one-time inspection of the power return and chassis grounding cable attachment point at frame 37, including the attachment parts, and modification of the installation of the VCCS.

In the NPRM, the FAA proposed to require a one-time inspection of the power return and chassis grounding cable attachment point at frame 37, including the attachment parts, and modification of the installation of the VCCS. This condition, if not addressed, could, in the case of damage to the oxygen supply line, lead to an uncontrolled fire with damage to the airplane and injury to the occupants. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0421.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from the Air Line Pilots Association, International (ALPA), who supported the NPRM without change. In addition, an individual commenter submitted a comment to the docket, but did not comment on the proposed required actions or the determination of the costs in the NPRM.

Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Pilatus PC–12 Service Bulletin 21–016, dated August 15, 2022, which specifies procedures for inspecting the power return and chassis grounding cable attachment point on the airframe at frame 37, including the attachment parts, modifying the installation of the VCCS compressor/condenser power return cables, and installing an additional isolated VCCS chassis ground cable. This service bulletin also specifies contacting Pilatus if any damage is found.

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.

Differences Between This AD and the MCAI

The MCAI requires contacting the manufacturer for approved corrective action instructions if any discrepancy is found during the inspection. This AD requires contacting either the Manager, International Validation Branch, FAA; EASA; or Pilatus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

Costs of Compliance

The FAA estimates that this AD affects 8 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspect	3 work-hours × $85 per hour = $255	Not Applicable	$255	$2,040
Modify	5 work-hours × $85 per hour = $425	$667	1,092	8,736

The repair instructions that may be needed as a result of the inspection could vary significantly from airplane to airplane. The FAA has no data to determine the costs to accomplish the repair or the number of airplanes that would need this repair.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–09–12 Pilatus Aircraft Ltd.: Amendment 39–22435; Docket No. FAA–2023–0421; Project Identifier MCAI–2022–01360–A.

(a) Effective Date

This airworthiness directive (AD) is effective July 5, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Pilatus Aircraft Ltd. Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes, serial numbers 466, 467, 725, 861, 1032, 1052, 1082, 1115, 1232, 1411, 1428, 1439, 1530, 1541, 1663, 1725, and 1802, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2197, Air Conditioning System Wiring.

(e) Unsafe Condition

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI identifies the unsafe condition as insufficient grounding of the vapor cycle cooling system (VCCS) compressor/condenser. The FAA is issuing this AD to address this condition. The unsafe condition, if not addressed, could, in the case of damage to the oxygen supply line, lead to an uncontrolled fire with damage to the airplane, and injury to the occupants.

(f) Compliance

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

(g) Required Actions

(1) Within 2 months after the effective date of this AD, inspect the power return and chassis grounding cable attachment points at frame 37, including the attachment parts, for physical and heat damage, de-lamination, and corrosion in accordance with steps (2) through (6) of Section 3.B. of the Accomplishment Instructions in Pilatus PC–12 Service Bulletin 21–016, dated August 15, 2022 (Pilatus PC–12 SB 21–016).

(2) If, during the inspection required by paragraph (g)(1) of this AD, any physical or heat damage, de-lamination, or corrosion as identified in steps (2) through (6) of Section 3.B. of the Accomplishment Instructions in Pilatus PC–12 SB 21–016 is detected, before further flight, repair using a method approved by the Manager, International Validation Branch, FAA; the European Union Aviation Safety Agency (EASA); or Pilatus's

EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) Within 2 months after the effective date of this AD, modify the installation of the VCCS compressor/condenser power return cables and install an additional isolated VCCS chassis ground cable in accordance with Section 3.C. of the Accomplishment Instructions in Pilatus PC–12 SB 21–016. Where the service bulletin specifies discarding the stop angle, this AD requires removing the stop angle from service.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in § 39.19. In accordance with § 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (i)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Additional Information

(1) Refer to EASA AD 2022–0212, dated October 18, 2022, for related information. This EASA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–0421.

(2) For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, International Validation Branch, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

(j) Material Incorporated by Reference

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

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

(i) Pilatus PC–12 Service Bulletin 21–016, dated August 15, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact Pilatus Aircraft Ltd., Customer Support General Aviation, CH–6371 Stans, Switzerland; phone: +41 848 24 7 365; email: *techsupport.ch@pilatus-aircraft.com;* website: *pilatus-aircraft.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on May 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–11447 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–13–P

DELAWARE RIVER BASIN COMMISSION

18 CFR Parts 401 and 420

Regulatory Program Fees and Water Charges Rates

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: Notice is provided of the Commission's regulatory program fees and schedule of water charges for the fiscal year beginning July 1, 2023.

DATES: This final rule is effective July 1, 2023.

FOR FURTHER INFORMATION CONTACT: Elba L. Deck, CPA, Director of Finance and Administration, 609–883–9500, ext. 201.

SUPPLEMENTARY INFORMATION: The Delaware River Basin Commission (''DRBC'' or ''Commission'') is a Federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states—Delaware, New Jersey, New York and Pennsylvania—and on behalf of the federal government, the North Atlantic Division Commander of the U.S. Army Corps of Engineers.

In accordance with 18 CFR 401.43(c), on July 1 of every year, the Commission's regulatory program fees as set forth in tables 1, 2 and 3 of that section are subject to an annual adjustment, commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia published by the U.S. Bureau of Labor Statistics during that year. Pursuant to 18 CFR 420.41(c), the same indexed adjustment applies to the Commission's schedule of water charges for consumptive and non-consumptive withdrawals of surface water within the basin. The referenced April 12-month CPI for 2023 showed an increase of 4.74%. Commensurate adjustments are thus required.

This notice is made in accordance with 18 CFR 401.43(c) and 18 CFR 420.41(c), which provide that a revised fee schedule will be published in the **Federal Register** by July 1. The revised fees also may be obtained by contacting the Commission during business hours or by checking the Commission's website.

List of Subjects

18 CFR Part 401

Administrative practice and procedure, Project review, Water pollution control, Water resources.

18 CFR Part 420

Water supply.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends parts 401 and 420 of title 18 of the Code of Federal Regulations as set forth below:

PART 401—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 401 continues to read as follows:

Authority: Delaware River Basin Compact (75 Stat. 688), unless otherwise noted.

Subpart C—Project Review Under Section 3.8 of the Compact

■ 2. In § 401.43, revise tables 1, 2, and 3 to read as follows:

§ 401.43 Regulatory program fees.

* * * * *

TABLE 1 TO § 401.43—DOCKET APPLICATION FILING FEE

Project type	Docket application fee	Fee maximum
Water Allocation	$491 per million gallons/month of allocation,[1] not to exceed $18,420.[1] Fee is doubled for any portion to be exported from the basin.	Greater of: $18,420[1] or Alternative Review Fee.
Wastewater Discharge	Private projects: $1,228;[1] Public projects: $614[1]	Alternative Review Fee.
Other	0.4% of project cost up to $10,000,000 plus 0.12% of project cost above $10,000,000 (if applicable), not to exceed $92,099[1].	Greater of: $92,099[1] or Alternative Review Fee.

[1] Subject to annual adjustment in accordance with paragraph (c) of this section.

TABLE 2 TO § 401.43—ANNUAL MONITORING AND COORDINATION FEE

	Annual fee	Allocation
Water Allocation	[1] 368	<4.99 mgm.
	[1] 553	5.00 to 49.99 mgm.
	[1] 798	50.00 to 499.99 mgm.
	[1] 1,013	500.00 to 9,999.99 mgm.
	[1] 1,228	> or = to 10,000 mgm.
	Annual fee	**Discharge design capacity**
Wastewater Discharge	[1] 368	<0.05 mgd
	[1] 749	0.05 to 1 mgd.
	[1] 1,007	1 to 10 mgd.
	[1] 1,228	>10 mgd.

[1] Subject to annual adjustment in accordance with paragraph (c) of this section.

TABLE 3 TO § 401.43—ADDITIONAL FEES

Proposed action	Fee	Fee maximum
Emergency Approval Under 18 CFR 401.40	$5,000	Alternative Review Fee.
Late Filed Renewal Surcharge	$2,000.	
Modification of a DRBC Approval	At Executive Director's discretion, Docket Application Fee for the appropriate project type.	Alternative Review Fee.
Name change	$1,228[1].	
Change of Ownership	$1,842[1].	

[1] Subject to annual adjustment in accordance with paragraph (c) of this section.

PART 420—BASIN REGULATIONS—WATER SUPPLY CHARGES

■ 3. The authority citation for part 420 continues to read as follows:

Authority: Delaware River Basin Compact, 75 Stat. 688.

■ 4. In § 420.41, revise paragraphs (a) and (b) to read as follows:

§ 420.41 Schedule of water charges.

* * * * *

(a) $98 per million gallons for consumptive use, subject to paragraph (c) of this section; and

(b) $0.98 per million gallons for non-consumptive use, subject to paragraph (c) of this section.

* * * * *

Dated: May 19, 2023.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2023–11205 Filed 5–30–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 587

Publication of Russian Harmful Foreign Activities Sanctions Regulations Web General License 8G

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of a Web General License.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing one general license (GL) issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations: GL 8G, which was previously made available on OFAC's website.

DATES: GL 8G was issued on May 5, 2023. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website: *www.treas.gov/ofac.*

Background

On May 5, 2023, OFAC issued GL 8G to authorize certain transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587. GL 8G was made available on OFAC's website (*www.treas.gov/ofac*) when it was issued. The text of this GL is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations

31 CFR Part 587

GENERAL LICENSE NO. 8G

Authorizing Transactions Related to Energy

(a) Except as provided in paragraph (c) of this general license, all transactions prohibited by Executive Order (E.O.) 14024 involving one or more of the following entities that are related to energy are authorized, through 12:01 a.m. eastern daylight time, November 1, 2023:

(1) State Corporation Bank for Development and Foreign Economic Affairs Vnesheconombank;

(2) Public Joint Stock Company Bank Financial Corporation Otkritie;

(3) Sovcombank Open Joint Stock Company;

(4) Public Joint Stock Company Sberbank of Russia;

(5) VTB Bank Public Joint Stock Company;

(6) Joint Stock Company Alfa-Bank;

(7) Public Joint Stock Company Rosbank;

(8) Bank Zenit Public Joint Stock Company;

(9) Bank Saint-Petersburg Public Joint Stock Company;

(10) Any entity in which one or more of the above persons own, directly or indirectly, individually or in the aggregate, a 50 percent or greater interest; or

(11) the Central Bank of the Russian Federation.

(b) For the purposes of this general license, the term ''related to energy'' means the extraction, production, refinement, liquefaction, gasification, regasification, conversion, enrichment, fabrication, transport, or purchase of petroleum, including crude oil, lease condensates, unfinished oils, natural gas liquids, petroleum products, natural gas, or other products capable of producing energy, such as coal, wood, or agricultural products used to manufacture biofuels, or uranium in any form, as well as the development, production, generation, transmission, or exchange of power, through any means, including nuclear, thermal, and renewable energy sources.

(c) This general license does not authorize:

(1) Any transactions prohibited by Directive 1A under E.O. 14024, *Prohibitions Related to Certain Sovereign Debt of the Russian Federation;*

(2) The opening or maintaining of a correspondent account or payable-through account for or on behalf of any entity subject to Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions;*

(3) Any debit to an account on the books of a U.S. financial institution of the Central Bank of the Russian Federation; or

(4) Any transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR), including transactions involving any person blocked pursuant to the RuHSR other than the blocked persons described in paragraph (a) of this general license, unless separately authorized.

(d) Effective May 5, 2023, General License No. 8F, dated February 24, 2023, is replaced and superseded in its entirety by this General License No. 8G.

Note to General License No. 8G. This authorization is valid until November 1, 2023, unless renewed.

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

Dated: May 5, 2023.

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

[FR Doc. 2023–11463 Filed 5–30–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0287]

Safety Zone; 47th Annual Swim Around Key West, Key West, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the 47th Annual Swim Around Key West, Key West, Florida to provide for the safety of life on the navigable waterways during this event. This action is necessary to ensure the safety of event participants and spectators. During the enforcement period, no person or vessel may enter, transit through, anchor in, or remain within the regulated area without approval from the Captain of the Port Key West or a designated representative.

DATES: The regulation in 33 CFR 165.786 will be enforced for the location identified in Item 6.2 of the table to § 165.786, from 6 a.m. until 4 p.m. on June 3, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Hailye Wilson, Sector Key West Waterways Management Department, Coast Guard; telephone (305) 292–8768; email: *hailye.m.wilson@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.786, Table to § 165.786, Item 6.2, for the 47th Annual Swim Around Key West from 6 a.m. until 4 p.m. on June 3, 2023. This action is being taken to provide for the safety of life on navigable waterways during this event. The regulation for recurring marine events within Sector Key West Captain of the Port (COTP) zone, 165.786, Table to § 165.786, Item 6.2, specifies the location of the regulated area. During the enforcement period, no person or vessel may enter, transit through, anchor in, or remain within the established regulated areas without approval from the Captain of the Port Key West or designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

The Coast Guard will provide notice of the regulated area by Local Notice to Mariners and Broadcast Notice to Mariners. If the Captain of the Port Key West determines that the regulated area need not be enforced for the full duration stated in this publication, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

J.D. Ingram,
Captain, U.S. Coast Guard, Captain of the Port Key West.

[FR Doc. 2023–11562 Filed 5–30–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0276]

Safety Zone; CFK Swim Around Key West, Key West, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the College of the Florida Keys Swim Around Key West, Key West, Florida to provide for the safety of life on the navigable waterways during this event. This action is necessary to ensure the safety of event participants and spectators. During the enforcement period, no person or vessel may enter, transit through, anchor in, or remain within the regulated area without approval from the Captain of the Port Key West or a designated representative.

DATES: The regulation in 33 CFR 165.786 will be enforced for the location identified in Item 6.1 of the table to § 165.786, from 8:30 a.m. until 4:30 p.m. on June 17, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Hailye Wilson, Sector Key West Waterways Management Department,

Coast Guard; telephone (305) 292–8768; email: *Hailye.M.Wilson@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.786, Table to § 165.786, Item 6.1, for the College of the Florida Keys Swim Around Key West from 8:30 a.m. until 4:30 p.m. on June 17, 2023. This action is being taken to provide for the safety of life on navigable waterways during this event. The regulation for recurring marine events within Sector Key West Captain of the Port (COTP) zone, 165.786, Table to § 165.786, Item 6.1, specifies the location of the regulated area. During the enforcement period, no person or vessel may enter, transit through, anchor in, or remain within the established regulated areas without approval from the Captain of the Port Key West or designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

The Coast Guard will provide notice of the regulated area by Local Notice to Mariners and Broadcast Notice to Mariners. If the Captain of the Port Key West determines that the regulated area need not be enforced for the full duration stated in this publication, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

J.D. Ingram,

Captain, U.S. Coast Guard, Captain of the Port Key West.

[FR Doc. 2023–11567 Filed 5–30–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

[Docket ID ED–2023–OSERS–0020]

Final Priority and Definition—Activities for Underserved Populations

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

ACTION: Final priority and definition.

SUMMARY: The U.S. Department of Education (Department) announces a priority and definition under the Rehabilitation Act of 1973, as amended (Rehabilitation Act), for Activities for Underserved Populations program, Assistance Listing Number (ALN) 84.315C. We take this action to improve the delivery of vocational rehabilitation services to, and the employment outcomes of, individuals with disabilities from underserved populations. For this priority, we define "underserved populations" to mean "Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color." The Department may use this priority and definition for competitions in fiscal year (FY) 2023 and later years.

DATES: Effective June 30, 2023.

FOR FURTHER INFORMATION CONTACT: Kristen Rhinehart-Fernandez, U.S. Department of Education, 400 Maryland Avenue SW, Room 5076, Potomac Center Plaza, Washington, DC 20202–5134. Telephone: (202) 245–6103. Email: *315C@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Purpose of Program: A purpose of the Activities for Underserved Populations program is to make awards to minority entities and Indian Tribes to conduct research, training, technical assistance, or a related activity to improve the quality, access, delivery of services, and competitive integrated employment outcomes under the Rehabilitation Act, especially for individuals with disabilities from underserved populations. As defined in section 21(b)(5) of the Rehabilitation Act, "minority entity" means "a historically Black college or university, a Hispanic-serving institution of higher education, an American Indian Tribal college or university, or another institution of higher education whose minority student enrollment is at least 50 percent." The definition of "Indian Tribe" in section 7(19)(B) of the Rehabilitation Act is "any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act) and a Tribal organization (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l))."

Program Authority: 29 U.S.C. 718(b)(2)(B).

We published a notice of proposed priority and definition (NPP) for this program in the **Federal Register** on February 8, 2023 (88 FR 8242). That document contained background information and our reasons for proposing the priority and definition.

There are no differences between the NPP and this notice of final priority and definition (NFP), as discussed in the *Analysis of Comments and Changes* section of this document.

Public Comment: In response to our invitation in the NPP, eight parties submitted comments on the proposed priority and definition. Generally, we do not address technical and other minor changes or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed priority and definition.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the priority since publication of the NPP follows.

Comment: One commenter commended the Department for including Indian Tribes in the definition of "underserved populations" and shared that it demonstrates a tangible effort to expand opportunities for Indian Tribes and is a step forward in repairing and building trust with the Tribes. Another commenter agreed that the priority would strengthen the delivery of services to individuals with disabilities from underserved populations.

Discussion: The Department appreciates support for this priority.

Changes: None.

Comment: One commenter expressed opposition to the proposed priority, stating that by exclusively focusing on or prioritizing awards to minority entities and Indian Tribes as described in 29 U.S.C. 718(b)(2)(B), the priority limits the entities described in 29 U.S.C. 718(b)(2)(C), which permits awards to a State or public or private nonprofit agency or organization to provide outreach and technical assistance to minority entities and Indian Tribes in order to increase their participation in activities carried out under the Rehabilitation Act and enhance their capacity to do so. The commenter asserted that awards should be granted based on the best possible outcome, not the race or ethnicity of the applicant.

Discussion: The proposed priority and definition are directly aligned with the program statute. Section 21 of the Rehabilitation Act (29 U.S.C. 718(b)(2)(A–C)) establishes three allowable activities for this program and the entities eligible to receive awards for each of the allowable activities. The Department has provided funding opportunities under each of the allowable activities at different times since this program was authorized, including section 718(b)(2)(C). For this funding opportunity, as described in the NPP, the Department determined that there was a need for the activities authorized by section 718(b)(2)(B). The Department further determined that this

priority and definition align with such activities, as well as the Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612), and Executive Order 13985 for Advancing Racial Equity and Support for Underserved Communities Through Federal Government, published in the **Federal Register** on January 20, 2021 (86 FR 7009).

Changes: None.

Comment: One commenter recommended that the priority include targeted research and interventions in educational settings for Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color who identify as LGBTQ+. The commenter noted that LGBTQ+ youth of color experience higher rates of homelessness and poverty and should be included in the priority.

Discussion: We appreciate the recommendation for including targeted research and interventions in educational settings in the priority for Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color who identify as LGBTQ+. However, the purpose of the priority is to improve the delivery of State vocational rehabilitation (VR) services to individuals with disabilities from underserved populations with the goal of improving competitive integrated employment outcomes. The Department anticipates that the training and technical assistance provided to State VR agencies through this priority will ultimately benefit Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color, who are individuals with disabilities, including those who identify as LGBTQ+.

Changes: None.

Comment: One commenter stated that the priority should provide an avenue for minority-serving institutions to train pre-service students and build the capacity of future VR counselors to effectively serve underserved populations. The commenter also suggested that additional strategies are needed to build a critical mass of skilled researchers at minority-serving institutions to study long-term inequities in employment experienced by individuals with disabilities from underserved populations. The commenter also inquired if applicants could propose activities to build a pipeline at minority-serving institutions to train and mentor students as future research leaders who could generate novel knowledge that informs service intervention and policy innovation for reducing employment disparities among individuals with disabilities from underserved populations.

Discussion: The Department believes that pre-service training is essential to improving VR services to, and competitive integrated employment outcomes of, individuals with disabilities from underserved populations. As stated in the priority, applicants are required to disseminate training and technical assistance material, analysis of data collected, evidence-based and promising practices, and lessons learned to RSA-funded Rehabilitation Long-Term Training projects designed to provide pre-service training, as well as RSA-funded technical assistance centers, Department-funded programs, and Federal partners, as applicable. In addition, applicants must develop products, such as toolkits, guides, manuals, webinars, and communities of learning for instructors, facilitators, State VR agency directors, and human resource and professional development specialists to facilitate the implementation of training and technical assistance material in curriculum and relevant training and development activities.

The Department also agrees that research focused on inequities in employment for individuals with disabilities from underserved populations, and encouraging students at minority entities to engage in such research, could help the VR system better enable individuals with disabilities from underserved populations to access VR resources, secure competitive integrated employment, and reach future goals. To that end, the priority requires the grantee to contribute to VR research and pedagogical practices that promote access to approaches that are racially, ethnically, culturally, and linguistically inclusive. Further, as described in paragraph (c)(iv) of the *Application Requirements,* under ''Quality of Project Services,'' applicants may include any other training and technical assistance activity that improves understanding, responsiveness, and delivery of services to, and competitive integrated employment outcomes for, underserved populations. For example, applicants may propose an activity at a minority entity to train and mentor students who could generate new knowledge that informs service intervention and policy innovation for reducing employment disparities among individuals with disabilities from underserved populations. However, activities included under paragraph (c)(iv) should not be the entire focus of the project, since the applicant must propose a project that, at a minimum, provides direct training and technical assistance to VR agencies by conducting all of the activities described under *Application Requirements,* paragraphs (a) through (f) in a culturally appropriate manner.

Changes: None.

Comment: One commenter recommended that the Department also target vulnerable populations such as English learners and individuals living in rural or remote communities under this priority. The commenter added that underserved and vulnerable populations often experience disproportionate outcomes.

Discussion: The Department agrees with the commenter that English learners and individuals living in rural or remote communities have experienced inequities that have limited or prevented their ability to achieve competitive integrated employment; however, the program authority under which the funding is appropriated is based on congressional findings regarding the inequitable treatment of individuals from minority backgrounds in the VR process, and the statute instructs the Secretary to concentrate on improving the outcome of services provided under the Rehabilitation Act to individuals from minority backgrounds. 29 U.S.C. 718 (Section 21, ''Traditionally Underserved Populations''). Therefore, in order to comply with statutory requirements, this priority focuses its definition of ''underserved populations'' on individuals from minority backgrounds: ''Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color.'' While such underserved populations will likely include some English learners and individuals from rural or remote areas, they are not specifically included in the target population due to the statutory focus on individuals from minority backgrounds in this particular funding opportunity. However, under the priority, the grantee must contribute to VR research and pedagogical practices that promote access to approaches that are racially, ethnically, culturally, and linguistically inclusive.

Changes: None.

Comment: One commenter recommended that we clearly define short- and long-term goals in the priority. The commenter raised concerns about the five-year performance period and proposed that the priority set intervals for evaluating

the effectiveness of the training and technical assistance that the grantee is providing to the identified State VR agencies. The commenter added that the Delphi method (a term generally used to describe a structured, iterative survey or feedback process to elicit and combine expert opinion to reach consensus) could help analyze different phases of development.

Discussion: The Department appreciates the commenter's concerns and suggestions. The Department notes that, under paragraph (d) of the *Application Requirements,* ''Quality of the Project Evaluation,'' applicants must include an evaluation plan for the project that includes such periodic review. The plan must describe a process or approach that will be used for gathering feedback from the identified State VR agencies throughout years two, three, four, and five of the project for continuous improvement and to evaluate the effectiveness of the training and technical assistance provided to a minimum of 15 State VR agencies. Additionally, under paragraph (d)(3), applicants must describe methodologies, including instruments, data collection methods, and analyses, that will be used to evaluate the project and how the methods of evaluation will produce quantitative and qualitative data to demonstrate whether the project activities achieved their intended outcomes. Applicants may propose the Delphi method or other appropriate methods to meet this requirement.

Changes: None.

Comment: One commenter responded to the Department's directed questions about the requirement for applicants to provide technical assistance to a minimum of 15 State VR agencies (Combined, General, or Agencies for the Blind) over a five-year period. The commenter spoke to how the requirement of providing technical assistance to a minimum of 15 State VR agencies may deter Indian Tribes from applying for this funding opportunity. The commenter recommended lowering the requirement from a minimum of 15 State VR agencies to five because of limited Tribal operating budgets, the rural location of many Tribes, andchanges in program staff resulting from Tribal elections. As it applies to Tribes located in Montana and the Rocky Mountain and Great Plains regions, the commenter explained that the minimum requirement may discourage Tribes from the funding opportunity altogether. The commenter indicated that Tribes in Montana operate under very limited budgets to meet the respective needs of the people they serve, and that providing training and technical assistance to a minimum of 15 State VR agencies over five years will likely contribute to additional budget constraints and concerns. The commenter added that it would also be difficult for Tribes in these regions to host or coordinate 15 trainings as Indian Reservations can be hundreds of miles from the neighboring county seat. Additionally, the commenter shared that Tribal elections could result in a change in the program applicant or program coordinator within the five-year grant period, particularly in Montana, where most Tribes hold elections every two years.

Discussion: We appreciate the commenter's concerns about the capability of Indian Tribes located in rural areas to successfully provide training and technical assistance to a minimum of 15 State VR agencies over a five-year performance period, including concerns about limited operating budgets and changes in Tribal government leadership. There are currently 78 VR agencies (34 Combined VR agencies, 22 General VR agencies, and 22 Blind VR agencies) and 93 Tribal VR programs. In addition, the Department funds the American Indian Vocational Rehabilitation Training and Technical Assistance Center and Tribal VR Institute (AIVRTTAC), which assists Tribal governments to develop or to increase their capacity to provide a program of vocational rehabilitation services, in a culturally relevant manner, to American Indians with disabilities residing on or near Federal or State reservations. The program's goal is to enable these individuals, consistent with their individual strengths, resources, priorities, concerns, abilities, capabilities, and informed choice, to prepare for and engage in gainful employment. Program services are provided under an individualized plan for employment and may include native healing services. The AIVRTTAC ensures that all materials and activities are culturally responsive through providing culturally responsive teaching, researching needs assessments, including examining and developing culturally based promising VR practices, assisting AIVRTTAC participants in adapting standard VR practices to the cultural and social needs of AIVRS projects, using the AIVRTTAC holistic AIVRS project model, and developing opportunities to bridge understanding between cultures. The Department identified a minimum number of State VR agencies based on factors such as cost, level of effort, scope of the project, duration of the training and technical assistance, and the unique challenges and demographics of State VR agencies. We note that the grantee may offer training and technical assistance in-person and remotely to the identified State VR agencies. The grantee may also determine how many State VR agencies to serve each year over a five-year period to meet the minimum requirement. In addition, applicants may subgrant to Indian Tribes to directly carry out project activities described in the priority, as stated in the notice inviting applications published elsewhere in this issue of the **Federal Register**.

In addition to these factors, the Department also recognizes the financial constraints of Indian Tribes, especially those located in rural areas, may be a potential barrier to applying for this competition. Therefore, the Department will expand the range of State VR agencies the grantee must serve in the Final Priority from 15 to a minimum range of 5 to 15 to ensure all applicants have an opportunity to successfully meet the goals of this program. When determining a minimum range of State VR agencies to serve, applicants should consider the estimated available funds described in the notice inviting applications published elsewhere in the **Federal Register**. Given the Department only plans to award one grant, applicants are encouraged to identify a meaningful number of State VR agencies to receive training and technical assistance from this project in order to increase competitive integrated employment outcomes for individuals with disabilities from underserved populations.

Changes: In the Final Priority, the Department provides funding for a cooperative agreement for a minority entity or an Indian Tribe to provide training and technical assistance to a minimum range of 5 to 15 State VR agencies (Combined, General, or Agencies for the Blind) over a five-year period of performance.

Comment: One commenter recommended that individuals with 8(a) certification (socially and economically disadvantaged small businesses) be included as eligible applicants.

Discussion: We appreciate the comment. However, for-profit entities, including small businesses, are not eligible applicants under 29 U.S.C. 718(b)(2)(B).

Changes: None.

Final Priority

Improving the Delivery of Vocational Rehabilitation Services to, and the Employment Outcomes of, Individuals with Disabilities from Underserved Populations.

Under this priority, the Department provides funding for a cooperative agreement for a minority entity or an Indian Tribe to provide training and technical assistance to a minimum range of 5 to 15 State VR agencies (Combined, General, or Agencies for the Blind) over a five-year period of performance so that the agencies are equipped to serve as role models for diversity, equity, inclusion, and accessibility in the workforce system by implementing policies, practices, and service delivery approaches that are designed to contribute to increasing competitive integrated employment outcomes for individuals with disabilities from underserved populations. Further, the grantee must contribute to VR research and pedagogical practices that promote access to approaches that are racially, ethnically, culturally, and linguistically inclusive.

During the first year of the project the grantee will focus on developing training and technical assistance material and gathering input and feedback from a diverse group of stakeholders including the Rehabilitation Services Administration (RSA), State VR agencies, and other relevant partners. During the period of performance, the grantee must enter into agreements with the State VR agencies receiving training and technical assistance. Each agreement must: specify the level of involvement from VR agency leadership and personnel and include an assurance that the VR agency is committed to sustainable systems change across the organization for improving delivery of services to underserved populations; explain how data will be collected and shared; identify training and technical assistance needs, intervention strategies, and implementation timelines; and describe how outcomes will be measured. The grantee must have a minimum of two agreements in place by the end of the first year of the grant.

Application Requirements

To be considered for funding under this priority, applicants must, at a minimum, propose a project that will conduct the following activities in a culturally appropriate manner. The Department encourages innovative approaches to meet this requirement. To meet this requirement, applicants must—

(a) Demonstrate, in the narrative section of the application under ''Significance of the Proposed Project,'' an understanding of the inequities and challenges experienced by individuals with disabilities from underserved populations determined eligible to receive VR services. To meet this requirement, applicants must—

(1) Present information and relevant data about the disparities that exist with respect to VR services and employment outcomes for underserved populations; and

(2) Describe how the project proposes to improve VR services for, and competitive integrated employment outcomes of, underserved populations.

(b) Demonstrate, in the narrative section of the application under ''Quality of Project Design,'' how the project will address inequities and challenges experienced by underserved populations determined eligible to receive VR services. To meet this requirement, applicants must—

(1) Demonstrate knowledge and experience working with individuals with disabilities from underserved populations;

(2) Incorporate into the project design current research and promising and evidence-based practices (EBPs),[1] research about adult learning principles and implementation science, and relevant findings, recommendations, and relevant strategies identified by the Targeted Communities project [2] to overcome barriers to competitive integrated employment and VR participation for individuals with disabilities from underserved populations;

(3) Detail how the project will collect and examine data, including from the RSA–911 and other relevant sources, from a minimum range of 5 to 15 State VR agencies regarding VR applicants, VR-eligible individuals, and VR participants by race/ethnicity by—

(i) Exploring patterns, changes, or shifts in demographics for individuals with disabilities from underserved populations;

(ii) Exploring data, by race/ethnicity, from each State VR agency regarding VR applicants to identify opportunities for increased outreach to and referral of individuals with disabilities from underserved populations to VR services;

(iii) Examining data, by race/ethnicity, from each State VR agency regarding selected VR services and competitive integrated employment outcomes at exit to identify inconsistencies or gaps in the provision of services;

(iv) Examining data from each State VR agency to identify reasons for successful and unsuccessful closures between VR program participants from underserved populations and VR program participants who are not from underserved populations; and

(v) Reviewing each State VR agency's service delivery model from eligibility determination to exit; and

(4) Present approaches for how the information and data described above will be used to inform strategies to improve the delivery of services to individuals with disabilities from underserved populations for each of the identified State VR agencies. For example, applicants may consider conducting a needs assessment and asset map for each of the identified State VR agencies to identify existing programs and services and businesses and philanthropic organizations in the community, as well as potential gaps and opportunities for collaboration, to support individuals with disabilities from underserved populations in successfully obtaining competitive integrated employment. Applicants may also consider designing a long-term data collection tool and provide analytical support and training to the identified State VR agencies to identify additional data elements not captured in the RSA–911 or other case management systems to continually assess the quality of services and outcomes for individuals with disabilities from underserved populations and individuals with disabilities not from underserved populations.

(c) Demonstrate, in the narrative section of the application under ''Quality of Project Services,'' how the project will be designed so that policies, practices, and service delivery approaches will contribute to increased competitive integrated employment outcomes for individuals with disabilities from underserved populations. To meet this requirement, applicants must—

(1) Propose training and technical assistance activities that will be offered to the identified State VR agencies. Training and technical assistance activities will be further developed during the first year of the grant and described in the agreements with the identified State VR agencies based on needs and analysis of data. Training and technical assistance activities may include, but are not limited to, (i) assisting in State VR agency coordination and cross-agency

[1] For purposes of these requirements, ''evidence-based practices'' (EBPs) means, at a minimum, demonstrating a rationale (as defined in 34 CFR 77.1) based on high-quality research findings or positive evaluation that such activity, strategy, or intervention is likely to improve student outcomes or other relevant outcomes.

[2] Final Report from the Vocational Rehabilitation Technical Assistance Center for Targeted Communities (Project E3) (PR/Award #H264F150003) *https://ncrtm.ed.gov/library/detail/vocational-rehabilitation-technical-assistance-center-targeted-communities-project* and project website: *https://projecte3.com/.*

partnerships with State and local agencies and community-based organizations, workforce programs, educational institutions, and other relevant local community agencies and organizations (*i.e.,* agencies and organizations that provide services and supports related to mental health, substance use, behavioral health, intellectual developmental disabilities, and other areas of need such as housing, food, transportation, and healthcare) to strengthen outreach and awareness about VR programs and services, build trust between State VR agency counselors and individuals with disabilities from underserved populations, and connect individuals with disabilities from underserved populations determined to be VR eligible with necessary supports to successfully obtain competitive integrated employment; (ii) reviewing policies, practices, and procedures from the identified State VR agencies and providing recommendations to help ensure they are culturally appropriate and implemented in an appropriate manner; (iii) developing strategies to strengthen diversity in the VR workforce (*e.g.,* reviewing hiring practices from the identified State VR agencies and identifying strategies that expand outreach to VR counselors from underserved populations and mentoring and coaching activities for new and existing VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel from underserved populations); and (iv) any other activity that improves understanding, responsiveness, and delivery of services to, and competitive integrated employment outcomes for, individuals with disabilities from underserved populations;

(2) Detail how those activities will incorporate relevant strategies and promising and effective practices identified by the Targeted Communities Project and other EBPs or related sources to the extent possible;

(3) Explain how training and technical assistance activities will be of high quality and sufficient intensity and duration to achieve the intended outcomes of the project;

(4) Describe how remote learning [3] opportunities will be incorporated into the project. Remote learning opportunities should offer experiences that advance engagement and implementation (*e.g.,* synchronous and asynchronous professional learning, professional learning networks or communities, and coaching), which could also be incorporated into Rehabilitation Counseling programs, as well as other training and professional development activities designed for the VR workforce, as appropriate. The remote learning environment must be accessible to individuals with disabilities in accordance with Section 504 of the Rehabilitation Act of 1973;

(5) Describe their knowledge, skills, and experience to support the training and technical assistance activities described above;

(6) Describe how the project will contribute to VR research and pedagogical practices that promote access to approaches that are racially, ethnically, culturally, and linguistically inclusive. To meet this requirement, applicants must describe how they will—

(i) Disseminate to all State VR agencies, RSA-funded Rehabilitation Long-Term Training projects and technical assistance centers, Department-funded programs, and Federal partners, as applicable, training and technical assistance material, analysis of data collected, evidence-based and promising practices, and lessons learned;

(ii) Develop products, such as toolkits, guides, manuals, webinars, and communities of learning, for instructors, facilitators, State VR agency directors, and human resource and professional development specialists to facilitate the implementation of training and technical assistance material in curriculum and relevant training and development activities; and

(iii) Gather input and feedback from a diverse group of stakeholders and subject matter experts, including RSA, State VR agencies, and other relevant partners, throughout the project to inform the development and delivery of the material described above.

(d) In the narrative section of the application under ''Quality of the Project Evaluation,'' include an evaluation plan for the project. The evaluation plan must describe—

(1) Clear and measurable outcomes;

(2) Approaches for measuring the effectiveness of the intervention strategies identified in the agreements, including standards and targets for measuring knowledge, skills, and abilities of State VR agency personnel before and after completion of training activities. To address this requirement, applicants must provide an approach for determining—

(i) The most effective practices in improving the delivery of services to individuals with disabilities from underserved populations and the data that demonstrate the effectiveness of the practices; and

(ii) The most effective practices in creating a culture of systems change within the State VR agency and the data that demonstrate the effectiveness of the practices;

(3) Methodologies, including instruments, data collection methods, and analyses, that will be used to evaluate the project and how the methods of evaluation will produce quantitative and qualitative data to demonstrate whether the project activities achieved their intended outcomes;

(4) How the evaluation will be coordinated, implemented, and revised, as needed, during the project. The applicant must designate at least one individual with sufficient dedicated time, demonstrated experience in evaluation, and knowledge of the project to coordinate and conduct the evaluation. This may include, but is not limited to, making revisions to reflect any changes or clarifications, as needed, to the model and to the evaluation design and instrumentation with the logic model (*e.g.,* designing instruments and developing quantitative or qualitative data collections that permit collecting of progress data and assessing project outcomes);

(5) How evaluation results will be used to improve delivery of services to VR program participants from underserved populations from eligibility determination to exit. To address this requirement, applicants must provide an approach to gather input and feedback that includes the experiences of VR program participants from underserved populations. Applicants may consider voluntary focus groups, use of a unique identifier, or another approach that adheres to consumer confidentiality requirements in 34 CFR 361.38; and

(6) A process for gathering feedback from the identified State VR agencies for continuous improvement throughout years two, three, four, and five of the project.

(e) Demonstrate, in the narrative section of the application under ''Quality of the Management Plan,'' how applicants will ensure that—

(1) The project's intended outcomes, including the evaluation, will be achieved on time and within budget through—

[3] ''Remote learning'' means programming where at least part of the learning occurs away from the physical building in a manner that addresses a learner's educational needs. Remote learning may include online, hybrid/blended learning, or non-technology-based learning (*e.g.,* lab kits, project supplies, paper packets).

(i) Clearly defined responsibilities of key project personnel, subawards, and contracts, as applicable;

(ii) Procedures to track and ensure completion of the action steps, timelines, and milestones established for key project activities, requirements, and deliverables;

(iii) Internal monitoring processes to ensure that the project is being implemented in accordance with the established application and management plan; and

(iv) Internal financial management controls to increase efficiency and cost-effectiveness, including by reducing waste or achieving better outcomes, and how the applicant will ensure accurate and timely obligations, drawdowns, and reporting of grant funds, as well as monitoring subawards as applicable, in accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 200 and the terms and conditions of the Federal award;

(2) The allocation of key project personnel, subawards, as applicable, and levels of effort of key personnel are appropriate and adequate to achieve the project's intended outcomes;

(3) The products and services are of high quality, relevance, and usefulness, in both content and delivery and are accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act of 1973, as applicable;

(4) The proposed project will benefit from a diversity of perspectives; and

(5) Projects will be awarded and operated in a manner consistent with nondiscrimination requirements contained in the Federal civil rights laws.

(f) Include the following:

(1) In Appendix A, personnel-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative;

(2) In Appendix A, a logic model [4] that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project;

(3) An assurance to maintain a high-quality website, with an easy-to-navigate design that is accessible to individuals with disabilities in accordance with Section 504 of the Rehabilitation Act of 1973, as applicable; and

(4) An assurance that training and technical assistance materials such as outreach, training curricula, presentations, reports, outcomes, and other relevant information will be submitted to RSA's National Clearinghouse of Rehabilitation Training Materials (NCRTM) (*https://ncrtm.ed.gov/*) at least 90 days before the end of the final budget period.

Final Definition

Underserved populations means Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the **Federal Register**.

Executive Orders 12866, 13563, and 14094

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) determines whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles stated in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866 (as amended by Executive Order 14094).

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation,

[4] "Logic model" (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active "ingredients" that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing this final priority and definition only on a reasoned determination that their benefits justify the costs. In choosing among alternative regulatory approaches, we selected the approach that maximizes net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with these Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Summary of Potential Costs and Benefits

The Department believes that the costs associated with the final priority and definition will be minimal, while the potential benefits are significant. The Department believes that this regulatory action does not impose significant costs on eligible entities. Participation in this program is voluntary, and the costs imposed on applicants by this regulatory action will be limited to paperwork burden related to preparing an application. The potential benefits of implementing the program will outweigh the costs incurred by applicants, and the costs of carrying out activities associated with the application will be paid for with program funds. For these reasons, we have determined that the costs of implementation will not be burdensome for eligible applicants, including small entities.

Paperwork Reduction Act of 1995

The final priority and definition contain information collection requirements that are approved by OMB under OMB control number 1820–0028; the final priority and definition do not affect the currently approved data collection.

Regulatory Flexibility Act Certification: The Secretary certifies that this final regulatory action will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define ''small entities'' as for-profit or nonprofit institutions with total annual revenue below $7,000,000 or, if they are institutions controlled by small governmental jurisdictions (that are comprised of cities, counties, towns, townships, villages, school districts, or special districts), with a population of less than 50,000.

The small entities that this regulatory action will affect are minority entities and Indian Tribes that may apply. We believe that the costs imposed on an applicant by the final priority and definition will be limited to paperwork burden related to preparing an application and that the benefits of the final priority and definition will outweigh any costs incurred by the applicant. We also believe that there are very few entities that can provide the type of technical assistance required under the final priority and definition. For these reasons, the final priority and definition will not impose a burden on a significant number of small entities.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–11601 Filed 5–30–23; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 174

[EPA–HQ–OPP–2019–0508; FRL–7261–04–OCSPP]

RIN 2070–AK54

Pesticides; Exemptions of Certain Plant-Incorporated Protectants (PIPs) Derived From Newer Technologies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is exempting a class of plant-incorporated protectants (PIPs) that have been created using genetic engineering from certain registration requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and from the requirements to establish a tolerance or tolerance exemption for residues of these substances on food or feed under the Federal Food, Drug, and Cosmetic Act (FFDCA). Specifically, EPA is finalizing its exemptions as described in its October 2020 proposal for PIPs now termed ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs,'' finalizing the process through which the Agency determines their eligibility for exemption, and finalizing the associated recordkeeping requirements. This set of exemptions reflects the biotechnological advances made since 2001, when EPA first exempted PIPs derived through conventional breeding and excluded from the exemptions those PIPs that are created through biotechnology. EPA

anticipates that today's exemptions will benefit the public by ensuring that human health and the environment are adequately protected, while also reducing the regulatory burden for the regulated community. These exemptions may also result in increased research and development activities, commercialization of new pest control options for farmers, particularly in minor crops, and increase the diversity of options for pest and disease management, which could provide environmental benefits.

DATES: This final rule is effective on July 31, 2023.

ADDRESSES: The docket for this action, identified under docket identification (ID) number EPA–HQ–OPP–2019–0508, is available at *https://www.regulations.gov.* Additional instructions on visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.* For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Amanda Pierce, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 948–3693; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you are a developer or registrant of a PIP. This action also may affect any person or company who might petition the Agency for a tolerance or an exemption from the requirement of a tolerance for any residue of a PIP. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Pesticide and Other Agricultural Chemical Manufacturing (NAICS code 325320), *e.g.,* pesticide manufacturers or formulators of pesticide products, importers or any person or company who seeks to register a pesticide or to obtain a tolerance for a pesticide.
- Crop Production (NAICS code 111), *e.g.,* seed companies.
- Colleges, universities, and professional schools (NAICS code 611310), *e.g.,* establishments of higher learning which are engaged in development and marketing of PIPs.
- Research and Development in the Physical, Engineering, and Life Sciences (except Nanobiotechnology) (NAICS code 541714), *e.g.,* biotechnology research and development laboratories or services.

If you have any questions regarding the applicability of this action to a particular entity after reading the regulatory text, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What action is the Agency taking?

This rule establishes exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* and codified at 40 CFR 174.26 and 174.27 and for the residues of such PIPs under the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a and codified at 40 CFR 174.541 for certain PIPs that are created in plants using biotechnology. In this final rule, the term ''exemption'' is applied to actions under both of these statutes. (EPA notes that this action only exempts qualifying PIPs from regulation under FIFRA and the need to establish a tolerance for residues of qualifying PIPs under section 408(e) of the FFDCA; other statutory or regulatory requirements may still apply, *e.g.,* State, Tribal, or local requirements). This rule provides criteria and definitions that identify the two groups of PIPs that are exempted through this action, called ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs,'' and codifies the process through which the Agency determines their eligibility for exemption. The rule also codifies the recordkeeping requirements for exempted PIPs, and the preamble, along with the accompanying Response to Comments document (Ref. 1), addresses the public comments that the Agency received on the proposed rule (85 FR 64308; October 9, 2020; FRL–10014–10) (Ref. 2) during the public comment period. EPA's responses to those comments are summarized in Unit IV. and in the Response to Comments document (Ref. 1) that is available in docket for this action.

C. What is the Agency's authority for taking this action?

This action is being taken under the authority of FIFRA section 25 (7 U.S.C. 136w) and FFDCA section 408(e) (21 U.S.C. 346a(e)). FIFRA section 25(a)(1) authorizes EPA to issue regulations to carry out the provisions of FIFRA in accordance with certain procedures prescribed in that section. In addition, FIFRA section 25(b) allows EPA to promulgate regulations to exempt from the requirements of FIFRA any pesticide which the Administrator determines is ''of a character which is unnecessary to be subject to [FIFRA] in order to carry out the purposes of [FIFRA].'' FFDCA section 408(e) authorizes EPA to initiate actions to establish tolerances or exemptions for pesticide chemical residues that meet the safety standard. Section 408 of the FFDCA is focused on human risk. To make a safety finding under FFDCA to support a tolerance or exemption for pesticide residues on food, EPA considers, among other things: the toxicity of the pesticide and its metabolites and degradates, aggregate exposure to the pesticide in foods and from other sources of exposure, and any special risks posed to infants and children. The potential for pesticide exposure through food from food-producing animals that consume feed is part of the human health risk assessment used in EPA's FFDCA determinations. Risk to non-target organisms and risk associated with occupational exposure is evaluated under FIFRA. A more detailed discussion of EPA's statutory authority is available in Units III.A., III.B., and III.C. of the proposed rule (85 FR 64313–64314, October 9, 2020) (Ref. 2).

D. Why is EPA taking this action?

Recent advances in genetic engineering offer not only precise means by which genes coding for pesticidal substances can be inserted into a plant genome but also allow for modifications of genes that already exist within a plant. Due to the sophistication of these technologies, PIPs can now be created through genetic engineering that are virtually indistinguishable from those created through conventional breeding. These advances also allowed EPA to develop specific exemption criteria to circumscribe PIPs created through genetic engineering that pose no greater risk than the PIPs created through conventional breeding that have been exempt since 2001.

This rule is an effort to implement the policy goals articulated by multiple administrations to improve, clarify, and streamline regulations of biotechnology, beginning with the White House Office of Science and Technology Policy in a policy statement in 1986 on the ''Coordinated Framework for the Regulation of Biotechnology'' (51 FR 23302; June 26, 1986), the update to the Coordinated Framework in 2017 (Ref. 3), Executive Order 13874 (84 FR 27899, June 11, 2019) on ''Modernizing the

Regulatory Framework for Agricultural Biotechnology Products,'' and more recently, Executive Order 14801 (87 FR 56849, September 12, 2022) on ''Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy.''

E. What are the estimated incremental impacts?

EPA has evaluated the potential incremental impacts of the proposed exemptions in the document entitled ''Cost Analysis For the Final Rule Exempting Certain Plant-Incorporated Protectants (PIPs) from Registration'' (Ref. 4), which is available in the docket and is briefly summarized here.

1. Benefits

This rule reduces the regulatory hurdle (primarily cost) of getting certain PIPs to market. Accordingly, this rule is likely to encourage more research and development in this area of biotechnology and better enable firms of all sizes to engage in the development of these types of PIPs. Entities producing products designed for minor crops may not support markets large enough to warrant fixed registration costs. These entities may feel the most regulatory relief as a result of this rule.

Crop varieties modified for greater pest and disease resistance could increase the diversity of options for pest and disease management, which in turn, could provide environmental benefits and lower exposure for workers who apply pesticides. Growers may also benefit because they will have more tools available to combat pest pressures.

The rule is estimated to reduce overall registration costs (fees plus information and data requirement costs) to developers of ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs.'' On a per-product basis, the cost savings are estimated to range from $472,000–$886,000 using a 3% discount rate on future maintenance fees. A range of cost savings is provided because ''loss-of-function PIPs'' have fewer data requirements than ''PIPs created through genetic engineering from a sexually compatible plant'' and are not required to submit a request for EPA confirmation (thereby avoiding an M009 PRIA fee). Therefore, the savings to developers for ''loss-of-function PIPs'' is higher.

On an annual basis, the Agency estimates that anywhere from one to ten PIPs may be eligible for exemption. This upper and lower bound estimate is provided because, while the number of PIPs eligible for exemption is unknown, EPA has determined that it is likely to be greater than one. This is an increase from the estimate provided in the cost analysis for the proposed rule, which only included savings from one PIP. Accordingly, EPA estimates the annual savings of this rule to range from $472,000–$8,856,000 using a 3% discount rate on future maintenance fees (the lower bound represents one PIP per year and the upper bound represents ten PIPs per year will be eligible for exemption).

Of the entities likely to develop the types of PIPs this rule exempts, EPA currently estimates that approximately 80% are small entities. These cost savings would be realized as EPA approval of new active ingredients are sought. These exemptions are likely to remove a potential barrier to market entry for small entities because the monetary investment via Pesticide Registration Improvement Act (PRIA) fees and information and data requirement costs are substantially reduced from what would have been required under the registration process (in the absence of this rulemaking).

2. Costs

The costs of the rule includes costs imposed on developers and differences to societal welfare as a result of the rulemaking. The cost imposed on developers of PIPs include the costs to:

- Meet the requirements of the eligibility determination process per 40 CFR 174, subpart E;
- Maintain records related to the requirements of the eligibility determination for five years starting from the effective date of the exemption per 40 CFR 174.73; and
- Report any information regarding adverse effects on human health and the environment alleged to be caused by the PIP be reported to EPA per 40 CFR 174.71.

These costs are outlined in the cost analysis for the final rule. In consideration of the benefits and costs of the rule, the net effect is a cost savings to regulated entities. This is because the requirements to meet the eligibility determination process are less than what is required under registration. In the baseline, or no rule scenario, developers must maintain records related to registration; in the rule scenario, developers must similarly maintain records related to the exemption and exemption eligibility determination process—the net effect therefore of this requirement on developers is zero. In both the baseline, or no rule scenario, and in the rule scenario, developers are subject to the adverse effects reporting requirement—the net effect therefore of this requirement on developers is also zero.

The costs of the rule also include differences to societal welfare as a result of the rulemaking, which in this case would be any increased risk to human health or the environment from the change in regulatory oversight from the rule. There are little to no costs such as these anticipated by the rule because the criteria for qualification were chosen to minimize any such risks. EPA has concluded that adverse effects due to aggregate exposure to residues of pesticidal substances from ''PIPs created through genetic engineering from a sexually compatible plant'' through the dietary, non-food oral, dermal and inhalation routes are highly unlikely.

II. Summary of the Proposed Rule

In a proposed rule issued in October 2020 (Ref. 2), EPA proposed to:

1. Exempt ''plant-incorporated protectants based on sexually compatible plants created through biotechnology'' (40 CFR 174.26) from the requirement of a tolerance under FFDCA and from certain registration requirements under FIFRA, except for the following requirements: a proposed requirement of recordkeeping (40 CFR 174.73), a proposed eligibility determination process (40 CFR 174, subpart E), and the existing adverse effects reporting requirement for exempt plant-incorporated protectants (40 CFR 174.71);
2. Clarify the general qualifications for exemption for plant-incorporated protectants at 40 CFR 174.21;
3. Clarify how the proposed exemption relates to the existing exemption for plant-incorporated protectants derived from sexually compatible plants at 40 CFR 174.25; and
4. Allow the existing inert ingredient exemption at 40 CFR 174.705 to include biotechnology.

Unit VI. of the proposed rule explained the proposed exemption for ''PIPs based on sexually compatible plants created through biotechnology,'' detailed the rationale underlying that proposal, and described associated definitions that were proposed for codification or amendment (85 FR 64308) (Ref. 2), and also described the two primary considerations that EPA believed together would constitute the basis for meeting the FIFRA section 25(b)(2) standard for exemption (the pesticidal substance is found in plants that are sexually compatible with the recipient plant; and limitations on the expression profile). Also described were the details of the proposed eligibility determination process, and a proposed recordkeeping requirement for

exempted PIPs listed under 40 CFR 174.21(d).

In addition, EPA proposed edits to 40 CFR 174.21 to clarify the applicability of this framework to other PIP exemptions and EPA proposed to clarify the relationship between the proposal on ''PIPs based on sexually compatible plants created through biotechnology'' and the exemptions currently at 40 CFR 174.25, ''Plant-incorporated protectant from sexually compatible plant,'' and 40 CFR 174.508, ''Pesticidal substance from sexually compatible plant; exemption from the requirement of a tolerance.'' EPA also proposed to allow the existing inert ingredient exemption at 40 CFR 174.705 to include inert ingredients created using biotechnology so long as they still meet the existing criteria.

III. Summary of the Final Rule

In this action, EPA is finalizing the following:

1. An exemption for a category of ''PIPs created through genetic engineering from a sexually compatible plant;''
2. An exemption for a category of ''loss-of-function PIPs;''
3. An exemption eligibility determination process for certain exempted PIPs, including exemption specific information required for submission to support the exemption;
4. Recordkeeping requirements for certain exempted PIPs;
5. Clarifications for the general qualifications for exemption at 40 CFR 174.21;
6. Clarifications on the relationship between the existing exemptions for PIPs from sexually compatible plants and the newly issued exemption for ''PIPs created through genetic engineering from a sexually compatible plant;'' and
7. Allow the existing inert ingredient exemption at 40 CFR 174.705 to include genetic engineering.

A. Exemption for ''PIPs Created Through Genetic Engineering From a Sexually Compatible Plant''

This rule exempts from all FIFRA requirements, except for the adverse effects reporting requirements at 40 CFR 174.71, the recordkeeping requirements at 40 CFR 174.73 (as specified in 40 CFR 174.21(d)), and the eligibility determination process outlined in subpart E, ''PIPs created through genetic engineering from a sexually compatible plant.'' In the proposed rule, PIPs described under 40 CFR 174.26 were termed ''PIPs based on sexually compatible plants created through biotechnology.'' In this final rule, EPA has updated the name of the PIPs described under 40 CFR 174.26 to be ''PIPs created through genetic engineering from a sexually compatible plant'' based on public comment, as discussed in Unit IV.A.3.

1. Associated Definitions

The language describing the exemption appears in 40 CFR 174.26. Pertinent definitions associated with the exemption are found in 40 CFR 174.3 and include:

''*Gene*'' and other grammatical variants such as ''genic,'' means a unit of heritable genetic material that is comprised of the genetic material necessary for the production of a substance.

The definition for ''gene'' was revised from the proposal to remove the word ''functional'' before the phrase ''unit of heritable genetic material that is comprised of the genetic material necessary for the production of a substance.'' EPA made this change because loss-of-function traits are created by targeting a gene underlying an unwanted trait by reducing or removing the gene's function. While the gene may no longer be functional, structurally it is still a gene. Although this is commonly understood in the scientific community, removing the word ''functional'' from the definition may reduce confusion over the relationship between the definition of ''gene'' and ''loss-of-function PIPs.'' Therefore, for the reasons outlined, EPA removed the word ''functional'' from the definition of ''gene.'' As discussed in Unit V.A. of the proposal, the two genic regions relevant to the exemptions under 40 CFR 174.26 are the coding and regulatory regions. These regions are delineated through use of the phrase ''genetic material necessary for the production,'' which as defined under 40 CFR 174.3 means both ''genetic material that encodes a substance or leads to the production of a substance; and regulatory regions. It does not include noncoding nonexpressed nucleotide sequences.'' ''Noncoding, nonexpressed nucleotide sequences'' is also defined under 40 CFR 174.3 and includes examples such as linkers, adapters, homopolymers, and sequences of restriction enzyme recognition sites (further discussed in the context of these exemptions in Unit IV.B.1.).

''*Genetic engineering*'' means the modification of the genome of an organism using recombinant, synthesized, or amplified nucleic acids or other techniques excluded from the definition of conventional breeding. ''Genome'' is a defined term in 40 CFR 174.3 which means ''the sum of the heritable genetic material in the plant, including genetic material in the nucleus and organelles.'' EPA believes the use of the defined word ''genome'' in the ''genetic engineering'' definition would capture genetic engineering edits resulting in modifications to the proteome or transcriptome that are stably heritable.

As discussed in Unit IV.A.2., EPA received a comment suggesting a definition for ''biotechnology.'' However, for consistency across the Coordinated Framework, the Agency chose to instead define ''genetic engineering.'' EPA used the two phrases synonymously in its proposed rule and therefore does not consider the change from ''biotechnology'' to ''genetic engineering'' to be substantive. For additional discussion on maintaining consistency across the Coordinated Framework for exemptions of products derived from genetic engineering, see Unit III.H.: ''Alignment of the proposed rule with USDA's amendment to 7 CFR 340'' of the Response to Comments document in the docket associated with this rulemaking.

''*Native allele*'' means a variant of a native gene that is identified in the genetic diversity of plants sexually compatible with the recipient plant.

''*Native gene*'' means a gene that is identified in the recipient plant or source plants that are sexually compatible with the recipient plant. It does not include genes introduced through genetic engineering from a source organism that is not sexually compatible with the source plant.

The definition for ''native gene'' was revised from the proposal based on public comment (Unit IV.A.1.). In the proposal, rather than specifically excluding genes introduced through recombinant DNA or similar techniques from a non-sexually compatible source organism, EPA used the term ''never derived.'' EPA received comment suggesting that a greater focus on excluding transgenes (*i.e.,* genes introduced from non-sexually compatible organisms) may aid in clarity and in turn reduce uncertainty around genes originating through natural horizontal gene transfer. EPA agreed with the suggestion and revised the definition to state EPA's intent more explicitly as outlined in the proposed rule (*i.e.,* to exclude substances that conventional plant breeders do not have experience with, such as a bacterial endotoxin not historically found in a food plant). Screening practices and analyses performed as part of the standard conventional breeding process serve to eliminate plants that raise safety, quality or performance concerns. By limiting exempt substances to those

in which conventional plant breeders have experience, EPA can have confidence that these conventional plant breeding practices would still be protective for substances of exempt PIPs.

In addition, EPA revised the definition in 40 CFR 174.3 for ''*Sexually compatible.*'' In the proposed definition EPA stated that ''a viable zygote can be formed.'' This phrase was minorly revised to state ''plants must be capable of forming a viable zygote'' for clarity.

2. Exemption Criteria

PIPs that are created through genetic engineering but that could have otherwise been created through conventional breeding are exempt (40 CFR 174.26). The exemption criteria and associated definitions circumscribe PIPs that are created through genetic engineering using knowledge of nucleotide sequences in sexually compatible source plants to re-create a native allele or other functional nucleotide sequence identical to that which is found in a source plant. This would enable the use of genetic engineering of clonally-propogated cultivars of crops such as potato, grape, tree fruits, etc., to recreate pesticidal alleles found in sexually compatible cultivars or crop wild relatives. The exemption specifies criteria regarding the types of modifications that are allowed to be made to ensure that the exempt PIPs are characteristic in identity and in expression profile to those found in conventionally bred plants, and are therefore substances with which conventional plant breeders and conventional plant breeding screening methods have experience.

The scope of ''PIPs created through genetic engineering from a sexually compatible plant'' is delineated in 40 CFR 174.26(a). The regulatory text identifies two overarching categories that specify what will qualify as an exempt PIP pesticidal substance: (1) The insertion of new genetic material and (2) The modification of existing genetic material.

The provision at 40 CFR 174.26(a)(1) allows for insertions of new genetic material into the recipient plant so long as the genetic material is a native gene that is found in the sexually compatible plant population of that plant. This category requires that the entire pesticidal substance (*e.g.,* amino acid sequence for proteinaceous PIPs) that is created from the native gene be identical to that produced in the source plant. 40 CFR 174.26(a)(1) was revised from the proposed text to include a criterion related to inserted regulatory regions. 40 CFR 174.26(a)(1) now requires that any regulatory regions inserted as part of the native gene be identical to the regulatory regions of the native gene identified in the source plant. This change was made in response to comments EPA received stating that the proposed criterion related to expression profile (proposed 40 CFR 174.26(b)) was unclear (Units IV.C.2. and IV.E.4.b.). In response to these comments, EPA instead now provides specific criteria at codified 174.26(a)(1) related to the types of modifications that may impact expression. EPA is aware that intronic regions of genes may exhibit regulatory functions, but EPA does not expect that all introns necessarily need to be inserted as part of a native gene. Therefore, when describing the criterion related to identical sequences in the regulatory regions, EPA used the phrase ''regulatory regions inserted as part of the native gene,'' to specify that the criterion only applies to those regulatory regions that are ultimately inserted as part of the native gene (*i.e.,* it is not required that all regulatory regions be inserted, but those that are inserted must meet the criterion).

The final text in 40 CFR 174.26(a)(1) was revised from what was in the proposed text to remove the clause ''into a non-genic location'' in the phrase ''A native gene is engineered into a non-genic location of the recipient plant genome [. . .].'' In the proposal, EPA stated that this phrase was intended to preclude the insertion of the native gene into an existing gene to prevent the production of a novel substance (*e.g.,* a partial or modified substance) by the existing gene. However, upon further evaluation of this clause, prompted by public comment (Response to Comments document Unit III.A.3.), EPA determined that this restriction is not necessary as any novel substance that would be produced as a result of a fusion with the inserted PIP gene (*i.e.,* through the creation of a novel open reading frame), would not meet the exemption under 40 CFR 174.26.

The provision at 40 CFR 174.26(a)(2) describes permissible modifications to the existing genetic material in the recipient plant. 40 CFR 174.26(a)(2) allows for modifications of the existing native gene to match corresponding polymorphic sequence(s) in a native allele of that gene using a single source plant as a template. Polymorphisms are variants of a gene sequence that are shared between native alleles. These genetic variations may be composed of single nucleotides (*i.e.,* Single nucleotide polymorphisms (SNPs)) or larger DNA segments and they are found at the same locus within the genetic sequence of two or more native alleles. In some cases, enhanced pesticidal properties of a gene product can be attributed to one or more of these genetic variations within a native gene (Refs. 5, 6). The final rule (see 40 CFR 174.26(a)(2)) allows developers to utilize their knowledge of specific polymorphisms in regulatory and coding regions of native alleles to make changes to the native gene in their recipient plant. The phrase ''using a single source plant as a template'' in the provision limits the number of source plants for the polymorphic sequences to one. For example, it is not permissible to modify the polymorphic sequence of a native gene (in the recipient plant) to match a polymorphic sequence found in the native allele of a source plant and also modify a second polymorphic sequence in the native gene to match a sequence found in the native allele of a different source plant. This requirement is because EPA believes that increasing the amount of plants used as source plants for a single PIP may also lead to an increase in the likelihood that the substance is altered to something that plant breeders may not have experience. The second part of the phrase ''as a template'' indicates that the polymorphism that is engineered into the recipient plant must be identical in sequence to that which is found in the native allele of the source plant.

The final rule (see 40 CFR 174.26(a)(2)) differs from what was proposed at 40 CFR 174.26(a)(2)(ii) in that EPA previously proposed to require that modifications resulting in a native allele produce a pesticidal substance identical to that produced in the source plant. The exemption category at 40 CFR 174.26(a)(2) is promulgated in response to comments received indicating that the proposed exemption categories were too narrow in that they do not capture the full extent of genetic variation that can occur in plants (Unit IV.C.1.). While the final text in 40 CFR 174.26(a)(2) does not require the entire substance to be identical to a substance found in the sexually compatible population of the recipient plant, it does require the individual polymorphism(s) to have been identified. By requiring the polymorphic sequences to be identical, this new exemption category allows the Agency to capture more of the possible genetic variation that can occur in plants, while staying within the bounds of what could have been achieved through conventional breeding and what was proposed.

EPA acknowledges that the genetic variation that is observed in plants has the potential to be greater than what is captured at 40 CFR 174.26(a). Therefore, the Agency intends to revisit the

question of capturing a broader range of genetic variation under 40 CFR 174.26 in the future; a new rulemaking process that would be initiated by the Agency if, for example, new scientific information becomes available or if prompted by an interested party through an Agency inquiry, *e.g.,* based on a specific PIP product. Importantly, any new categories of exempt PIPs that would be added to 40 CFR 174.26 through this process in the future: (1) Would be required to fall within the previously defined scope of exempt PIPs, *i.e.,* those that can be created through conventional breeding; (2) Would be subject to recordkeeping requirements and documentation for exemption (Unit III.D.); and (3) Would at least initially be subject to the EPA confirmation process (Unit III.C.3.). By adhering to these requirements, EPA can ensure that any future categories of PIPs created through genetic engineering from sexually compatible plants will remain within the scientific scope that was presented in the proposal, and that underlies the current exemptions at 40 CFR 174.26, and that these categories would remain subject to the procedural guard rails set in place by the eligibility determination process.

The proposed regulatory text included additional categories that are not being finalized under 40 CFR 174.26. To increase clarity, the category encompassing ''loss-of-function PIPs'' that was proposed at 40 CFR 174.26(a)(2)(iv) has been removed and a new, stand alone exemption for ''loss-of-function PIPs'' at 40 CFR 174.27 was created in its place (Unit III.B.). Proposed 40 CFR 174.26(a)(2)(i) allowed for regulatory region modifications so long as the pesticidal substance remained unchanged, but relied on proposed 174.26(b) to specify the bounds of the expression profile. However, EPA received public comment stating that the criterion related to expression profile at proposed 40 CFR 174.26(b) was unclear (Units IV.C.2. and IV.E.4.b.). In response to these comments, 40 CFR 174.26(a)(2) now includes a criterion related to inserted regulatory region modifications (*i.e.,* must match corresponding polymorphic sequences in a native allele), therefore making proposed 40 CFR 174.26(a)(2)(i) redundant. Because proposed 40 CFR 174.26(a)(2)(i) was removed, proposed 40 CFR 174.26(a)(2)(iii) was also removed as it was dependent on proposed 40 CFR 174.26(a)(2)(i). Proposed 40 CFR 174.26(a)(2)(ii) is effectively a subset of what is possible under codified 40 CFR 174.26(a)(2), and is therefore not finalized. Finally, proposed 40 CFR 174.26(b) previously specified expression profile bounds, but due to public comment, EPA now includes specific criteria related to allowable modifications that could impact expression in the subsections of 40 CFR 174.26(a), thereby making proposed 40 CFR 174.26(b) unnecessary.

EPA does not believe that the removal of the proposed categories from the final regulatory text at 40 CFR 174.26 reduces the scope of PIPs exempted through this rulemaking since proposed 40 CFR 174.26(a)(2)(iv) is now being finalized as 40 CFR 174.27, proposed 40 CFR 174.26(a)(2)(ii) represents a subset of what can be accomplished under codified 40 CFR 174.26(a)(2), and since proposed 40 CFR 174.26(a)(2)(i) and proposed 40 CFR 174.26(a)(2)(iii) were deemed redundant.

The final text of 40 CFR 174.26(b) states that the requirements in 40 CFR 174.21(d) (*i.e.,* the recordkeeping requirements and the eligibility determination procedures) must be met in order for the exemption to apply. This is minorly revised from the proposed regulatory text which stated that the ''exemption does not apply until the requirements in subpart E of this part have been met;'' however, the recordkeeping requirements are located in subpart D, and therefore citing to 40 CFR 174.21(d) is a more streamlined citation.

In addition to exempting the active ingredient of PIPs created through genetic engineering from sexually compatible plants from the requirements of FIFRA, EPA is also finalizing the exemption for residues of these substances from the requirement of a tolerance under the FFDCA at 40 CFR 174.541. The exemption criteria are identical to those at 40 CFR 174.26 except that in order to be exempted from the requirements of a tolerance, residues of the pesticidal substance must also not be present at levels that are injurious or deleterious to human health (40 CFR 174.541(b)). The ''injurious or deleterious'' language is included in this rule to align with the same criteria found in 40 CFR 174.508 for residues of PIPs in sexually compatible plants. (*https://www.govinfo.gov/content/pkg/FR-2001-07-19/pdf/01-17983.pdf*). This language was adopted in the 2001 rule in response to comments about the potential for naturally occurring compounds to be present in foods at hazardous levels and to be more consistent with FDA policy and the standard applied to evaluate adulterated food: ''food shall be deemed to be adulterated . . . if it bears or contains any poisonous or deleterious substance which may render it injurious to health. . . .'' 21 U.S.C. 342(a)(1). The purpose of this language was to allow expeditious removal of the offending food from the market if injurious or deleterious levels of a substance were present in food. All of the criteria in 174.541 must be met: the conditions in paragraph (a) limit the identity of the substance, the condition in paragraph (b) set limits on the level of expression in the plant, and the conditions in paragraph (c) ensure the application of the exemption is properly documented. Regarding the condition in paragraph (b), one example of how this might work is if a source plant were to produce a pesticidal substance at levels that are injurious or deleterious to human health, that PIP would not qualify for exemption if the level of expression in the recipient plant matched the injurious or deleterious levels seen in the source plant. It is also important to note that EPA considers multiple native gene insertions of the same gene to be one PIP (further discussed in Unit IV.B.2.), so the criterion related to safe expression levels in food plants (40 CFR 174.541(b)) would apply to the overall expression level from all inserted gene copies. Developers modifying or inserting genes that produce substances with sequence homology to known mammalian toxins, toxicants, or allergens should ensure that the levels of pesticidal substances are within the ranges of levels generally seen in plant varieties currently on the market and known to produce food safe for consumption (*i.e.,* ensure that their levels are not injurious or deleterious to human health). Such substances expressed above these levels would likely trigger additional review during the EPA confirmation and may not fit the exemption criteria.

Additionally, 40 CFR 174.541(c) has been edited to more specifically cite to 40 CFR 174.90, rather than the entire subpart E. This citation is different from that found at 40 CFR 174.26(b) due to a difference in statutes. Specifically, 40 CFR 174.26(b) cites to 40 CFR 174.21(d), which describes the general qualifications for exemption under FIFRA, whereas 40 CFR 174.541 is an exemption from the requirement of a tolerance under FFDCA and therefore would not cite to exemption qualifications under FIFRA. Because the regulatory text at 40 CFR 174.26 for the active ingredient of ''PIPs created through genetic engineering from a sexually compatible plant'' and the corresponding tolerance exemption for residues of these active ingredients at 40 CFR 174.541 are identical (except for

the two clauses discussed in this paragraph) all other changes to the regulatory text that were discussed for 40 CFR 174.26 in this Unit were also applied to 40 CFR 174.541.

B. Exemption of ''Loss-of-Function PIPs''

This rule exempts ''loss-of-function PIPs'' from all FIFRA requirements, except for the adverse effects reporting requirements at 40 CFR 174.71, the recordkeeping requirements at 174.73 (as specified in 40 CFR 174.21(d)), and the eligibility determination process outlined in subpart E. The exempt PIPs represent a subcategory of PIPs described in the proposed rule (Ref. 2). In this final rule, EPA is creating a separate exemption for ''loss-of-function PIPs,'' which allows the Agency to create criteria specific to these types of PIPs and an accompanying definition for increased clarity. EPA made this change in response to comments that indicated the need for greater clarity and the broadening of the exemption text related to ''loss-of-function PIPs'' regarding the identicality of the substance (Unit IV.D.2.). As discussed in Unit IV.D.1., the modified genetic material of a ''loss-of-function PIP'' constitutes both the pesticidal substance and the active ingredient. The language describing the exemption appears in 40 CFR 174.27.

1. Associated Definitions

Because EPA is creating a separate exemption for ''loss-of-function PIPs,'' EPA is also codifying a definition associated with the exemption in 40 CFR 174.3:

''*Loss-of-function plant-incorporated protectant*'' means a plant-incorporated protectant in which the genetic material of a native gene is modified to result in a pesticidal effect through the reduction or elimination of the activity of that gene. For purposes of loss-of-function plant-incorporated protectants, the active ingredient and pesticidal substance are one and the same and are defined as the genetic material that has been modified to create the pesticidal trait (*i.e.,* modification of the sequence of nucleic acids). Loss-of-function plant-incorporated protectants do not include instances where the reduction or elimination of the activity of the modified native gene results in the intentional increase of activity of another pesticidal gene.

The first sentence of this definition specifies that for a PIP to be considered a ''loss-of-function PIP,'' a pesticidal effect must be created through the genetic modification of a native gene, which then leads to the reduction or elimination of the activity of that native gene. The second sentence defines the regulated substance (see Unit IV.D.1. for additional discussion). The third sentence explicitly excludes the scenario in which a modification of a native gene not only leads to the reduction in the expression of that native gene, but additionally leads to an increase of activity of another, ''secondary'' gene, with that ''secondary'' gene then conferring the pesticidal activity (*e.g.,* the altered gene encodes for a repressor whose absence does not itself lead to a pesticidal effect but rather the increased expression of a second gene that encodes a pesticidal substance). This definition is consistent with the description of ''loss-of-function PIPs'' in Unit VII.E. of the proposed rule (Ref. 2).

2. Exemption Criteria

Both the definition at 40 CFR 174.3 and the exemption text at 40 CFR 174.27 focus on the loss-of-function trait that results from the modification (*i.e.,* the reduction or elimination of the activity of the modified gene), and do not include requirements related to source plants or limit the location within the gene to which modifications are allowed to be made (*i.e.,* regulatory region or coding region). Specifically, 40 CFR 174.27 specifies two requirements, the first of which at 40 CFR 174.27(a) is almost identical in language to the loss-of-function definition and specifies that the genetic modification must result in a ''loss-of-function PIP.'' The type of genetic modification to a native gene that results in the loss of activity of that gene is not relevant so long as a ''loss-of-function PIP'' is the result of that modification. As with the exemptions at 40 CFR 174.26, the second requirement at 40 CFR 174.27(b) specifies that the exemption for ''loss-of-function PIPs'' only goes into effect after the requirements for the eligibility determination in 40 CFR 174.21(d) have been met.

In the proposed rule, ''loss-of-function PIPs'' were a subcategory under 40 CFR 174.26 (specifically proposed 40 CFR 174.26(a)(2)(iv)), and they were held to the same ''identical substance'' criterion as other PIPs described in proposed 40 CFR 174.26. While the EPA does not find that it can make an *a priori* safety determination under FIFRA and FFDCA for non-identical pesticidal substances now exempted under 40 CFR 174.26 (Unit IV.C.1.), it finds that no such restriction is warranted for ''loss-of-function PIPs'' under 40 CFR 174.27 (Unit IV.D.2.). This conclusion is based on characteristics of ''loss-of-function PIPs,'' the common occurrence of pesticidal traits resulting from the loss-of-function of endogenous genes in conventional breeding, and the biological processes that all proteins undergo within plants (Unit IV.D.2.).

The absence of function is a hallmark of ''loss-of-function PIPs,'' *e.g.,* loss of the activity of a native gene that would otherwise facilitate the susceptibility of that plant to a pathogen. Importantly, the criteria and definition state that for a ''loss-of-function PIP,'' the native gene modification results in a pesticidal effect from the reduction or elimination of the activity of *that* gene. This indicates a direct cause-and-effect relationship between the reduction in the expression of a specific native gene and a pesticidal effect. This direct cause-and-effect relationship also means that not all modifications that lead to a loss-of-function of a gene and that result in a pesticidal effect are considered ''loss-of-function PIPs.'' For example, this scenario may occur if a modification of a native gene not only leads to the reduction in the expression of that native gene, but also to an increase of the activity of *another,* ''secondary'' gene, with that ''secondary'' gene then conferring the pesticidal activity (*e.g.,* the altered gene encodes for a repressor protein whose absence does not itself lead to a pesticidal trait but rather the increased expression of a second gene that encodes a pesticidal substance). Because in this instance there is no direct cause-and-effect relationship between the reduction of the expression of the modified native gene and the pesticidal effect, that gene modification and resulting ''secondary'' activity would not be considered a ''loss-of-function PIP'' under 40 CFR 174.27. Further, in the scenario described, that gene modification and resulting ''secondary'' activity would only be exempt under the new regulations if it meets the criteria outlined in 40 CFR 174.26 and from FFDCA if the residues meet the requirements under 40 CFR 174.541. For ''loss-of-function PIPs,'' EPA clearly indicates the requirement for this direct cause-and-effect relationship of native gene modification and the pesticidal effect in the second sentence of the ''loss-of-function PIP'' definition.

C. Eligibility Determination Process

The Agency is finalizing subpart E, which includes provisions describing the eligibility determination process and documentation required for an exemption of certain PIPs. Specifically, in order for a PIP listed under 40 CFR 174.21(d) to be eligible for exemption, an exemption eligibility determination must be completed prior to engaging in

FIFRA-regulated activities. EPA agrees with commenters arguing that requiring an eligibility determination will provide additional clarity to developers of PIP products under certain circumstances and increase transparency and public trust in products containing these PIPs (Unit IV.E.1.). The primary difference between the proposal and the final rule is the restriction of the self-determination option to only certain PIPs exempted by this rulemaking. In the proposal, all exempted PIPs had the option of self-determination. However, in the final rule, only developers of ''loss-of-function PIPs'' (40 CFR 174.27) currently have the option to self-determine whether the exemption criteria are met. To that end, modifications were made to proposed 40 CFR 174.90, 40 CFR 174.91, and 40 CFR 174.93 (Units III.C.1., C.2., and C.3.). In addition, the titles of these three subsections were minorly revised from the proposal for clarity.

Given the straightforward criteria describing ''loss-of-function PIPs'' (*i.e.,* a focus on function rather than source plant or underlying sequence), EPA believes it is appropriate for ''loss-of-function PIPs'' to be eligible for the self-determination option as it is unlikely for a developer to accidentally misdetermine exemption eligibility of these PIPs. Additionally, the mode of action of ''loss-of-function PIPs'' (*i.e.,* reduction or elimination of an endogenous gene) is fundamentally different from ''PIPs created through genetic engineering from a sexually compatible plant'' (*e.g.,* intentional production of a pesticidal protein), and as such, further lends itself to the availability of a self-determination option. Although ''PIPs created through genetic engineering from a sexually compatible plant'' are not currently eligible for the self-determination option, EPA intends to reconsider this in future rulemakings.

A separate determination of eligibility of exemption for purposes of the FFDCA exemption for a PIP proposed for use in food or feed is required only if that determination has not already been submitted under FIFRA. This is because the exemption eligibility determination process described in 40 CFR 174.21 already requires the applicant to certify that the PIP meets the general qualifications for exemption, which includes exemption under the FFDCA for PIPs used in food or feed. A scenario in which a developer will need an exemption eligibility determination specifically for the purposes of FFDCA, but not FIFRA, would be when residues of a PIP are in or on food imported into the United States, but the PIP is not intended to be sold or distributed for pesticidal use (*e.g.,* PIP-containing seed or plant sold for planting) in the United States (and thus is not subject to FIFRA regulation). Additional discussion on the types of activities that warrant an eligibility determination can be found in Unit IV.E.5.

1. Determining Eligibility

Regarding the process of an exemption eligibility determination under 40 CFR 174.90, this provision states at 40 CFR 174.90(a) that, depending on the applicable exemption, developers have two, non-mutually exclusive options to notify EPA that their PIP meets the exemption criteria: (1) Seek EPA confirmation that a PIP meets the exemption criteria, and (2) Submit a self-determination letter that a PIP meets the exemption criteria. For PIPs subject to the eligibility determination process, an EPA confirmation is mandatory unless the PIP is listed at 40 CFR 174.90(a)(2) as eligible for the self-determination option. For PIPs eligible for the self-determination option, an EPA confirmation can be sought instead of, in conjunction with, or subsequent to the submission of the self-determination letter.

As stated in Unit III.C., only ''loss-of-function PIPs'' under 40 CFR 174.27 are currently eligible for the self-determination option and no ''PIPs created through genetic engineering from a sexually compatible plant'' under 40 CFR 174.26 are currently listed under 40 CFR 174.90(a)(2). Therefore all ''PIPs created through genetic engineering from a sexually compatible plant'' are required to undergo an EPA confirmation process. However, EPA intends to reconsider this in future rulemakings, and as such, EPA has codified text at 40 CFR 174.90(a)(2)(ii) to accommodate this possibility.

The provision explains at 40 CFR 174.90(b) that submissions for a request for EPA confirmation or a letter of self-determination must be made electronically, which means that they may not be made by mailing the information in physical form to the Agency (*e.g.,* sending hard copies or data storage devices such as DVD). Specifically, electronic submissions are required to be made through EPA's electronic submission portal which receives legally acceptable data in a secure manner (see Unit IV.E.6. for additional discussion). That system is used, amongst other things, for submission of pesticide registration applications, and will now additionally accommodate the eligibility determination processes associated with the PIPs identified in this rule. The electronic submission process will accommodate submissions when the final rule is effective, specifically, 60 days after the date of publication in the **Federal Register**. This electronic submission process differs from the proposal, which included instructions on how to submit a self-determination or confirmation request via physical mail. Guidance for electronic submission can be found in Pesticide Registration Notice 2011–3 (Ref. 7) or any subsequent revision or replacement. The provision at 40 CFR 174.90(c) also explains the procedures that must be followed to claim information submitted as confidential.

For PIPs that are eligible for both the self-determination and EPA confirmation options, the provision at 40 CFR 174.90(d) further explains the relationship between the EPA confirmation processes and a letter of self-determination. Specifically, if a developer chooses to request EPA confirmation in accordance with 40 CFR 174.93 in conjunction with or subsequent to submitting a self-determination letter in accordance with 40 CFR 174.91, the exemption is effective from the time the company receives confirmation of submission of the self-determination letter. The exemption remains effective if EPA affirms the developer's determination that the PIP meets the exemption criteria and the self-determination is superseded by EPA's written confirmation in response to the confirmation request. Alternatively, in instances in which no prior self-determination has been provided to the Agency in accordance with 40 CFR 174.91, and the developer submits a request for confirmation to the Agency, the exemption applies only once EPA provides written notice to the developer confirming that the PIP meets the criteria for exemption.

The provision also includes text at 40 CFR 174.90(e) stating that EPA reserves the right to assess or revisit at any time after EPA issues a confirmation of eligibility or the letter of self-determination is submitted, whether a PIP meets, or has met, the criteria for exemption. If EPA finds or has reason to believe that, at any time before or during this review of eligibility for exemption, the product is non-compliant with FIFRA or presents an adverse risk to human health, the environment, or program integrity, the Agency can take immediate steps—including enforcement—to address that non-compliance or to protect against those adverse risks. This is revised from the proposed text to make explicitly clear

that although EPA will generally notify the submitter in writing of EPA's intention to initiate a review of eligibility for exemption, EPA may take such action without first informing the submitter of an eligibility review if the situation warrants.

As exempt PIPs are still subject to 40 CFR 174.71, upon learning of any adverse effects (*i.e.,* that a person or nontarget organism allegedly suffered an adverse effect due to exposure to a PIP), EPA has the authority to evaluate whether the PIP still meets the criteria for exemption. As described in the preamble of the July 19, 2001, **Federal Register** notice implementing 40 CFR 174.71 (66 FR 37772; July 19, 2001; FRL–6057–7) (Ref. 8), reports involving food or feed (*i.e.,* those subject to enforcement under FFDCA) would be made to EPA, but EPA will share such reports with FDA. EPA and FDA will individually determine whether any action, including the possibility of enforcement, is necessary to protect the public health or the environment, and if so, what constitutes appropriate action based on their respective statutes (EPA–FIFRA; FDA–FFDCA). Additional discussion regarding EPA enforcement can be found in Unit III.D.7. of the Response to Comments document found in the docket associated with this rulemaking.

The provision outlines instances at 40 CFR 174.90(f) in which an exemption determination for a PIP can be extended to other PIPs. A determination that a PIP meets the exemption criteria would be required for each modified gene and plant species combination (*e.g.,* PIP ''A'' in corn and PIP ''A'' in tomato would each require their own determination). However, EPA is aware that a plant species can comprise multiple varieties and does not intend for the PIP in each variety to require its own submission. In order to extend the exemption for a PIP, the developer would need to comply with the provisions outlined in 40 CFR 174.21(d) for the first modification in that plant species and that exemption can then be extended in one of two ways. If the exempted PIP is moved through conventional breeding, the exemption is extended to the subsequent PIP. To extend the exemption of the PIP to subsequent genetic engineering events, the PIP must meet exemption-specific criteria outlined by EPA. The paragraph in this text was edited from the proposed rule to explicitly state that movement of exempt PIPs through conventional breeding also results in the extension of exemption status of that PIP and to clarify that the subparagraphs 40 CFR 174.90(f)(1) and 40 CFR 174.90(f)(2) are specific to genetic engineering.

For a ''PIP created through genetic engineering from a sexually compatible plant,'' the exemption extends to subsequent engineering of that PIP by the submitter into other varieties of that same plant species as long as the subsequent PIP produces the identical substance as in the exempt PIP and no new modifications were made to the regulatory regions. For example, if a developer first modifies an existing gene in a tomato variety to create a native allele, this would require a determination; however, if the developer subsequently creates the same native allele in another tomato variety, the developer would not be required to submit a second determination request for the additional variety. For a ''loss-of-function PIP,'' an exemption extends to subsequent engineering of that PIP by the submitter into other varieties of that same plant species as long as the submitter is targeting the same native gene to create the ''loss-of-function PIP.'' This text is modified from the proposal based on a comment arguing that the criteria should focus on the trait phenotype and function (Unit IV.E.2.). As described in Unit IV.D.2., ''loss-of-function PIPs'' now have their own exemption category with a focus on function rather than substance identity, and as such, the extension of the exemption for ''loss-of-function PIPs'' is now described in 40 CFR 174.90(f)(2) with a similar focus.

Finally, EPA has added a new paragraph (g) to 40 CFR 174.90, which explains that a duplicative eligibility submission is not required for purposes of 40 CFR 174.541(c), if it is already being submitted for purposes of 40 CFR 174.21(d). This provision was not in the proposal, but was added for clarification based on public comment (Unit IV.E.5.). Related to these comments, EPA is confirming that the Agency is requiring a separate eligibility determination to be made through EPA's electronic submission portal for residues of those PIPs under 40 CFR 174.541 that are imported into the United States and that are used for food or feed if the developer has not already obtained an exemption under 40 CFR 174.541. This submission includes an acknowledgement that the developer is only submitting an exemption eligibility determination for the purposes of FFDCA but not FIFRA, and therefore it is not permissible for the PIP to be sold or distributed for pesticidal use (*e.g.,* PIP-containing seed or plant sold for planting) in the United States. As discussed in the preamble of the proposed rule, a separate submission of the eligibility determination of the FFDCA exemption for a PIP proposed for use in food or feed is required only if it has not already been submitted under FIFRA.

2. Process for a ''Letter of Self-Determination'' for a PIP To Qualify for an Exemption

This rule finalizes a new provision in subpart E, 40 CFR 174.91, entitled ''Submitting a letter of self-determination'' The provision describes the requirements and process of notifying EPA that the developer has determined (or ''self-determined'') that a PIP qualifies for exemption.

The provision at 40 CFR 174.91 explains that a developer must submit the letter of self-determination prior to engaging in activities that would be subject to FIFRA for the proposed PIP (*e.g.,* distribution and sale of the PIP at issue). As specified in 40 CFR 174.90(b), self-determination letters must be submitted electronically. If a developer does not have an EPA company number, they will be required to obtain one in order to be able to submit a self-determination letter. Self-determination letters will not be submitted under FIFRA section 33 and will not be subject to application fees under the Pesticide Registration Improvement Extension Act of 2022 (PRIA 5). The exemption does not apply until EPA confirms receipt of the self-determination, but since the submission of the self-determination letter will be made electronically, the receipt confirmation by the Agency occurs automatically upon submission and is considered equivalent to written confirmation of receipt.

The provision at 40 CFR 174.91(b) includes information on the required contents of the self-determination letter. This includes a statement certifying the developer's determination of exemption eligibility, the identity of the recipient plant, a unique gene identifier for the native gene, the trait type (*e.g.,* insect resistance), and information on the applicable exemption. The gene identifier is for the native gene (not necessarily the exact sequence of the PIP) and must be from databases curated by the National Center for Biotechnology Information (NCBI), which is part of the National Library of Medicine of the National Institutes of Health (NLM) at the National Institutes of Health (NIH). These databases are available free of charge to scientists globally and will ensure availability of the gene information to EPA and a means to standardize that information. Based on public comment (Unit IV.E.3.), this provision was clarified to explicitly request the identity of the recipient plant, an identifier for the native gene,

and the trait type, rather than the name of the PIP, which may or may not have included such information. Additionally, rather than listing PIP categories eligible for self-determination under 40 CFR 174.91(b)(2) as had been proposed, the provision now cites to the list under 40 CFR 174.90(a)(2). Lastly, EPA streamlined the regulatory text by merging 40 CFR 174.91(b)(4) with 40 CFR 174.91(b)(3) and removing the text of the certification statement from the provisions. The statement is captured in the electronic submission portal and thus listing it in the regulatory text was deemed redundant.

EPA notes that the developer is responsible at all times for ensuring the self-determination is accurate and if at any time EPA determines that a self-determination was fraudulently or incorrectly made, or is no longer accurate due to the availability of new information that was not available at the time the self-determination was made, EPA will notify FDA of this new information, and the Agencies can take action to protect the environment and public health, respectively. This includes the possibility of enforcement under FIFRA or FFDCA.

3. Process To Obtain an EPA Confirmation That a PIP Qualifies for Exemption

This rule establishes a new provision in subpart E entitled ''Requesting EPA confirmation'' (40 CFR 174.93), which describes the process through which a developer may seek confirmation from EPA as to whether a PIP meets the criteria for exemption codified in 40 CFR 174.21. A developer must submit information as outlined in 40 CFR 174.91 along with specific supporting documentation. For example, the information required to support the request for a ''PIP created through genetic engineering from a sexually compatible plant'' is described in 40 CFR 174.95 and discussed in Unit III.C.4.a.

In addition, the provision at 40 CFR 174.93 explains that upon receipt of the request, EPA will review the submission and determine whether the PIP meets all necessary criteria to be exempt under 40 CFR 174.21. The Agency will notify the submitter in writing of its determination. The exemption goes into effect only once the developer receives EPA's confirmation in writing, unless a self-determination letter was previously submitted. As discussed in Unit III.C.1., EPA reserves the right to reassess whether a PIP meets the criteria for exemption should the Agency learn of relevant information subsequent to confirming its eligibility to be exempt under 40 CFR 174.21.

Requests for EPA confirmation are to be submitted using the submission category (M009) and associated fee structure for a Non-FIFRA Regulated Determination under FIFRA section 33 (PRIA). The logistics of the submission for a request and EPA review times may change in the future if PRIA changes or a different structure for submissions is adopted.

4. Documentation for an Exemption

a. PIPs Created Through Genetic Engineering From Sexually Compatible Plants

The rule finalizes the documentation needed for an exemption for ''PIPs created through genetic engineering from a sexually compatible plant.'' There are four main information elements associated with the required documentation, which capture the: (1) Biology of the plant; (2) Description of how the trait was engineered into the plant; (3) Molecular characterization of the PIP; and (4) Information on the history of safe use for those PIPs that are either known mammalian toxins or toxicants or that are from a source plant that is a wild relative of the recipient plant. Collectively, this information allows EPA to ensure that a PIP meets the exemption criteria at 40 CFR 174.26 and 40 CFR 174.541.

The first element (40 CFR 174.95(a)) requires information on the biology of the plant and has two components: (1) The identity of the recipient plant, including genus and species; and, if the PIP was derived from another plant species, the identity of the source plant, including genus and species; and (2) Information to support that the recipient plant and the source plant are sexually compatible. The regulatory text regarding sexual compatibility was minorly revised from proposed ''if the plant-incorporated protectant was derived from another plant species'' to ''if the plant-incorporated protectant was derived from a plant species other than the recipient plant species'' to more directly articulate that this information is only needed if the source and recipient plant are taxonomically classified as belonging to different plant species. As stated in the preamble of the proposed rule (Unit VI.C.4.), to meet this requirement a developer may provide a peer-reviewed literature rationale (*e.g.,* breeding guides, journal articles) instead of generating empirical data to demonstrate that the two plant species are sexually compatible. Therefore, for clarity based on public comment (Unit IV.E.4.a.), the regulatory text regarding sexual compatibility was further modified to replace ''demonstrate'' with ''information to support.''

The second element (40 CFR 174.95(b)) captures information on the pesticidal trait and how it was engineered into the plant. EPA anticipates that this element can be addressed through a narrative description of the intended pesticidal function of the PIP and information on the techniques used to make the genetic modification in the recipient plant (*e.g.,* the molecular tools used, transformation method). The text was revised from the proposal to also require information on the steps that were taken to ensure that no engineering components (*i.e.,* PIP inert ingredients) are expected to remain in the final plant product. Engineering components include, but are not limited to, those associated with the genetic engineering of the plant itself (*e.g.,* Cas protein) and selectable markers that, in the early steps of PIP development, aid in the selection of plant transformants that contain the desired traits (*e.g.,* herbicide resistant markers). Unless the engineering components themselves meet the requirements at 40 CFR 174.705, they would not be exempt inert ingredients. Thus, by requiring this information, EPA will be able to ensure that no unapproved inert ingredients are expected to remain in the final plant product. Similarly, based on public comment (Unit IV.A.2.), EPA has also included a requirement that the developer describe the measures taken to maximize the likelihood that the modification to the recipient plant is limited to the intended modification, including ensuring off-target mutations were minimized (*e.g.,* through the use of *in silico* techniques in guide RNA development). This could be information on the specificity of the endonuclease in the recipient plant species and the use of predictive *in silico* tools that can identify other potential target sites. As discussed in the preamble of the proposed rule (Unit V.A.), by using the definition of a ''gene'' the Agency restricts any genetic modifications made through biotechnology that would fall under the exemption to modifications to the gene itself. Thus, by requiring this information, EPA can determine that this is true.

The third element (40 CFR 174.95(c)) requires information on the molecular identity of the PIP. Specifically, EPA is requiring the sequence of the PIP in the recipient plant and its comparator. This was revised per public comment to clarify the required sequence information, which is based on the

relevant comparator and the type of pesticidal substance (Unit IV.E.4.a.). For example, for native gene insertions the comparator is the sequence of the PIP in the source plant, whereas for native genes that are modified to match corresponding polymorphic site(s), the relevant comparators are the sequence of the PIP in the source plant, the modified recipient plant, and the original native gene in the unmodified recipient plant. What determines the type of sequence information that must be provided is the molecular composition of the pesticidal substance. Nucleic acid sequences must be provided for both native gene insertions and for genes modified to match a corresponding polymorphic site. In addition, if the pesticidal substance is proteinaceous, an amino acid sequence must also be provided. In addition to basic sequence information, if a native allele has been modified according to 40 CFR 174.26(a)(2), then documentation is also required that identifies the modified polymorphic sites within the relevant sequences.

To provide more clarity in response to several comments that were received on the proposal (Unit IV.E.4.b.), EPA has removed the requirement to provide information on the expression profile for those PIPs where the regulatory region has been modified. In the final rule, EPA was able to remove the requirement to provide information on the expression profile because the Agency now includes at 40 CFR 174.26(a) specific criteria related to allowable modifications that could impact expression, thereby restricting expression to what is found in the sexually compatible plant population.

The fourth element (40 CFR 174.95(d)) captures the requirement from proposed 40 CFR 174.95(b) for pesticidal substances that are known allergens or mammalian toxins/toxicants. For these substances, a description of how conventional breeding practices are being used to ensure they do not exceed human dietary safety levels in the recipient food plant must be provided. EPA revised this from the proposed text to specify ''human dietary safety levels'' rather than ''safe levels'' for clarity. EPA also added a clarifying parenthetical, ''ensure residues of pesticidal substance are not present in food at levels that are injurious or deleterious and are within the ranges of levels generally seen in plant varieties currently on the market and/or known to produce food safe for consumption,'' to further define what is meant by ''human dietary safety levels.'' EPA is aware that the conventional breeding process is generally comprised of three stages: trait mapping, trait introgression, and field testing (Ref. 9). Through genetic engineering, the second stage, trait introgression, can occur more quickly and more precisely (*i.e.,* insert only the trait of interest without linkage drag of undesirable traits). However, trait mapping (requires knowledge of plant genetics and biology, likely includes an understanding of any naturally occuring plant toxins) and field testing (evaluates traits related to agronomic parameters, consumer preferences, allergens/toxins/nutrition) are expected to still occur under their normal timeframes. The second component of this section is specific to those PIPs that are from a source plant that is a wild relative, *i.e.,* a non-domesticated relative. 40 CFR 174.95(d)(2) is new and was added as a result of comments that the Agency received on the proposed rule (Unit IV.E.4.a.). For PIPs from wild relatives, a rationale as to why they do not pose a hazard to humans or the environment must be submitted. Several examples of the type of information that can be used to address this requirement are provided in the regulatory text itself.

Information described under elements one through four will inform whether the PIP meets criteria (a) and (b) of the FIFRA exemption and criteria (a) and (b) of the FFDCA exemption for the requirement of a tolerance for residues of PIPs.

b. Loss-of-Function PIPs

This rule also finalizes the documentation needed for an exemption for ''loss-of-function PIPs.'' As discussed in Unit III.B., ''loss-of-function PIPs'' have now been removed as a subcategory from 40 CFR 174.26 and an exemption specific to ''loss-of-function PIPs'' has been created at 40 CFR 174.27. Consequently, establishment of documentation requirements for this PIP category were necessary (40 CFR 174.96). As the ''loss-of-function PIPs'' exemption is focused on phenotype rather than specific underlying nucleic acid sequences, the documentation associated with the exemption is similarly focused on the trait. To this end, the identity of the modified plant (*i.e.,* genus and species) and a description of the pesticidal trait is required (40 CFR 174.96(a)). Along with the description of the pesticidal trait, a description of how the trait was engineered is also required (40 CFR 174.96(b)). This includes a description of the steps that were taken to ensure that no engineering components (*e.g.,* Cas proteins) are expected to remain in the plant and measures taken to maximize the likelihood that the modification to the recipient plant is limited to the intended modification, including ensuring off-target mutations were minimized (*e.g.,* through the use of *in silico* techniques in guide RNA development). This information allows the EPA to ensure the criteria for exemption are met (*e.g.,* no non-exempt inert ingredients remain in the final plant).

D. Recordkeeping Requirements for PIPs Exempt by This Rulemaking

At 40 CFR 174.73, subpart D, EPA is codifying a requirement under FIFRA section 3(a) that any person who is required to submit documentation for the eligibility determination of a PIP under 40 CFR 174.21(d), must maintain documentation of either the request for EPA confirmation or the letter of self-determination (or both, if applicable) along with all supporting documentation for the specific exemption as specified in subpart E. These documents must be maintained for five years starting with the effective date of the exemption. This text is minorly revised from the proposed text for clarity.

E. Clarification of General Qualifications for Exemption

This rule finalizes edits to the ''General Qualifications for Exemptions'' provisions at 40 CFR 174.21 to clarify the applicability of this framework to other PIP exemptions. For paragraph (a), this revision simply clarifies that this paragraph is specific to the active ingredient of the PIP, rather than the PIP as a whole. This is because the definition of a PIP under 40 CFR 174.3 also includes ''any inert ingredient,'' and inert ingredients are not exempt under subpart B but rather subpart X. In the proposed rule, EPA used the phrase ''pesticidal substance'' in its proposed revisions to 40 CFR 174.21(a), while in the final rule, the Agency uses the phrase ''active ingredient.'' The active ingredient definition at 40 CFR 174.3 includes both the genetic material and any pesticidal substance produced (*e.g.,* a protein). Exemption criteria related to both the genetic material and the pesticidal substance are specified in exemptions under subpart B. As such, the titles for the exemptions in subpart B are similarly codified to specify ''active ingredient.''

Paragraph (b) is revised to refer to subpart W, rather than the specific sections and is also revised to specify that the tolerance exemptions apply to the residues of the active ingredient, rather than the PIP as a whole for the same rationale as outlined for the edit

to 40 CFR 174.21(a). It should be noted that although paragraph (b) specifies active ingredient, there are separate tolerance exemptions specific to both the residues of the pesticidal substance (*e.g.,* 40 CFR 174.541) and the genetic material (*i.e.,* 40 CFR 174.507) under subpart W.

Paragraph (c) is revised to refer to subpart X, rather than the specific section of 40 CFR 174.705.

EPA is also finalizing a new paragraph (d) in section 40 CFR 174.21 to accommodate the exemption eligibility determination process (Unit III.C.) and the recordkeeping requirements (Unit III.D.). This paragraph specifies that for PIPs listed in the subsequent subparagraphs, the exemption is contingent upon compliance with recordkeeping requirements and the eligibility determination process. The addition of paragraph (d) does not impact the exemption under section 40 CFR 174.25 for PIPs from sexually compatible plants through conventional breeding as this exemption is not identified in paragraph (d). EPA made two revisions to 40 CFR 174.21(d) since proposal of the rule. First, the Agency added a clarification that 40 CFR 174.73 is implemented ''per sections 8 and 9 of FIFRA (U.S.C. 136f and 136g).'' Those sections of FIFRA specify EPA's inspection authority and impose recordkeeping requirements and they still apply to the PIPs exempted under this rule. Secondly, ''[Reserved]'' was moved to 40 CFR 174.21(d)(3) and replaced in its proposed position at 40 CFR 174.21(d)(2) with ''Loss-of-function plant-incorporated protectants,'' to accommodate the newly created exemption for these types of PIPs at 40 CFR 174.27.

F. Clarification of the Exemption for Sexually Compatible PIPs

The rule finalizes clarifications of the relationship between the newly exempted ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs'' with the previous FIFRA and FFDCA exemptions related to conventionally bred plants (*i.e.,* 40 CFR 174.25 and 40 CFR 174.508). EPA inserted ''created through conventional breeding'' at the end of each section title, and inserted an additional criterion into 40 CFR 174.25 and 40 CFR 174.508, stating that the genetic material is transferred only through conventional breeding. The exemptions at 40 CFR 174.25 and 40 CFR 174.508 have always meant ''only through conventional breeding,'' but this clarification is necessary given the amended definition for ''sexually compatible.''

G. Inert Ingredient Exemption Includes Genetic Engineering

While EPA revised 40 CFR 174.25 and 40 CFR 174.508 to include a criterion specifying that the genetic material is transferred from the source plant to the recipient plant only through conventional breeding, a parallel revision was not proposed or finalized at 40 CFR 174.705.

The amended definition for ''sexually compatible'' states that ''plants must be *capable of forming* a viable zygote through the union of two gametes through conventional breeding'' (emphasis added), which differs from the definition promulgated in 2001 that specified that ''a viable zygote *is formed only* through the union of two gametes through conventional breeding'' (emphasis added). The amendment of the ''sexually compatible'' definition therefore removes the criterion that the gamete formation may only occur through conventional breeding, which would otherwise preclude the use of genetic engineering to create PIPs that are exempt even if those PIPs are moved between sexually compatible plants. Because EPA is not adding an additional conventional breeding criterion to 40 CFR 174.705, like it is for 40 CFR 174.25 and 40 CFR 174.508, the inert ingredient exemption at 40 CFR 174.705 is no longer bound by conventional breeding and therefore allows for the exemption of inert ingredients that are initiated through biotechnology, so long as they still meet the existing criteria of that section.

IV. Discussion of Public Comments and the Agency's Responses

EPA received a total of 8,120 comments on the proposed rule. Of those, 28 were unique and one of those unique comments was supported by 8,093 co-signers. Comments were received from private citizens, industry, academia, professional and trade associations, State regulatory associations, and public interest groups. Of the 28 unique comments, twenty-three were generally supportive of an exemption for PIPs created through biotechnology, while three comments, one of which included the mass mailer, were opposed. An additional two respondents commented on specific aspects of the rule while remaining silent as to their overall position on its promulgation.

In this unit, EPA provides a summary of the major issues raised by commenters and EPA's responses, as well as summaries of public comments that prompted changes to the proposed requirements for the final rule. All public comments and EPA's responses, including those that do not raise significant issues or substantially change the proposed requirements, are included in Response to Comments document (Ref. 1).

A. Definitions and Titles

1. Relationship Between ''Conventional Breeding'' and the Terms ''Native'' and ''Never Derived''

In the proposed rule, EPA sought comment on whether the intent behind the use of the terms ''native'' and ''never derived'' is clear or whether alternative phrasing should be used instead. Most of the commenters that responded to this request stated that EPA's intent was clear but had suggestions on edits to the definitions of ''native gene'' and ''native allele.'' A concern raised by several of the commenters was that alleles that emerged from the use of common conventional breeding techniques, such as induced mutagenesis, may be unintentionally excluded from the definition of ''native allele.'' Thus, some commenters suggested explicitly including the use of induced mutagenesis, embryo rescue, and other conventional breeding techniques in the 40 CFR 174.3 definitions for ''native allele,'' ''native gene,'' ''sexually compatible,'' or ''conventional breeding.'' Another commenter provided an alternative and suggested to focus on the exclusion of transgenes from the native gene definition more explicitly. EPA agreed with the suggestion to focus on the exclusion of transgenes and revised the definition accordingly (Unit III.A.1.). As stated in the proposal, the Agency does not mean to imply that using the term ''native'' would exclude genes originated through conventional breeding techniques like mutagenesis. Native genes comprising the gene pool of sexually compatible plant populations have been developed through the processes of mutation, selection, and genetic exchange. Mutations in any part of a gene can occur naturally or may be induced including through chemical mutagenesis used by plant breeders to create new varieties. Alleles found in sexually compatible plants that may have been created through conventional breeding would be included in the definition of ''native allele'' and ''native gene.'' Additionally, as the requirement does not specify an allele frequency that must be met to qualify as a native allele, identifying one individual with a particular allele is sufficient to claim an allele as a ''native allele.'' EPA also notes that there is no time component of the requirement, and so use of a

native allele identified in a plant from the 1950s, for example, is permissible so long as that plant species is a species known to be sexually compatible with the recipient plant.

Regarding requests to explicitly list conventional breeding techniques like mutagenesis in one of the definitions, EPA does not find this to be necessary, and listing specific conventional breeding techniques may only serve to further cause confusion. EPA finds that the techniques listed in the conventional breeding definition (*e.g.,* bridging crosses and wide crosses) focus on the merging of genetic material from different organisms. Therefore, specific conventional breeding techniques, such as induced mutagenesis, are not explicitly included in the ''conventional breeding'' definition because they are not relevant techniques to the merging of genetic material between organisms.

2. Definition of ''Genetic Engineering''

Two commenters requested that the term ''biotechnology'' be defined. As the regulations have a definition for ''conventional breeding'' under 40 CFR 174.3, which forms the basis for the exemption under 40 CFR 174.25, EPA agrees that it would be prudent to similarly provide a definition to inform the exemption under 40 CFR 174.26. Given that USDA's recent revisions to 7 CFR 340 use the phrase ''genetic engineering,'' EPA chose to define ''genetic engineering'' rather than ''biotechnology,'' to provide consistency across the Coordinated Framework (Ref. 3). EPA thusly updated the term used in the exemption title to be ''genetic engineering.'' EPA used ''genetic engineering'' and ''biotechnology'' synonymously in its proposed rule as evidenced by Unit VI.A.3.g. titled ''Are there any considerations associated with newer biotechnology techniques?,'' where EPA discussed genetic engineering techniques like clustered regularly interspaced short palindromic repeats (CRISPR), zinc-finger nucleases, transcription activator-like effector nucleases, and oligonucleotide-directed mutagenesis.

EPA also received comments requesting the Agency limit the definition of ''genetic engineering'' and therefore the exemptions at 40 CFR 174.26 and 40 CFR 174.27 to high precision techniques such as CRISPR. The Agency has chosen to adopt a broader definition of ''genetic engineering,'' which is more consistent with the dictionary definition of the term. Although the exemptions at 40 CFR 174.26 and 40 CFR 174.27 are not restricted to specific genetic engineering techniques, the exemption criteria in the provisions themselves inherently limit the types of techniques which are likely to be used. For example, it is unlikely for a developer to be able to make the modifications described in 40 CFR 174.26(a)(2)(i) or 40 CFR 174.26(a)(2)(ii) using techniques other than high precision technologies.

Commenters also pointed out that such high precision techniques can be used to limit potential off-target effects from genetic engineering. EPA agrees with the commenters that existing gene editing technologies can be used in a manner to limit off-target effects (*e.g.,* through the use of *in silico* analyses in guide RNA development), and EPA notes that it is expected that the majority of developers already use these types of techniques (Ref. 10). Rather than explicitly limiting the exemption to specific gene modifying techniques, such as CRISPR, the Agency has added an item in the documentation required for developers in 40 CFR 174.95 to describe the measures taken to maximize the likelihood that the modification to the recipient plant is limited to the intended modification (Unit III.C.4.a.). As noted, it is anticipated that developers are already utilizing basic measures to reduce off-target effects, and as such, EPA does not anticipate that this requirement for a description would be unduly burdensome.

3. Title of the Exemption, Name of Exempted PIPs

EPA received comments related to various aspects of the name EPA chose for PIPs proposed for exemption under 40 CFR 174.26. One commenter requested that EPA move the clause ''created through biotechnology'' to directly follow ''PIP.'' The concern was that the original phrasing of ''PIPs based on sexually compatible plants created through biotechnology'' may suggest that the plant has been modified to be sexually compatible, rather than the intended requirement that the resulting PIP be based on a PIP from a sexually compatible plant. EPA agreed with this comment and reordered the clauses as suggested for clarity.

B. Clarification on Allowable Modifications

1. Noncoding, Nonexpressed

EPA received several comments requesting clarification as to whether the presence of ''noncoding, nonexpressed nucleotide sequences'' would affect the exemption status of a PIP at 40 CFR 174.26(a). Commenters argued that because noncoding, nonexpressed sequences are currently excluded from the definition of ''genetic material necessary for the production'' at 40 CFR 174.3, their presence in the recipient plant should not affect the exemption status of a PIP that otherwise meets the exemption criteria.

''Noncoding, nonexpressed nucleotide sequences'' are defined at 40 CFR 174.3, in part as ''nucleotide sequences that are not transcribed and are not involved in gene expression.'' One such example are the left and right border sequences that flank the genetic material that is inserted into the plant genome when using *Agrobacterium*-mediated transformation. These sequences facilitate the integration of the genetic cargo into the plant genome and will remain in the recipient plant together with the genetic material that the developer wishes to express to create the pesticidal trait. Other examples of ''noncoding, nonexpressed nucleotide sequences'' are linker sequences and restriction enzyme recognition sites.

As discussed in the preamble of the proposed rule, ''EPA expects that any ingredients intentionally added during the development of ''PIPs created through genetic engineering from a sexually compatible plant'' that are specific to the production of the active ingredient (*e.g.,* guide RNA, DNA nuclease) and that could function as an inert ingredient would either be transiently transformed or would be removed (*e.g.,* through segregation of the trait) during the breeding process and that if these ingredients have not been removed from the final product the product would not meet the criteria proposed under the new 40 CFR 174.26 and would not qualify for the new exemptions.'' Like the inert ingredients cited in this quote, noncoding, nonexpressed sequences are intentionally added during the development of the PIP to facilitate the integration of the genetic cargo. Thus, EPA finds that if these sequences are not removed from the final product, *i.e.,* the recipient plant, they similarly do not meet the criteria for exemption under 40 CFR 174.26 and 40 CFR 174.27. In this way, the PIPs exempted under this rulemaking remain indistinguishable from those created through conventional breeding.

2. Editing or Insertion of Multiple PIPs in a Single Event

EPA received requests to clarify whether modifications to multiple genes within a single recipient plant would qualify for the exemptions at 40 CFR 174.26. The exemptions at 40 CFR 174.26 and 40 CFR 174.27 do not limit the number of PIPs that can be created in a single recipient plant. Therefore,

changes to multiple genes in a single recipient plant are allowed, so long as each resulting PIP individually meets the exemption criteria. In these instances, the M009 PRIA fee for an EPA determination applies to each individual PIP, meaning that if one plant contains multiple unique PIPs, the M009 PRIA fee would apply multiple times (*e.g.,* the M009 PRIA fee is applied three times for the creation of three unique PIPs in a single recipient plant). The exception is a scenario in which the same gene is modified or inserted multiple times across the genome. For example, it may be necessary to modify several homologous genes of a native gene in a recipient plant to create a single PIP (*i.e.,* to create a loss-of-function PIP where the trait requires all homologous genes to be modified). Conversely, a developer may wish to insert multiple copies of the same native gene. In the instance of modifying/inserting the same gene multiple times across the genome, the M009 fee is only applied once, as the application contains only one PIP.

C. PIPs Created Through Genetic Engineering From a Sexually Compatible Plant

1. Identical Substance Criterion

EPA received several comments on the ''identical substance'' criteria stating, amongst other things, that modifications that result in non-identical substances may not result in a change in risk profile and that the requirement for the production of an identical substance is not consistent with the requirements for PIPs from sexually compatible plants that are moved through conventional breeding. In response, EPA has edited the exemption category related to modifications in an existing native gene at 40 CFR 174.26(a)(2) to incorporate the use of polymorphic regions (Unit III.A.2.).

The exemption category at 40 CFR 174.26(a)(2) does not require the production of an identical substance, while still staying within the scope of what could be achieved through conventional breeding and thus within the scope of the proposed rulemaking. The exemption criterion at 40 CFR 174.26(a)(2) now allows for modifications of the existing native gene using a single source plant as a template to match corresponding polymorphic sequence(s) in a native allele of that gene. Polymorphisms are variants of a gene sequence that are shared between native alleles. These genetic variations may be composed of single nucleotides (*i.e.,* SNPs) or larger DNA segments and they are found at the same locus within the genetic sequence of two or more native alleles (Ref. 11). In some cases, enhanced pesticidal properties of a gene product can be attributed to one or more of these genetic variations within a native gene. 40 CFR 174.26(a)(2) allows developers to utilize their knowledge of specific polymorphisms in native alleles to make changes to the native gene in their recipient plant. While this category does not require the entire substance to be identical to a substance found in the sexually compatible population of the recipient plant, it does require the individual polymorphism(s) to have been identified. It is also important to note that this category requires the use of a *single* source plant as a template, meaning it is not allowed to combine polymorphisms from multiple native alleles in a single PIP. By requiring the polymorphic sequences to be identical and the use of a single source plant as a template, this separate exemption category allows the Agency to capture more of the possible genetic variation that can occur in plants, while staying within the bounds of what could have been achieved through conventional breeding.

2. Expression Profile Criterion

EPA proposed at 40 CFR 174.26(b) a criterion that was intended to ensure that the expression profile of exempted PIPs falls within that which is found in the sexually compatible population. Limiting expression profiles of exempted PIPs in this way is a key limitation to prevent novel environmental and dietary exposures. However, commenters expressed concern over the feasibility to generate the information required to demonstrate eligibility for exemption and had several questions on how these requirements could be met (Unit IV.E.4.b.). Additionally, the Agency received requests to clarify whether the criteria that the pesticidal substance may not be expressed at higher levels, in different tissues, or at different developmental stages, would apply simultaneously or independently. Commenters also requested clarification on the identity of the appropriate comparator for the expression profile criteria at 40 CFR 174.26(b). These comments prompted the Agency to reevaluate the text proposed at 40 CFR 174.26(b).

Given the number of comments received surrounding the expression criteria, and that limiting expression profiles of exempted PIPs is a key limitation to prevent novel environmental and dietary exposures, EPA is not codifying proposed 40 CFR 174.26(b) and is instead finalizing specific criteria at codified 40 CFR 174.26(a) related to the types of permissible modifications that may impact expression. EPA now requires that regulatory regions inserted as part of a native gene per codified 40 CFR 174.26(a)(1), be identical to those found in the native gene in the source plant. The exemption category at 40 CFR 174.26(a)(2) specifies that modifications to an existing native gene, which includes regulatory and coding regions, must match corresponding polymorphic sequence(s) in a native allele. By requiring that inserted regulatory regions match those found in the native gene in the source plant and that modified regulatory regions match polymorphic sequences found in a native allele, EPA can ensure that the expression profile of PIPs exempted under 40 CFR 174.26 will stay within the bounds of what could be obtained through conventional breeding. Furthermore, this criterion coupled with the information on the history of safe use (40 CFR 174.95(d)) allows EPA to ensure that the expression profile of PIPs exempt from the requirement of a tolerance under 40 CFR 174.541 meet the requirement that expression be at levels that are not injurious or deleterious to human health.

D. Loss-of-Function PIPs

1. How are Loss-of-Function Traits Regulated Under FIFRA?

EPA received a number of comments questioning whether loss-of-function traits conferring pesticidal effects are considered pesticides under FIFRA. As stated in the preamble of the proposed rule (Ref. 2), EPA considers the modification of existing native genes in a plant that elicit a loss-of-function trait conferring a pesticidal effect, *i.e.,* ''loss-of-function PIPs,'' to be a pesticide. In the case of ''loss-of-function PIPs,'' the genetic material of the plant has been altered to reduce or eliminate the activity of a gene that would otherwise facilitate the susceptibility of that plant to a pathogen; therefore, the reduction or elimination of that activity has a mitigating or pesticidal effect.

FIFRA defines a ''pesticide,'' in relevant part, as ''any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.'' FIFRA section 2(u), 7 U.S.C. 136(u). For ''loss-of-function PIPs'' (now exempted under 40 CFR 174.27), the modified genetic material, *e.g.,* the modified gene or the genetic material surrounding an excised gene, is the pesticidal substance, since that material operates in the plant to mitigate the pest. Further, the modified

genetic material has been modified with the intent to mitigate the pest. Therefore, any plant containing the loss of function trait sold or distributed with pesticidal claims would meet the statutory definition of a pesticide.

Under EPA's regulations, a substance is considered to be intended for a pesticidal purpose if, among other things, the person who distributes or sells the substance as a pesticide product claims, states, or implies that the substance can or should be used as a pesticide; the substance has no significant commercially valuable use other than use for pesticidal purpose; or a person sells or distributes a product with actual or constructive knowledge that the product will be used, or is intended to be used, for a pesticidal purpose. See 40 CFR 152.15. Therefore, products carrying a pesticidal claim, such as stating that the plant variety resists disease, indicate clear pesticidal intent. Further, even if such claims were not made, if the seller or distributor knew that the loss of function trait was contained in the plant, the substance would still be considered to be intended for a pesticidal purpose. Likewise, even for loss-of-function PIPs that result in the complete elimination of activity from the modified genetic material, the intentional modification of the plant's genetic material to result in a pesticidal effect indicates that the developer has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose and that there is not a significant commercially valuable use other than for a pesticidal purpose. The result is that ''loss-of-function PIPs'' are subject to regulation under FIFRA. This Final Rule exempts ''loss-of-function PIPs'' that meet the criteria under 40 CFR 174.27 from certain regulation under FIFRA. Without this exemption, sale and distribution of plants containing those modifications would require registration under FIFRA.

Furthermore, PIPs from sexually compatible plants have been exempt under 40 CFR 174.25 for over 20 years. Had a developer sought confirmation that their conventionally bred, disease-resistant plant was exempt, EPA would have exempted such a product under 40 CFR 174.25 on the basis that it is a PIP trait that has been created via conventional breeding. (See *e.g.,* 66 FR 37772; July 19, 2001 (FRL–6057–7)). This determination would be made without making a distinction of mode of action (*e.g.,* gene loss-of-function or production of a protein). Disease-resistant traits are often caused by the loss-of-function of a gene, and the 2001 preamble focused on the presence of a pesticidal trait (*i.e.,* disease resistance) and claims of resistance in its determinations that such a trait would be considered a pesticide and a PIP, indicating that EPA did not make a distinction as to whether the disease-resistant trait was conferred via a gene loss-of-function or via production of a proteinaceous substance. Therefore, it is consistent to consider loss-of-function traits to be both pesticides and PIPs.

2. Criteria for the Exemption Specific to ''Loss-of-Function PIPs''

EPA received several comments from industry, trade, and academia on the criterion of substance identity, requesting that the exemptions should be broadened to include non-identical pesticidal substances. By creating a separate exemption for ''loss-of-function PIPs'' with specific criteria and an accompanying definition, EPA finds that ''loss-of-function PIPs'' as described by 40 CFR 174.27 do not require the ''identical substance'' criterion, as do PIPs exempt under 40 CFR 174.26, due to fundamental differences in the pesticidal activity of ''loss-of-function PIPs'' compared to PIPs exempt under 40 CFR 174.26.

''Loss-of-function PIPs'' are characterized by a modification that leads to the reduction or elimination of the activity of that gene, which then results in a pesticidal trait (*e.g.,* the inactivation of a gene coding for a plant receptor confers disease resistance). Mutations that lead to a loss of gene function occur naturally and are prevalent within many organisms, including plants. For example, one study of 1,071 genomes of the model plant *Arabidopsis thaliana* showed a total of 60,819 loss-of-function variants within 12,907 genes, out of a genome-wide total of approximately 25,500 genes (Refs. 12, 13). In addition to their natural occurrence as a result of various biotic and abiotic factors, plant breeders have intentionally induced these types of mutations during the conventional breeding process. One example is the treatment of seeds by chemical mutagens, which is a technique used by breeders to create new plant varieties (Refs. 14, 15).

The traits that may result from the loss of function of a gene are diverse, ranging from altered grain size, increased drought tolerance, and resistance to plant diseases (Refs. 16–20). Disease resistance in plants from the loss of function of S-genes (susceptibility genes) have been identified in natural plant populations, and researchers have used knowledge about naturally occurring gene variants to create pest resistance in various plant species using genetic engineering (Refs. 18, 19). For example, genetically engineered deletions in parts of the regulatory region of the SWEET14 gene in rice created a plant line that is resistant to the *Xanthomonas oryzae* pv. oryzae (*Xoo*) pathogen, and genetically engineered loss-of-function of eIF4E achieved potyvirus resistance in cucumber (Refs. 21, 22).

As previously stated, EPA does not require an ''identical substance'' criterion for ''loss-of-function PIPs,'' and this is because mutations in any part of a gene have the potential to result in the loss of its function. Examples include deletions within the regulatory region that lead to the reduced expression (and thus reduced abundance) of an unmodified protein, or a single nucleotide change in the coding region, which can result in the creation of a premature stop codon, leading to the production of a shorter version of the protein originally encoded by that gene. Other changes to the coding region may also lead to mis-splicing of the pre-mRNA, which can subsequently result in the degradation of the pre-mRNA (no protein produced) or the production of a non-functional protein (Refs. 23, 24). If a non-functional protein is produced, a normal part of routine biological processes is for the cell to recognize it as such and target it for degradation into its amino acid constituents. This turnover of protein occurs independent of how the non-functional protein was created, be it the result from a permanent genetic change (either through natural or induced mutation) or errors created when cells transcribe and/or translate the genetic code (Refs. 25–28). The ability of the cell to recognize and break down non-functional proteins is a routine cell function, and it enables the organism to be economical with its resources by reusing the amino acids for those proteins that do serve a purpose.

Based on the prevalence of loss-of-function mutations in plants and the biological considerations of protein homeostasis, EPA finds that it does not need the same requirements on characteristics as it does for ''PIPs created through genetic engineering from a sexually compatible plant.'' Therefore, ''loss-of-function PIPs,'' as exempted under 40 CFR 174.27, are still supported by the risk assessment as presented in the proposed rule.

As the ''loss-of-function PIP'' exemption is focused on function, there is no nucleic acid sequence requirement in the exemption criteria under 40 CFR 174.27 or in the exemption documentation under 40 CFR 174.96. Commenters have stated a concern that

minor crops may face a disadvantage due to fewer genomic resources being available for their specific crop species. For example, one commenter stated that knowledge of genes in major crops or model organisms can inform the development of minor crops due to conserved gene function from a shared common ancestor, even when those plants are no longer sexually compatible. EPA believes that the codified exemption for ''loss-of-function PIPs'' with its focus on function will allow for use of this knowledge and provide a benefit for developers, including those of minor crops.

E. Eligibility Determination Process

1. Options To Determine Exemption Eligibility

In the proposal, all exempted ''PIPs created through genetic engineering from a sexually compatible plant'' had the option of self-determination. However, in the final rule, only developers of ''loss-of-function PIPs'' (40 CFR 174.27) have the option to self-determine whether the exemption criteria are met.

The Agency finds the approach to require an EPA confirmation for ''PIPs created through genetic engineering from sexually compatible plants'' justified. Commenters felt that a mandatory EPA confirmation process would prevent an incorrect exemption determination. EPA agrees with commenters arguing that doing so will provide additional clarity to developers of ''PIPs created through genetic engineering from sexually compatible plants'' and increase transparency and public trust in products containing these PIPs.

Other commenters were supportive of the flexibility that a mandatory self-determination process with a voluntary EPA confirmation process would provide. EPA acknowledges the value of this flexibility and has determined that developers of ''loss-of-function PIPs'' will have the option to either self-determine or request EPA confirmation of exemption eligibility. Given the straightforward nature of the criteria describing ''loss-of-function PIPs'' (*i.e.,* a focus on function rather than source plant or underlying sequence), EPA believes it appropriate for ''loss-of-function PIPs'' to be eligible for the self-determination option as it is unlikely for a developer to accidentally mis-determine these PIPs. Furthermore, the mode of action of ''loss-of-function PIPs'' (*i.e.,* reduction or elimination of an endogenous gene) is fundamentally different from ''PIPs created through genetic engineering from a sexually compatible plant'' (*e.g.,* intentional production of a pesticidal protein), and as such, further lends itself to the availability of a self-determination option.

2. Extension of Exemption Status

Commenters were largely supportive of the option to transfer the exemption status of a particular PIP to other plant varieties. Regarding this option, one commenter felt that the criterion in the proposal at 40 CFR 174.90(e)(1)(ii) that required that the same phenotype be created through non-homologous end joining repair modifications was too narrow. EPA agreed with this comment and, given the creation of a separate exemption for ''loss-of-function PIPs'' focused on function, was able to revise the exemption extension criteria for ''loss-of-function PIPs'' to be similarly focused on function (Unit III.C.1.).

3. Contents of a Self-Determination Letter

In the proposal, EPA proposed to require submitters of self-determination letters to identify the PIP (at proposed 40 CFR 174.91(b)(2) and 40 CFR 174.91(b)(3)). Two commenters stated that EPA should require additional information on the PIP with the submission of a self-determination letter. Specifically, it was requested that EPA require information on the plant species, a description of the pesticidal trait, and a short summary of how the pesticidal trait was introduced into the plant variety. It was also requested that EPA require developers to submit information that would be required for an EPA confirmation. EPA agrees that information on the recipient plant species and a unique gene identifier should be included in the self-determination letter and has updated the text at 40 CFR 174.91 to reflect this (Unit III.C.2.). Because the identity of the PIP may or may not include the name of the modified gene or plant species (*e.g.,* the identity of the PIP could also be a trade name), the Agency has clarified that a gene identifier and the identity of the recipient plant must also be included in the submission of a self-determination letter.

Regarding the other suggestions, such as a description of the pesticidal trait, a short summary of how the trait was introduced, and other information otherwise provided to the Agency as part of the EPA confirmation process, the Agency does not find this information necessary to be submitted with the self-determination letter. This is because the self-determination process does not involve an EPA review or confirmation. However, the information provided during an EPA confirmation is the same information required to be maintained by the recordkeeping requirements under 40 CFR 174.73, which equally applies to those submitting a self-determination of exemption. As part of the recordkeeping requirements, the information suggested by the commenters must already be made available to EPA upon request. Although the Agency is not requiring a summary description of the pesticidal trait and how it was introduced in the self-determination letter, the Agency agrees that identifying the trait type (*e.g.,* insect resistance or disease resistance) would provide useful information for the public and for State level agencies and edited 40 CFR 174.91(b)(2) to reflect this. Thus, the language at 40 CFR 174.91(b)(2) now requires information on plant species, gene identifier, and trait type.

4. Documentation for an Exemption for ''PIPs Created Through Genetic Engineering From a Sexually Compatible Plant''

a. Scope of the Required Documentation

EPA received comments on the scope of the documentation that is required to be produced to support an exemption for ''PIPs created through genetic engineering from a sexually compatible plant.'' One commenter requested that, in addition to discussing the categories of information needed to assess applicability of the exemption to a PIP, EPA furthermore establish expectations in the regulatory text on what information the Agency deems sufficient to satisfy each of the exemption criteria. In line with this, one commenter suggested to revise 40 CFR 174.95(a)(2) to replace ''information to demonstrate the recipient plant and the source plant are sexually compatible'' with ''information to support that the recipient plant and the source plant are sexually compatible.'' The Agency agrees with this suggestion as a developer may, for example, provide a peer-reviewed literature rationale instead of generating empirical data to demonstrate that two plants are sexually compatible. The Agency revised the regulatory text in the final rule accordingly (Unit III.C.4.a.).

The same commenter also suggested two revisions to 40 CFR 174.95(c)(1). First, the commenter suggested that the documentation requirements should limit sequence comparison to nucleic acids, rather than require both the nucleic acid and the amino acid sequence for proteinaceous PIPs and to limit the nucleic acid sequence comparison to the location of the

intended modification(s) rather than the entire PIP. Second, the commenter requested that if an amino acid sequence was required, EPA further clarify the language on the sequence requirements to state ''nucleotide sequence and deduced amino acid sequence.'' EPA has revised the text at 40 CFR 174.95(c)(1) for increased clarity as to the required sequence information based on the relevant comparator, *i.e.,* the specific comparator at 40 CFR 174.95(c) is now listed based on the corresponding exemption category at 40 CFR 174.26. The Agency maintains that the entire nucleic acid sequence must be provided for all PIPs exempted under 174.26(a), as both exemptions at 40 CFR 174.26(a) allow for modifications in the regulatory regions. Thus, providing EPA with the nucleic acid sequence of the entire gene will allow the determination if the modifications meet the exemption requirements (Unit III.C.4.a.). The Agency maintains that the full-length amino acid sequence must additionally be provided for proteinaceous PIPs but agrees with the commenter that the deduced amino acid sequence would be sufficient to inform the identity of that PIP in these instances.

Commenters requested that EPA exclude wild relatives as potential source plants and/or impose geographic restrictions on source plants, noting that non-target organisms living within the range of the wild donor plants would have adapted to exposures from these wild plants and that non-target organisms from outside this range may therefore be negatively impacted by a PIP from the wild plant due to lack of previous exposure. Additionally, it was noted that allowing sexually compatible wild relatives as source plants may result in toxins from these plants being missed as part of the plant breeder screening.

EPA understands that wild relatives provide an important source of genetic variation for developers and therefore has chosen not to exclude them from use as sexually compatible source plants for exempt PIPs. However, to address the concern raised by the commenters, EPA has added a requirement at 40 CFR 174.95(d)(2) that if the source plant is a wild relative of the recipient plant, the developer must describe why the PIP is not anticipated to pose a hazard to humans or the environment. EPA provides a list in the regulatory text at 40 CFR 174.95(d)(2) of the types of information that can be used to describe why a PIP is not anticipated to pose a hazard to humans or the environment.

b. Feasibility To Meet the PIP Expression Criteria and Develop Adequate Documentation

EPA received several comments on the proposed rule regarding the PIP expression criteria at 40 CFR 174.26(b) and the associated documentation requirements at 40 CFR 174.95(c)(2). Several commenters raised concerns that meeting the documentation requirements would be impractical and cost prohibitive given the large variation in plant gene expression between tissues and growth stages, especially when considering gene expression in different environmental conditions. One commenter submitted that data to meet the expression limitation exemption criteria should only be required if the intent of the modification is to increase levels of the expressed pesticidal substance. This approach is consistent with the Agency's analysis of gene expression articulated in the proposal. Specifically, EPA found that although variations in the production of plant substances will occur in response to environmental conditions, there are physiological and practical considerations that limit the expression level, and thus the abundance of a particular substance in plants that are sexually compatible. EPA finds that this is especially true for regulatory regions and polymorphic sequences that are present in regulatory regions that are moved between native alleles. In other words, there is the expectation that the expression pattern of a PIP would be within that what is found within the sexually compatible population, so long as it is under the control of the regulatory elements found within a native allele.

Consistent with this assessment and taking into consideration the comments received on the impracticality and potential financial burden of determining the expression levels to comply with proposed 40 CFR 174.95(c)(2), the Agency removed the exemption criterion at proposed 40 CFR 174.26(a)(2)(i) that would have allowed modifications to regulatory regions for the purpose of altering the expression level of a pesticidal substance. Instead, EPA is now requiring at 40 CFR 174.26(a)(1) that any regulatory region that is inserted as part of a native gene must be identical in nucleotide sequence to the regulatory region of the native gene as it is identified in the source plant. Similarly, 40 CFR 174.26(a)(2) allows regulatory region changes only based on polymorphic sequence(s) identified in a native allele of the modified gene. In making these revisions to 40 CFR 174.26, EPA is able to remove the requirements for expression profile confirmation at proposed 40 CFR 174.95(c)(2), as the expectation is that the expression profiles of PIPs that meet these exemption criteria at 40 CFR 174.26(a) will not be outside of that what is found within the sexually compatible population of the recipient plant.

5. Activities That Require Submission of an Eligibility Determination

Two commenters requested clarification on which activities may require a separate notification of self-determination for a PIP under 40 CFR 174.541. Specifically, commenters requested clarification in those instances in which a plant containing the PIP is imported to the United States for the distribution in commerce for consumption or planting in the absence of a tolerance or tolerance exemption granted under FFDCA.

EPA is confirming that the Agency is requiring a separate eligibility determination under 40 CFR 174.541 for residues of those PIPs that are imported into the United States and that are used for food or feed if the developer has not already obtained an exemption under 40 CFR 174.21. As discussed in the preamble of the proposed rule, a separate submission of the eligibility determination of the FFDCA exemption for a PIP proposed for use in food or feed is required only if it has not already been submitted under FIFRA. To clarify, EPA has added a new paragraph (g) to 40 CFR 174.90, which explains that a duplicative eligibility submission is not required for purposes of 40 CFR 174.541(c), if it is already being submitted for purposes of 40 CFR 174.21(d). The proposal discussed one such scenario where this might be the case (*e.g.,* Unit VI.C.1. of the proposed rule). Briefly, a developer will need an exemption eligibility determination for the purposes of FFDCA but not FIFRA when residues of a PIP will be in or on food imported into the United States, but the PIP is not intended to be sold or distributed for pesticidal use (*e.g.,* PIP containing seed or plant sold for planting) in the United States. In that case, the PIP residues in the imported food would need a tolerance or tolerance exemption to allow for distribution in interstate commerce in the United States under the FFDCA, but would not need a FIFRA exemption since it is not intended to be sold or distributed for pesticidal purposes in the United States.

Other commenters inquired whether testing of PIPs at or under 10 acres of land would require an Experimental Use Permit (EUP) under FIFRA section 5 and

therefore whether an eligibility determination for certain PIPs would be required at these acreages. 40 CFR 172.3 applies to PIPs. As described in 40 CFR 172.3, tests on 10 acres or less are presumed to not require an EUP so long as any food or feed crops involved in, or affected by, such tests (including, but not limited to, crops subsequently grown on such land which may reasonably be expected to contain residues of the tested pesticides) are destroyed or consumed only by experimental animals unless an appropriate tolerance or exemption from a tolerance has been established under FFDCA for residues of the pesticide. Further, pursuant to 40 CFR 172.3(e), EPA may, on a case-by-case basis, require that testing be carried out under an EUP even if such testing involves 10 acres or less. For a PIP subject to this rulemaking that would be used in testing taking place on 10 acres or less to be able to take advantage of the presumption in 40 CFR 172.3, that PIP would need to either demonstrate that the appropriate tolerance or exemption has been established or follow the requirements of crop destruction. Pursuant to subpart E of 40 CFR 174 as codified in this rule, for PIPs exempted under 40 CFR 174.26, demonstrating that the tolerance exemption at section 40 CFR 174.541 applied would require an EPA confirmation, and for PIPs exempted under 40 CFR 174.27, it would require the submission of a self-determination. For a PIP for which a tolerance exemption has not been established, in addition to requirements of crop destruction for field testing at or under 10 acres, EPA previously published and still relies on guidance (Ref. 29) detailing containment measures to restrict the flow of genetic material, including seeds, from field tests to minimize the potential for PIP residues that do not have a tolerance exemption to enter the food supply. These additional considerations are crucial to prevent PIPs lacking a tolerance exemption from entering the food supply and the consequences of adulteration under FFDCA. EPA notes that it is expecting to provide an update to the information and/or process provided in PRN 2007–2 (Ref. 29) regarding measures needed for containing small-scale testing of PIPs in light of changes in regulatory oversight due to USDA's recently revised 7 CFR part 340 regulations.

6. Submitting Confidential Business Information (CBI)

Several commenters noted that information included in a request for EPA confirmation may be classified as CBI and requested assurance and clarification for how EPA would protect intellectual property and other proprietary information. As EPA is using its existing electronic reporting site for receiving submissions, this information will be transmitted to EPA in a secure manner. As stated in 40 CFR 174.90(c), any claims of confidentiality for information submitted in the request for EPA confirmation must be made in accordance with the procedures outlined in 40 CFR 174.9 of subpart A. 40 CFR 174.9 instructs a submitter on how to claim data or other information as CBI. Information likely to be claimed as CBI may be part of the documentation for an exemption (*e.g.,* sequence information on the pesticidal substance). Developers also have the option to claim information submitted as part of the self-determination as CBI (*e.g.,* gene ID, plant species). However, it is important to note that every individual piece of information claimed as CBI must be supported by its own substantiation. For this reason, and for reasons of public transparency, as it has for all PIPs, EPA continues to encourage PIP developers to limit their claims to CBI to only the most pertinent pieces of information.

F. Endangered Species Assessment

EPA received public comment regarding whether the proposed exemption may affect endangered species. EPA determined that this action invokes obligations under the Endangered Species Act because this is a discretionary action that exempts certain pesticidal substances from some requirements under FIFRA, such that the exemptions could cause potential exposures in the environment. Therefore, EPA conducted an Endangered Species Assessment for ''PIPs created through genetic engineering from a sexually compatible plant'' and for ''loss-of-function PIPs.''

In the proposed rule, after careful consideration of potential interactions that the PIPs proposed for exemption may have with nontarget organisms (see Unit VI.A.3. of the proposed rule), EPA preliminarily determined that use of the PIPs proposed for exemption is not likely to cause unreasonable adverse effects on the environment and humans in the absence of regulatory oversight (although ''regulatory oversight'' still exists in the form of the adverse effects reporting requirement in existing 40 CFR 174.71) resulting in a reasonable expectation that no discernible effects to nontarget organisms will occur. As no discernible effects to nontarget organisms are reasonably expected to occur due to the use of these PIPs, which necessarily includes any threatened or endangered species (listed species), EPA therefore reaches a ''No Effect'' determination for listed species and their critical habitats.

Herein, EPA provides brief summaries of key considerations used in the Agency's determination that the PIP exemptions proposed in the 2020 preamble and finalized in this rule are reasonably expected to result in no discernable effects to nontarget organisms, including listed species. In the proposed rule, EPA considered several factors in determining whether PIPs that meet the criteria under proposed 40 CFR 174.26 could be exempted from FIFRA requirements in order to meet the 40 CFR 174.21(a) requirement (Unit VI.A.3.h. of the proposed rule). In its assessment, the Agency relied on the large body of knowledge that currently exists on sexually compatible plants and genetic diversity. Briefly, with regard to the potential ecological effects, the Agency found that there is: ''(1) Low potential for novel exposures; (2) Low potential for levels of ''PIPs created through genetic engineering from a sexually compatible plant'' to exceed levels found in sexually compatible plants; and (3) Low potential for ''PIPs created through genetic engineering from a sexually compatible plant'' to move from cultivated plants to wild or weedy relatives through gene flow and increase weediness.'' (Unit VI.A.3. of the proposed rule). EPA also evaluated considerations specific to newer biotechnology techniques related to the PIPs proposed for exemption and found that their use in creating these PIPs would pose negligible risk to the environment. Lastly, the Agency found that the likelihood is negligible that the transfer of a PIP via biotechnology from a nonagricultural (wild) relative to an agricultural one would pose a greater risk than if it were transferred through conventional breeding.

In summary, PIPs that are exempted under 40 CFR 174.26 represent a subset of substances already present in related plants and are equivalent both in identity and in expression profile (how much, where, and when the substances are expressed in plants). As ''loss-of-function PIPs'' exempted under 40 CFR 174.27 were originally proposed as a subcategory of PIPs exempted under 40 CFR 174.26, they too fall within the scope of the Agency's analysis in the proposed rule preamble. Pesticidal traits resulting from the loss-of-function of an endogenous gene are common occurrences in wild plants and in conventional breeding (Refs. 18, 19) and EPA finds that there is no potential for

novel exposures or hazards for ''loss-of-function PIPs,'' as this group of PIPs is characterized by a modification that leads to the reduction or elimination of the activity of a gene that had already been present in the recipient plant. As the PIPs exempted under this rule are considered to be equivalent to those already found in nature and used in conventional breeding, there is a reasonable expectation that no discernible effects to listed species will occur from their use. As no discernible effects are reasonably expected to occur to listed species due to the use of these PIPs, EPA therefore reaches a ''No Effect'' determination for listed species and their critical habitats.

VII. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. Response to Comments to the Proposed Rule to Exempt Certain Plant-Incorporated Protectants (PIPs) Derived from Newer Technologies. Available at *https://www.regulations.gov* under Docket ID No. EPA–HQ–OPP–2019–0508.
2. USEPA. 2020. Pesticides; Exemptions of Certain Plant-Incorporated Protectants (PIPs) Derived from Newer Technologies. 85 FR 64308, October 9, 2020 (FRL–10014–10). Available at *https://www.regulations.gov* under Docket ID No. EPA–HQ–OPP–2019–0508.
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VIII. FIFRA Review Requirements

Pursuant to FIFRA section 25(a), EPA submitted the draft final rule to the United States Department of Agriculture (USDA) for review, with a copy sent to the appropriate Congressional Committees as required under FIFRA section 25(a). The Agency did not receive any comments from USDA.

In accordance with FIFRA section 25(d), the EPA asked the FIFRA Scientific Advisory Panel (SAP) to waive review of the draft final rule, as was done for the draft proposed rule. The FIFRA SAP waived its scientific review of the draft final rule on October 12, 2022, because the rule does not raise scientific or science policy issues that warrant a scientific review by the SAP.

IX. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Orders 12866: Regulatory Planning and Review and 14094: Modernizing Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Any changes made in response to OMB recommendations during that review have been documented in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action (Ref. 4) which is summarized in more detail in Unit I.E., and included in the docket.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared is assigned EPA ICR No. 2619.02 (Ref. 30), and identified by OMB Control No. 2070–0214. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The information collection activities in this rule are associated with the exemption eligibility process (*i.e.,* self-determination, request for EPA confirmation, and associated recordkeeping) established in this rule as an alternative to the existing pesticide registration and tolerance activities that are currently approved by OMB under OMB Control No. 2070–0060 (EPA ICR No. 0277.23), OMB Control No. 2070–0142 (EPA ICR No. 1693.10), OMB Control No. 2070–0028 (EPA ICR No. 0143.13, and OMB Control No. 2070–0024 (EPA ICR No. 0597.13). Once this ICR is approved, EPA intends to amend the ICR approved by OMB under OMB Control No. 2070–0060 (EPA ICR No. 0277.23) to incorporate the information collection activities and burden attributable to this rule.

Respondents/affected entities: See Unit I.A.

Respondent's obligation to respond: Required to obtain the exemption (40 CFR part 174).

Frequency of response: On occasion.

Total estimated number of respondents: 10.

Total estimated number of responses: 10 (per year), which reflects an estimate of 1 response per respondent each year. The ICR accounts for the most conservative burden estimate, which the Agency projects will be up to 10 submissions per year.

Total estimated burden: 850 hours (per year), which reflects an approximate burden of 85 hours per submission. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $125,800 (per year), includes $0 annualized capital or operation and maintenance costs.

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 OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

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.* In making this determination, EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the Agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule relieves regulatory burden on the small entities subject to the rule. The rule is expected to reduce costs to developers of ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs,'' and the cost savings per product are approximately $472,000–$886,000. The cost savings per product will be realized when the developer submits a letter of self-determination or requests EPA confirmation, as applicable. The exemption for ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs'' reduces the costs associated with meeting regulatory requirements for these types of PIPs and therefore removes a potential barrier to market entry for small entities. Of the entities likely to develop PIPs that meet the exemptions outlined in this rulemaking, EPA currently estimates that approximately 80% are small entities.

I have therefore concluded that this action will relieve regulatory burden for all directly regulated small entities. The basis for this determination is presented in the small entity analysis prepared as part of the cost analysis for this rulemaking (Ref. 4), which is summarized in Unit I.E., and a copy is available in the docket.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action is not expected to impose an enforceable duty on any State, local or Tribal governments, and the requirements imposed on the private sector are not expected to result in annual expenditures of $100 million or more. Accordingly, EPA has determined that the requirements of sections 202, 203, or 205 do not apply to this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because 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. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have Tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not have substantial direct effects on Tribal governments, on the relationship

between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated as a significant energy action by the Administrator of the Office of Information and Regulatory Affairs.

I. National Technology Transfer Advancement Act (NTTAA)

This action does not involve technical standards that would require Agency consideration under NTTAA section 12(d), 15 U.S.C. 272.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or indigenous peoples) and low-income populations.

EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or indigenous peoples. Although this action does not concern human health or environmental conditions, EPA considered potential environmental justice concerns during the development of the proposed rule, sought comments specifically on this point with regard to the proposed exemptions, and finds that this action will not result in disproportionately high and adverse human health, environmental, climate-related, or other cumulative impacts on disadvantaged communities.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and 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).

L. Executive Orders 13874: Modernizing the Regulatory Framework for Agricultural Biotechnology Products and 14801: Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy

This action is intended to further implement section 4(b) of Executive Order 13874 (84 FR 27899, June 11, 2019), and section 8 of Executive Order 14801 (87 FR 56849, September 12, 2022). This final rule may promote future innovation and competitiveness by efficiently exempting through regulation qualifying ''PIPs created through genetic engineering from a sexually compatible plant'' and ''loss-of-function PIPs'' that meet the FIFRA and FFDCA standards for exemption.

List of Subjects in 40 CFR Part 174

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Plant-incorporated protectants, Reporting and recordkeeping requirements.

Michael S. Regan,

Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR part 174 is amended as follows:

PART 174—PROCEDURES AND REQUIREMENTS FOR PLANT-INCORPORATED PROTECTANTS

■ 1. The authority citation for part 174 continues to read as follows:

Authority: 7 U.S.C. 136–136y; 21 U.S.C. 321(q), 346a and 371.

■ 2. Amend § 174.3 by adding in alphabetical order definitions for ''Gene'', ''Genetic engineering'', ''Loss-of-function plant-incorporated protectant'', ''Native allele'', and ''Native gene'' and revising the definition of ''Sexually compatible'' to read as follows:

§ 174.3 Definitions.

* * * * *

Gene, and other grammatical variants such as ''genic,'' means a unit of heritable genetic material that is comprised of the genetic material necessary for the production of a substance.

Genetic engineering means the modification of the genome of an organism using recombinant, synthesized, or amplified nucleic acids or other techniques excluded from the definition of conventional breeding.

* * * * *

Loss-of-function plant-incorporated protectant means a plant-incorporated protectant in which the genetic material of a native gene is modified to result in a pesticidal effect through the reduction or elimination of the activity of that gene. For purposes of loss-of-function plant-incorporated protectants, the active ingredient and pesticidal substance are one and the same and are defined as the genetic material that has been modified to create the pesticidal trait (*i.e.,* modification of the sequence of nucleic acids). Loss-of-function plant-incorporated protectants do not include instances where the reduction or elimination of the activity of the modified native gene results in the intentional increase of activity of another pesticidal gene.

Native allele means a variant of a native gene that is identified in the genetic diversity of plants sexually compatible with the recipient plant.

Native gene means a gene that is identified in the recipient plant or source plants that are sexually compatible with the recipient plant. It does not include genes introduced through genetic engineering from a source organism that is not sexually compatible with the source plant.

* * * * *

Sexually compatible, when referring to plants, means plants must be capable of forming a viable zygote through the union of two gametes through conventional breeding.

* * * * *

■ 3. Revise § 174.21 to read as follows:

§ 174.21 General qualifications for exemptions.

A plant-incorporated protectant is exempt from the requirements of FIFRA, other than the requirements of § 174.71,

if it meets the exemption criteria in paragraphs (a) through (d) of this section. Plant-incorporated protectants that are not exempt from the requirements of FIFRA under this subpart are subject to all the requirements of FIFRA.

(a) The active ingredient of the plant-incorporated protectant meets the exemption criteria listed in at least one of the sections in §§ 174.25 through 174.50.

(b) When the plant-incorporated protectant is intended to be produced and used in a crop used as food, the residues of the active ingredient of the plant-incorporated protectant are either exempted from the requirement of a tolerance under FFDCA (21 U.S.C. 321 *et seq.*) as listed in subpart W of this part, or no tolerance would otherwise be required.

(c) Any inert ingredient that is part of the plant-incorporated protectant is listed as an approved inert ingredient in subpart X of this part.

(d) For plant-incorporated protectants listed in the subparagraphs below, the exemption applies only if the developer is compliant with the general recordkeeping requirements specified in § 174.73 per sections 8 and 9 of FIFRA, 7 U.S.C. 136f and 136g, and only after compliance with the relevant eligibility determination procedures specified in § 174.90:

(1) Plant-incorporated protectant created through genetic engineering from a sexually compatible plant.

(2) Loss-of-function plant-incorporated protectant.

■ 4. Amend § 174.25 by revising the section heading and the introductory text and adding paragraph (c) to read as follows:

§ 174.25 Active ingredient of a plant-incorporated protectant from a sexually compatible plant created through conventional breeding.

The active ingredient is exempt if all of the following conditions are met:

* * * * *

(c) The genetic material is transferred from the source plant to the recipient plant only through conventional breeding.

■ 5. Add § 174.26 to subpart B to read as follows:

§ 174.26 Active ingredient of a plant-incorporated protectant created through genetic engineering from a sexually compatible plant.

The active ingredient is exempt if the conditions in paragraphs (a) and (b) of this section are met.

(a) The active ingredient is characteristic of the population of plants sexually compatible with the recipient plant and is created through genetic engineering from either an insertion of a native gene into the recipient plant as specified in paragraph (a)(1) of this section or a modification of an existing native gene in the recipient plant as specified in paragraph (a)(2) of this section.

(1) *Insertion.* A native gene is inserted into the genome of the recipient plant and produces a pesticidal substance identical in sequence to the pesticidal substance identified in the source plant. The regulatory regions inserted as part of the native gene must be identical in nucleic acid sequence to those regulatory regions of the native gene identified in the source plant.

(2) *Modification.* The existing native gene is modified to match corresponding polymorphic sequence(s) in a native allele of that gene using a single source plant as a template.

(b) This exemption does not apply until the requirements in § 174.21(d) have been met.

■ 6. Add § 174.27 to subpart B to read as follows:

§ 174.27 Active ingredient of a loss-of-function plant-incorporated protectant.

The active ingredient is exempt if the following conditions are met:

(a) The genetic material of a native gene is modified using genetic engineering to result in a pesticidal effect through the reduction or elimination of the activity of that gene; and

(b) This exemption does not apply until the requirements in § 174.21(d) have been met.

■ 7. Add § 174.73 to subpart D to read as follows:

§ 174.73 General recordkeeping requirements for exemptions.

For 5 years, starting with the effective date of a plant-incorporated protectant exemption, any person who is required to submit documentation for the determination of eligibility for a plant-incorporated protectant listed under § 174.21(d) must do both of the following:

(a) Maintain documentation of either the request for EPA confirmation or the letter of self-determination (or both, if applicable) along with all supporting documentation for the specific exemption listed in subpart E of this part.

(b) Make the documentation outlined in paragraph (a) of this section available to EPA upon request.

■ 8. Add subpart E to read as follows:

Subpart E—Exemption Eligibility Determination Process and Requirements

Sec.

174.90 Determining eligibility.
174.91 Submitting a letter of self-determination.
174.93 Requesting EPA confirmation.
174.95 Documentation for an exemption for a plant-incorporated protectant created through genetic engineering from a sexually compatible plant.
174.96 Documentation for an exemption for a loss-of-function plant-incorporated protectant.

Subpart E—Exemption Eligibility Determination Process and Requirements

§ 174.90 Determining eligibility.

(a) *Options for determining eligibility.* As required in §§ 174.21(d) and 174.541(c), the developer must notify EPA to be eligible for exemption. Available notification options differ by plant-incorporated protectant. The developer must do at least one of the following:

(1) *EPA confirmation.* Unless permitted in paragraph (a)(2) of this section, a developer must submit a request for EPA confirmation of eligibility in accordance with § 174.93. Any developer may submit a request for EPA confirmation of eligibility in accordance with § 174.93.

(2) *Self-determination.* A developer may submit a letter of self-determination in accordance with § 174.91 if the plant-incorporated protectant qualifies for exemption as one of the following:

(i) A loss-of-function plant-incorporated protectant eligible for exemption under § 174.27.

(ii) [Reserved]

(b) *Where to submit a request for EPA confirmation or letter of self-determination.* A request for EPA confirmation of eligibility or a letter of self-determination must be submitted electronically.

(c) *Claims of confidentiality.* Any claims of confidentiality for information submitted in the request for EPA confirmation or a letter of self-determination must be made in accordance with the procedures outlined in § 174.9.

(d) *Overlapping determinations of eligibility.* If a plant-incorporated protectant is eligible for a self-determination option, a developer may elect to submit a letter of self-determination as well as a request for EPA confirmation of eligibility concurrently or at a later time. If the developer so elects, the letter of self-determination will remain in effect while EPA evaluates the request for confirmation of eligibility.

(e) *Revisiting eligibility determination.* If, at any time after EPA issues a confirmation of eligibility or the letter of self-determination is submitted, EPA becomes aware of information indicating that a plant-incorporated protectant no longer meets the criteria for exemption (*e.g.,* adverse effects reports submitted under § 174.71) or that the self-determination was incorrect, EPA will generally notify the submitter in writing of EPA's intention to initiate a review of eligibility for exemption and may request additional information from the submitter in order to evaluate that eligibility for exemption. Upon conclusion of its review, EPA will notify the submitter in writing of its determination as to whether the plant-incorporated protectant meets the exemption criteria and any actions that will be required should the plant-incorporated protectant be found to not meet the exemption criteria. Under those circumstances, the plant-incorporated protectant may be considered to be noncompliant with FIFRA and subject to possible enforcement by EPA. At any time, if EPA finds or has reason to believe that a plant-incorporated protectant's non-compliance with FIFRA requires immediate action, EPA may take such action, including enforcement, without first informing the submitter of an eligibility review.

(f) *Extension of exemption.* An exemption can be extended in one of two ways. First, if the exempted plant-incorporated protectant is moved through conventional breeding to other plants, the exemption is extended to the subsequent plant-incorporated protectant. Second, to extend the exemption of the plant-incorporated protectant to subsequent genetic engineering events in other plants, the following exemption-specific criteria apply:

(1) *Plant-incorporated protectant created through genetic engineering from a sexually compatible plant.* An exemption extends to a plant-incorporated protectant when that plant-incorporated protectant is genetically engineered by the submitter into another variety of that same plant species, the substance produced is identical to the substance produced in the original recipient plant, and no new modifications were made to the regulatory regions.

(2) *Loss of function plant-incorporated protectant.* An exemption extends to a plant-incorporated protectant when that plant-incorporated protectant is genetically engineered by the submitter into another variety of that same plant species and the same native gene is targeted to create the loss-of-function PIP.

(g) *No duplication necessary.* A developer is not required to submit duplicative requests for eligibility determination or self-determination under both §§ 174.541(c) and 174.21(d), if it has already been submitted for purposes of determining eligibility under § 174.21(d).

§ 174.91 Submitting a letter of self-determination.

To self-determine eligibility for the exemption of a plant-incorporated protectant listed under § 174.90(a)(2), a developer must comply with all of the following requirements.

(a) *When to submit a letter of self-determination.* A letter of self-determination for an exemption must be submitted to EPA prior to engaging in any activity that would be subject to FIFRA absent an exemption.

(b) *Contents of a letter of self-determination.* The letter of self-determination must:

(1) Provide the name and contact information for the submitter (including telephone number and email address), company name, or other affiliation.

(2) Identify the plant-incorporated protectant by providing: the identity of the recipient plant (genus and species), a unique identifier for the native gene from the National Center for Biotechnology Information (NCBI) at the National Library of Medicine of the National Institutes of Health (NLM) at the National Institutes of Health (NIH) (*i.e.,* Entrez GeneID), the trait type (*e.g.,* insect resistance), and cite the paragraph under § 174.90(a)(2) that indicates that the plant-incorporated protectant is eligible for self-determination.

(3) Complete and submit the certification statement provided in the electronic submission portal. The statement must be dated and signed by the certifying official identified in the certification statement.

(c) *EPA response.* EPA will provide electronic confirmation of receipt immediately. Electronic confirmation of receipt shall be equivalent to written confirmation of receipt.

(d) *Effective date of exemption.* The exemption does not apply until EPA confirms receipt of the letter of self-determination.

§ 174.93 Requesting EPA confirmation.

To request EPA confirmation of eligibility for exemption of a plant-incorporated protectant listed under § 174.21(d), a developer must comply with all of the following requirements.

(a) *When to submit a request for EPA confirmation.* Unless the developer has received confirmation of receipt of a letter of self-determination, the request for EPA confirmation must be submitted prior to engaging in any activity that would be subject to FIFRA absent an exemption.

(b) *Contents of a request for EPA confirmation of exemption eligibility.* The request must contain information as specified in § 174.91(b) and supporting documentation, as specified in exemption-specific sections of this subpart (*e.g.,* § 174.95).

(c) *EPA review and response.* Upon receipt of a request, EPA will review and evaluate the information provided to determine whether the plant-incorporated protectant meets the exemption criteria in § 174.21. EPA may require additional information to assess whether a plant-incorporated protectant meets the criteria for exemption. EPA will notify the submitter in writing of its determination. If EPA determines that the plant-incorporated protectant does not meet the criteria for exemption, EPA will notify the submitter in writing of any actions that will be required.

(d) *Effective date of exemption.* If the plant-incorporated protectant is not already exempt pursuant to the self-determination process under § 174.91, this exemption applies once EPA notifies the submitter in writing, confirming that the plant-incorporated protectant meets the criteria for exemption.

§ 174.95 Documentation for an exemption for a plant-incorporated protectant created through genetic engineering from a sexually compatible plant.

A developer requesting EPA confirmation of exemption eligibility for a plant-incorporated protectant created through genetic engineering from a sexually compatible plant pursuant to § 174.93 must submit the information in the following paragraphs to EPA. The following documentation must be maintained by a developer of a plant-incorporated protectant created through genetic engineering from a sexually compatible plant per § 174.73:

(a) *Biology of the plant.* (1) The identity of the recipient plant, including genus and species.

(2) If the plant-incorporated protectant was derived from a plant species other than the recipient plant species, provide the identity of the source plant including genus and species and information to support the determination that the recipient plant and the source plant are sexually compatible (*e.g.,* through peer-reviewed literature rationale).

(b) *Description of the pesticidal trait and how the trait was engineered into*

the plant. Include a description of the measures that were taken to ensure that no engineering components (*e.g.,* Cas proteins) are present in the final plant product and the measures taken to maximize the likelihood that the modification to the recipient plant is limited to the intended modification.

(c) *Molecular characterization of the plant-incorporated protectant.* A nucleic acid sequence comparison of the plant-incorporated protectant between the recipient plant and the comparator(s). A deduced amino acid sequence comparison is additionally required when the pesticidal substance is proteinaceous. The relevant comparator(s) for the sequence comparison(s) are determined by the type of modification:

(1) For § 174.26(a)(1), sequences in the source plant and in the recipient plant.

(2) For § 174.26(a)(2), sequences in the recipient plant before the modification, after the modification, and the sequence in the source plant. The polymorphic site(s) must be indicated.

(d) *Information on the history of safe use of the plant-incorporated protectant.* (1) If the pesticidal substance is a known allergen or mammalian toxin/toxicant (*e.g.,* solanine), describe how conventional breeding practices are being used to ensure that it does not exceed human dietary safety levels in the recipient food plant (*i.e.,* ensure residues of pesticidal substance are not present in food at levels that are injurious or deleterious and are within the ranges of levels generally seen in plant varieties currently on the market and/or known to produce food safe for consumption).

(2) If the source plant is a wild relative of the recipient plant, describe why the plant-incorporated protectant is not anticipated to pose a hazard to humans or the environment (*e.g.,* Are levels of the pesticidal substance produced in the recipient plant within the ranges of levels generally seen in plant varieties currently on the market and/or known to produce food safe for consumption? Is the pesticidal mode of action non-toxic? Does the plant-incorporated protectant lack sequence similarity to known mammalian toxins, toxicants, or allergens? Is the plant-incorporated protectant a commonly screened substance and therefore familiar to plant breeders?).

§ 174.96 Documentation for an exemption for a loss-of-function plant-incorporated protectant.

A developer requesting EPA confirmation of exemption eligibility for a loss-of-function plant-incorporated protectant pursuant to § 174.93 must submit the information in the following paragraphs to EPA along with the developer's request for exemption confirmation. The following documentation must be maintained by a developer of a loss-of-function plant-incorporated protectant per § 174.73:

(a) Biology of the plant: The identity of the recipient plant, including genus and species.

(b) Description of the pesticidal trait that results from the loss-of-function and how the trait was engineered into the plant. Include a description of the steps that were taken to ensure that no engineering components (*e.g.,* Cas proteins) remain in the plant and the measures taken to maximize the likelihood that the modification to the recipient plant is limited to the intended modification.

■ 9. Amend § 174.508 by:

■ a. Revising the section heading and introductory text;

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

■ c. Adding a new paragraph (c).

These revisions and addition read as follows:

§ 174.508 Pesticidal substance of a plant-incorporated protectant from a sexually compatible plant created through conventional breeding; exemption from the requirement of a tolerance.

Residues of a pesticidal substance are exempt from the requirement of a tolerance if all the following conditions are met:

* * * * *

(c) The genetic material is transferred from the source plant to the recipient plant only through conventional breeding.

* * * * *

■ 10. Add § 174.541 to read as follows:

§ 174.541 Pesticidal substance of a plant-incorporated protectant created through genetic engineering from a sexually compatible plant; exemption from the requirement of a tolerance.

Residues of a pesticidal substance are exempt from the requirements of a tolerance if the conditions in paragraphs (a) through (c) of this section are met.

(a) The pesticidal substance is characteristic of the population of plants sexually compatible with the recipient food plant and is created through genetic engineering from either an insertion of a native gene into the recipient food plant as specified in paragraph (a)(1) of this section or a modification of an existing native gene in the recipient food plant as specified in paragraph (a)(2) of this section.

(1) *Insertion.* A native gene is inserted into the genome of the recipient food plant and produces a pesticidal substance identical in sequence to the pesticidal substance identified in the source plant. The regulatory regions inserted as part of the native gene must be identical in nucleic acid sequence to those regulatory regions of the native gene identified in the source plant.

(2) *Modification.* The existing native gene is modified to match corresponding polymorphic sequence(s) in a native allele of that gene using a single source plant as a template.

(b) The residues of the pesticidal substance are not present in food from the plant at levels that are injurious or deleterious to human health.

(c) This exemption does not apply until the requirements in § 174.90 have been met.

[FR Doc. 2023–11477 Filed 5–30–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 417, 422, 423, 455, and 460

[CMS–4201–CN]

RIN 0938–AU96

Medicare Program; Contract Year 2024 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicare Cost Plan Program, and Programs of All-Inclusive Care for the Elderly; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule; correction.

SUMMARY: This document corrects technical errors that appeared in the final rule published in the **Federal Register** on April 12, 2023, entitled ''Contract Year 2024 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicare Cost Plan Program, and Programs of All-Inclusive Care for the Elderly.''

DATES: This correcting document is effective June 5, 2023.

FOR FURTHER INFORMATION CONTACT: Lucia Patrone, (410) 786–8621.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2023–07115 of April 12, 2023 (88 FR 22120), there were a

number of technical errors that are identified and corrected in this correcting document. The provisions in this correction document are effective as if they had been included in the document published April 12, 2023. Accordingly, the corrections are effective June 5, 2023.

II. Summary of Errors

A. Summary Errors in the Preamble

On page 22134, we inadvertently omitted § 422.514(d)(1) from the list of sections finalized.

On page 22135, we made errors in our discussion of the effective dates for the changes to the general enrollment period (GEP) made by the Consolidated Appropriations Act, 2021, and the Part D special enrollment period (SEP).

On page 22150, we made a typographical error in a regulatory reference.

On page 22226, we made a typographical error when specifying a term.

On page 22300, we made a technical error regarding an acronym.

B. Summary of Errors in the Regulations Text

On page 22336 in § 422.2267(a)(3), we made a typographical error.

On page 22341 in § 423.2264 we made a typographical error and technical errors in regulations text regarding election periods and third-party marketing.

On page 22344 in § 423.2536(c), we made a typographical error in a reference.

On page 22345 in § 460.70, we made a--typographical error in a paragraph designation; technical error in the use of an acronym; and technical error in the use of a term.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule in accordance with 5 U.S.C. 553(b) of the Administrative Procedure Act (APA). The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

We believe that this final rule correcting document does not constitute a rule that would be subject to the notice and comment or delayed effective date requirements. This document merely corrects typographical and technical errors in the final rule, but it does not make substantive changes to the policies or the implementing regulations that were adopted in the final rule. As a result, this final rule correcting document is intended to ensure that the information in the final rule accurately reflects the policies and regulatory amendments adopted in that document.

In addition, even if this were a rule to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the minor corrections in this document into the final rule or delaying the effective date would be unnecessary, as we are not altering our policies or regulatory changes, but rather, we are simply implementing correctly the policies and regulatory changes that we previously proposed, requested comment on, and subsequently finalized. This final rule correcting document is intended solely to ensure that the final rule accurately reflects these policies and regulatory changes. Furthermore, such notice and comment procedures would be contrary to the public interest because it is in the public's interest to ensure that the final rule accurately reflects our policies and regulatory changes. Therefore, we believe we have good cause to waive the notice and comment and effective date requirements.

Correction of Errors

In FR Doc. 2023–07115 of April 12, 2023 (88 FR 22120), make the following corrections:

A. Corrections of Errors in the Preamble

1. On page 22134, third column, third full paragraph, line 7, the reference ''422.514(g)'' is corrected to read ''422.514(d)(1) and (g)''.

2. On page 22135, first column, second full paragraph, lines 4 and 5, the phrase ''provide that on'' is corrected to read, ''provide that for GEPs on''.

3. On 22150, first column, sixth full paragraph, lines 6 and 7, the reference ''§ 423.2508(d)(1) through (5)'' is corrected to read ''§ 423.2508(c)(1) through (5)''.

4. On page 22226, third column, third full paragraph, line 6, the phrase ''anon-English'' is corrected to read ''a non-English''.

5. On page 22300, third column, first full paragraph, line 28, the phrase ''and the SAA,'' is corrected to read ''and the State administering agency (SAA),''.

B. Correction of Errors in the Regulations Text

■ 1. On page 22336, second column, first partial paragraph (§ 422.2267(a)(3)), line 3, the phrase ''anon-English'' is corrected to read ''a non-English''.

■ 2. On page 22341—

■ a. First column, 17th paragraph (§ 423.2264(c)(3)(i)(A)), line 2, the phrase ''prior of'' is corrected to read ''prior to''.

■ b. Third column—

■ i. Fourth paragraph (§ 423.2267(e)(41) introductory text), line 25, the phrase ''The MA organization must'' is corrected to read ''The Part D sponsor must''.

■ ii. Fifth paragraph (§ 423.2267(e)(41)(i)), lines 3 and 4, the phrase ''one MA organization'' is corrected to read ''one Part D sponsor.''

■ 3. On page 22344, second column, 14th full paragraph (§ 423.2536(c) introductory text), line 6, the reference ''§ 423.2508(d)(1)'' is corrected to read ''§ 423.2508(c)(1)''.

■ 4. On page 22345, second column—

■ a. Third paragraph (§ 460.70(a)), the paragraph number ''(xviv)'' is corrected to read ''(xix)''.

■ b. Fourteenth paragraph (§ 460.70(a)(3)(ii)), line 2, the phrase ''the SAA'' is corrected to read ''the State administering agency''.

■ c. Fifteenth paragraph (§ 460.70(a)(4)), line 8, the phrase ''participant medical specialty.'' is corrected to read ''particular medical specialty''.

Elizabeth J. Gramling,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2023–11550 Filed 5–30–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 1820

[BLM_CO_FRN_MO454500169192]

RIN 1004–AE96

Application Procedures, Execution and Filing of Forms: Correction of State Office and Public Room Addresses for Filings and Recordings, Including Proper Offices for Recording of Mining Claims; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: This final rule amends Bureau of Land Management (BLM) regulations pertaining to execution and filing of forms in order to reflect the new addresses for the BLM-Colorado State Office and its Public Room. All filings and other documents relating to public lands in Colorado must be filed at the BLM Colorado State Office Public Room, Denver Federal Center Building 1A, Lakewood, CO 80225.

DATES: This rule is effective on May 31, 2023.

ADDRESSES: You may send inquiries or suggestions to the Director for Communications, BLM-Colorado State Office, P.O. Box 151029, Lakewood, CO 80215.

FOR FURTHER INFORMATION CONTACT: Jennifer Bednar, telephone: 303–358–7726, email: *jbednar@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. Background
II. Procedural Matters

I. Background

This final rule reflects the administrative action of changing the street addresses of the Colorado State Office, including the Public Room, of the BLM. This rule changes the postal and street address for the personal filing of documents relating to public lands in Colorado but makes no other changes in filing requirements. The BLM has determined that the rule has no substantive impact on the public, imposes no costs, and merely updates a list of addresses included in the Code of Federal Regulations for the convenience of the public. The Department of the Interior, therefore, for good cause finds that under 5 U.S.C. 553(b)(B), notice and public comment procedures are unnecessary.

II. Procedural Matters

Regulatory Planning and Review (Executive Order 12866)

This final rule is an administrative action to change the address for one BLM State Office. This rule was not subject to review by the Office of Management and Budget under Executive Order 12866. The rule imposes no costs, and merely updates a list of addresses included in the Code of Federal Regulations for the convenience of the public.

National Environmental Policy Act

The BLM has found that the final rule is of a procedural nature and thus is categorically excluded from further documentation under the National Environmental Policy Act of 1969 in accordance with 43 CFR 46.210(i). In addition, the final rule does not present any of the 12 extraordinary circumstances listed at 43 CFR 46.215.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. This final rule is a purely administrative regulatory action having no effects upon the public or the environment, and it has been determined that the rule will not have a significant effect on the economy or small entities.

Congressional Review Act

This final rule is a purely administrative regulatory action having no effects upon the public or the economy. This is not a major rule under the Congressional Review Act (5 U.S.C. 804(2)). The rule will not have an annual effect on the economy of $100 million or more. The rule will not cause a major increase in costs of prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to complete with foreign-based enterprises.

Unfunded Mandate Reform Act

The BLM has determined that this final rule is not significant under the Unfunded Mandates Reform Act of 1995 because the rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Further, the administrative final rule will not significantly or uniquely affect small governments. It does not require action by any non-Federal government entity. Therefore, the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et. seq.*), is not required.

Executive Order 12630, Government Action and Interference With Constitutionally Protected Property Rights (Takings)

As required by Executive Order 12630, the Department of the Interior has determined that the rule will not cause a taking of private property. No private property rights will be affected by a rule that merely reports an address change for the Colorado State Office and its Public Room. The Department therefore certifies that this final rule does not represent a governmental action capable of interference with constitutionally protected property rights.

Executive Order 13132, Federalism

In accordance with Executive Order 13132, the BLM finds that the rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

The final rule does not have substantial direct effects on the States, on the relationship between the national governments and the States, or the distribution of power and the responsibilities among the various levels of government. This administrative final rule does not preempt State law.

Executive Order 12988, Civil Justice Reform

This final rule is a purely administrative regulatory action having no effects upon the public and will not unduly burden the judicial system. This final rule meets the requirements of Sections 3(a) and 3(b)(2) of the Executive Order.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with the Executive Order 13175, the BLM finds that the rule does not include policies that have Tribal implications. This final rule is purely an administrative action having no effects upon the public or the environment, imposing no costs, and merely updates the Colorado State Office and its Public Room addresses included in the Code of Federal Regulations.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

In accordance with Executive Order 13211, the BLM has determined that the final rule will not have substantial direct effects on the energy supply, distribution, or use, including a shortfall

in supply or price increase. This final rule is a purely administrative action and has no implications under Executive Order 13211.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 43 CFR Part 1820

Administrative practice and procedure, Archives and records, Public lands.

For the reasons discussed in the preamble, the Bureau of Land Management amends 43 CFR part 1820 as follows:

PART 1820—APPLICATION PROCEDURES

■ 1. The authority citation for part 1820 continues to read as follows:

Authority: 5 U.S.C. 552, 43 U.S.C. 2, 1201, 1733, and 1740.

Subpart 1821—General Information

■ 2. Amend § 1821.10 in paragraph (a) by revising the entry for ''Colorado State Office'' to read as follows:

§ 1821.10 Where are BLM offices located?

(a) * * *

State Offices and Areas of Jurisdiction

* * * * *

Colorado State Office, Denver Federal Center, Building 40, Lakewood, CO 80215; Public Room, Denver Federal Center, Building 1A, Lakewood, CO 80225; P.O. Box 151029, Lakewood, CO 80215.

* * * * *

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

[FR Doc. 2023–11553 Filed 5–30–23; 8:45 am]

BILLING CODE 4331–16–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 17–287, 11–42, 09–197; FCC 17–155; FR ID 141908]

Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) is issuing a final rule for the Lifeline program.

DATES: This rule is effective May 31, 2023. As of May 31, 2023, the amendments to 47 CFR 54.403(a)(3), 54.413, and 54.414(b), published January 16, 2018, at 83 FR 2075, are withdrawn,

FOR FURTHER INFORMATION CONTACT: Nicholas Page, *Nicholas.Page@fcc.gov,* Telecommunications Access Policy Division, Wireline Competition Bureau, (202) 418–7400 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (Commission) adopted amendments to 47 CFR 54.403(a)(3), 54.413, and 54.414(b) that were to become effective upon announcement in the **Federal Register** of OMB information collection approval (83 FR 2075, January 16, 2018) (FR Doc. 2018–00152). These amended rules were vacated by the Court of Appeals for the D.C. Circuit in *National Lifeline Association* v. *Federal Communications Commission.* 921 F.3d 1102. Accordingly, revisions to § 54.403(a)(3), third column on page 2084; § 54.413, first column on page 2085; and § 54.414(b), second column on page 2085 are being withdrawn and these rules are reverting back to their prior version.

List of Subjects in 47 CFR Part 54

Communications common carriers, Health facilities, Internet, Libraries, Reporting and recordkeeping requirements, Schools, and Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 to read as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, 1601–1609, and 1752, unless otherwise noted.

■ 2. Amend § 54.403 by revising paragraph (a)(3) to read as follows:

§ 54.403 Lifeline support amount.

* * * * *

(a) * * *

(3) *Tribal lands support amount.* Additional Federal Lifeline support of up to $25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to an eligible resident of Tribal lands, as defined in § 54.400(e), to the extent that the eligible telecommunications carrier certifies to the Administrator that it will pass through the full Tribal lands support amount to the qualifying eligible resident of Tribal lands and that it has received any non-Federal regulatory approvals necessary to implement the required rate reduction.

* * * * *

■ 3. Revise § 54.413 to read as follows:

§ 54.413 Link Up for Tribal lands.

(a) *Definition.* For purposes of this subpart, the term ''Tribal Link Up'' means an assistance program for eligible residents of Tribal lands seeking telecommunications service from a telecommunications carrier that is receiving high-cost support on Tribal lands, pursuant to subpart D of this part, that provides:

(1) A 100 percent reduction, up to $100, of the customary charge for commencing telecommunications service for a single telecommunications connection at a subscriber's principal place of residence imposed by an eligible telecommunications carrier that is also receiving high-cost support on Tribal lands, pursuant to subpart D of this part. For purposes of this subpart, a ''customary charge for commencing telecommunications service''' is the ordinary charge an eligible telecommunications carrier imposes and collects from all subscribers to initiate service with that eligible telecommunications carrier. A charge imposed only on qualifying low-income consumers to initiate service is not a customary charge for commencing telecommunications service. Activation charges routinely waived, reduced, or eliminated with the purchase of additional products, services, or minutes are not customary charges

eligible for universal service support; and

(2) A deferred schedule of payments of the customary charge for commencing telecommunications service for a single telecommunications connection at a subscriber's principal place of residence imposed by an eligible telecommunications carrier that is also receiving high-cost support on Tribal lands, pursuant to subpart D of this part, for which the eligible resident of Tribal lands does not pay interest. The interest charges not assessed to the eligible resident of Tribal lands shall be for a customary charge for connecting telecommunications service of up to $200 and such interest charges shall be deferred for a period not to exceed one year.

(b) An eligible resident of Tribal lands may receive the benefit of the Tribal Link Up program for a second or subsequent time only for otherwise qualifying commencement of telecommunications service at a principal place of residence with an address different from the address for which Tribal Link Up assistance was provided previously.

■ 4. Amend § 54.414 by revising paragraph (b) to read as follows:

§ 54.414 Reimbursement for Tribal Link Up.

* * * * *

(b) In order to receive universal support reimbursement for providing Tribal Link Up, eligible telecommunications carriers must follow the procedures set forth in § 54.410 to determine an eligible resident of Tribal lands' initial eligibility for Tribal Link Up. Eligible telecommunications carriers must obtain a certification form from each eligible resident of Tribal lands that complies with § 54.410 prior to enrolling him or her in Tribal Link Up.

* * * * *

[FR Doc. 2023–11103 Filed 5–30–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 230523–0136]

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: Final rule.

SUMMARY: This rule implements the domestic 2023 harvest specifications for Pacific whiting including the 2023 tribal allocation for the Pacific whiting fishery, the non-tribal sector allocations, and a set-aside for incidental mortality in research activities and non-groundfish fisheries. NMFS issues this final 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, and other applicable laws. These 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: Effective May 31, 2023.

ADDRESSES:

Electronic Access

This final 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 (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

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. NMFS issued a proposed rule on April 06, 2023 (88 FR 20457), that describes the Agreement, including the establishment of F–40 percent default harvest rate, the explicit allocation of Pacific whiting coastwide total allowable catch (TAC) to the United States (73.88 percent) and Canada (26.12 percent), the bilateral bodies to implement the terms of the Agreement, including the Joint Management Committee (JMC), and the process used to determine the coastwide TAC under the Agreement, including adjusting the TAC for carryovers from the prior year. The proposed rule also proposed allocating 17.5 percent of the U.S. TAC of Pacific whiting for 2023 to Pacific Coast Indian tribes that have a treaty right to harvest groundfish, and implementing a set-aside (750 metric tons (mt)) for Pacific whiting for research and incidental mortality in other fisheries.

2023 TAC Recommendation

The Treaty's Advisory Panel (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 AP, as well the Treaty's Joint Technical Committee, and Science Review Group, 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.

The JMC agreed on a recommended and adjusted coastwide TAC of 625,000 mt, of Pacific whiting, which resulted in a U.S. TAC of 461,750 mt (73.88 percent of 625,000 mt). This recommendation is consistent with the best available scientific information, provisions of the Agreement, and the Pacific Whiting Act of 2006 (Whiting Act). The recommendation was transmitted via letter to the United States and Canadian Governments on March 2, 2023. Consistent with the Agreement, the Department of Commerce consulted with the Department of State on the recommended TAC. In a written communication to the NMFS West Coast Region on March 17, 2023, the State Department concurred with the NMFS recommendation to accept the JMC recommended adjusted TAC for 2023. NMFS, under delegation of authority from the Secretary of Commerce, approved the adjusted TAC recommendation of 461,750 mt for U.S. fisheries on March 23, 2023.

This final rule announces the adjusted coastwide TAC of 625,000 mt and adjusted U.S. TAC of 461,750 mt, and implements the domestic 2023 Pacific whiting harvest specifications, including, the 2023 tribal allocation of 80,806 mt, the preliminary allocations for three non-tribal commercial whiting sectors, and a set-aside for incidental mortality in research activities and non-groundfish) fisheries (*e.g.,* pink shrimp fishery). The tribal and non-tribal allocations for Pacific whiting, as well as the set-aside, are effective until December 31, 2023.

Tribal Allocations

This final rule establishes the tribal allocation of Pacific whiting for 2023 as described in the proposed rule (88 FR 20457). Since 1996, NMFS has been allocating a portion of the U.S. TAC of Pacific whiting to the tribal fishery. Regulations for the Pacific Coast Groundfish Fishery Management Plan (FMP) specify that the tribal allocation is subtracted from the total U.S. Pacific whiting TAC. The tribal Pacific whiting fishery is managed separately from the non-tribal Pacific whiting fishery and is not governed by limited entry or open access regulations or allocations. NMFS is establishing the 2023 tribal allocation as 80,806 mt (17.5 percent of the U.S. TAC) in this final rule.

In 2009, NMFS, the states of Washington and Oregon, and the tribes with treaty rights to harvest Pacific whiting started a process to determine the long-term tribal allocation for Pacific whiting; however, no long-term allocation has been determined. While new scientific information or discussions with the relevant parties may impact that decision, the best available scientific information to date suggests that 80,806 mt is within the likely range of potential treaty right amounts. As with prior tribal Pacific whiting allocations, this final rule is not intended to establish precedent for future Pacific whiting seasons, or for the determination of the total amount of Pacific whiting to which the Tribes are entitled under their treaty right. The long-term tribal treaty amount will be based on further development of scientific information and additional coordination and discussion with and among the coastal tribes and the states of Washington and Oregon.

Non-Tribal Research and Bycatch Set-Aside

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 non-groundfish fisheries 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 2023. Consistent with section 303(c)(2) of the Magnuson-Stevens Fishery Management and Conservation Act (Magnuson-Stevens Act), on November 16, 2022, the Council deemed the proposed regulations for the research and incidental mortality set-aside to be necessary and appropriate to implement the FMP. This final rule will implement the Council's recommendations.

Non-Tribal Harvest Guidelines and Allocations

This final rule implements the fishery harvest guideline (HG), also called the non-tribal allocation as described in the proposed rule published on April 06, 2023 (88 FR 20457). The 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 adjusted U.S. 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 1—2023 U.S. 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 rule would be implemented under the statutory and regulatory authority of sections 304(b) and 305(d) of the Magnuson-Stevens Act, the Whiting Act, the regulations governing the groundfish fishery at 50 CFR 660.5 through 660.360, and other applicable laws. Additionally, with this final rule, NMFS, will 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).

Comments and Responses

NMFS issued a proposed rule on April 6, 2023 (88 FR 20457). The comment period on the proposed rule closed April 21, 2023. No comments were received during the public comment period.

Changes From the Proposed Rule

NMFS has not made any changes to the proposed regulatory text and there are no substantive changes from the proposed rule.

Classification

The Administrator, West Coast Region, NMFS, determined that the final rule is necessary for the conservation and management of the Pacific whiting and that it is consistent with sections 304(b) and 305(d), and other provisions of the Magnuson-Stevens Act, the Pacific Coast Groundfish FMP, and other applicable laws.

Pursuant to 5 U.S.C. 553(d)(3), the NMFS Assistant Administrator finds good cause to waive the 30-day delay in the date of effectiveness for this final rule because such a delay would be contrary to the public interest. If this final rule were delayed by 30 days, Pacific coast whiting fishermen would not be able to fish under the final catch limits for Pacific whiting for that time period, and would not be able to realize the full level of economic opportunity this rule provides. Waiving the 30-day delay in the date of effectiveness will allow this final rule to more fully benefit the fishery through increased fishing opportunities as described in the preamble of this rule.

This rulemaking could not be completed prior to the May 1 start date of the 2023 Pacific Whiting primary fishing season due to the short time frame between the approval of the TAC recommendation and the start of the fishing season. The AP and JMC met in Vancouver, British Columbia, Canada on February 28–March 1, 2023, to develop advice on a 2023 coastwide TAC. At this meeting, the JMC agreed on a TAC recommendation, which was transmitted to the United States and Canadian Governments on March 2, 2023. The Department of Commerce consulted with the Department of State on the recommended TAC, and concurred with the NMFS West Coast Region on March 17, 2023 to accept the JMC recommended adjusted TAC for 2023. NMFS, under delegation of authority from the Secretary of Commerce, approved the TAC recommendation U.S. fisheries on March 23, 2023. This rulemaking was proceeded once the JMC agreed on a recommended coastwide TAC, and the Department of Commerce in consultation with the Department of State reviewed and approved the recommended U.S. TAC. The proposed rule published on April 6, 2023 and the public comment period closed on April 21, 2023 (88 FR 20457). The 2023 Pacific whiting primary fishing season began shortly thereafter on May 1, 2023.

In addition, because this rule increases catch limits for Pacific whiting compared to the interim allocation the fishery is currently operating under, it therefore finds good cause to waive the 30-day delay in the date of effectiveness requirement. The Pacific whiting fishery season began fishing on May 01, 2023 under interim allocations based on the lowest coastwide TAC considered in the proposed rule. This final rule implements a higher TAC for Pacific whiting than the interim allocation provided prior to the season opening, and implementing the rule upon publication provides the whiting fleet more opportunity and greater flexibility to harvest the optimal yield. Timely implementation of the full TAC will avoid the need to pause the Pacific whiting fishery if the interim allocations are fully harvested. Additionally, many vessels in the Pacific Whiting fishery also participate in the Alaskan Pollock fishery. Issuing complete 2023 whiting allocations to quota owners in a timely fashion ensures they can plan their participation for the year in both the Pacific Whiting and Alaskan Pollock fisheries.

Waiving the 30-day delay in effectiveness will not have a negative impact on any entities, as there are no new compliance requirements or other burdens placed on the fishing community with this rule. Making this rule effective immediately would also serve the best interests of the public because it will allow for the longest possible fishing season for Pacific whiting and therefore the best possible economic outcome for those whose livelihoods depend on this fishery.

The Office of Management and Budget has determined that this final 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.

Final Regulatory Flexibility Analysis

NMFS issued a proposed rule on April 6, 2023 (88 FR 20457), for the 2023 Harvest Specifications for Pacific Whiting, and 2023 tribal allocation for Pacific whiting. An Initial Regulatory Flexibility Analysis (IRFA) was prepared and summarized in the Classification section of the preamble to the proposed rule. The comment period on the proposed rule closed April 21, 2023. NMFS did not receive any public comments on the proposed rule. The Chief Counsel for Advocacy of the Small Business Administration (SBA) did not file any comments on the IRFA or the proposed rule. The description of this action, its purpose, and its legal basis are described in the preamble to the proposed rule and are not repeated here. A Final Regulatory Flexibility Analysis (FRFA) was prepared and incorporates the IRFA. There were no public comments received on the IRFA. NMFS also prepared a RIR for this action. A copy of the RIR/FRFA is available from NMFS (see **ADDRESSES**). A summary of the FRFA, per the requirements of 5 U.S.C. 604 follows.

Under the Regulatory Flexibility Act (RFA), the term ''small entities'' includes small businesses, small organizations, and small governmental jurisdictions. The Small Business Administration 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 (see 80 FR 81194, December 29, 2015). 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 North American Industry Classification

System (NAICS) code 311710 at 13 CFR 121.201). For purposes of rulemaking, NMFS is also applying the seafood processor standard to catcher processors because whiting C/Ps earn the majority of the revenue from processed seafood product.

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

No public comments were received on the proposed rule.

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 final rule announces the adjusted coastwide TAC and U.S. TAC and allocates Pacific whiting to the following sectors/programs: Tribal, Shorebased IFQ Program Trawl Fishery, MS Coop Program Whiting At-sea Trawl Fishery, and C/P Coop Program Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the adjusted U.S. TAC.

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 from several perspectives; they have participants that are large entities, and 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 has limited entry permit holders self-report size status. For 2023, all 10 C/P permits reported 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 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 1,100 mt.

Impacts to the U.S. non-tribal fishery are measured with an estimate of ex-vessel revenue. The 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 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 2023 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 the set-aside for research and incidental mortality NMFS considered two alternatives: ''No Action'' and the ''Proposed Action.'' No other alternatives were considered by the Council at their November 2022 meeting.

Under the no action alternative, 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 this alternative received no further consideration.

Under the no action alternative, NMFS would not implement the set-aside amount of 750 mt recommended by the Council. Not implementing a set-aside of the U.S. 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 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 received no further consideration.

NMFS did not consider a broader range of alternatives to the 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 Action alternative, NMFS will set the tribal allocation percentage at 17.5 percent, as requested by the Tribes. This would yield a tribal allocation of 80,806 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 alternative received no further consideration.

Regulatory Flexibility Act Determination of No Significant Impact

NMFS determined this final 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.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. A small entity compliance guide will be sent to stakeholders, and copies of the final rule and guides (*i.e.,* information bulletins) are available from NMFS at the following website: *https://www.fisheries.noaa.gov/species/pacific-whiting#management.*

With this final rule, NMFS, acting on behalf of the Secretary, determined that the FMP is implemented 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. Wash. 1974).

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

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian fisheries.

Dated: May 23, 2023.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS amends 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.*

■ 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.

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■ 3. Revise table 1a to part 660, subpart C, 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

TABLE 1a TO PART 660, SUBPART C—2023, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES—Continued

[Weights in metric tons]

[Capitalized stocks are overfished]

Stocks	Area	OFL	ABC	ACL [a]	Fishery HG [b]
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
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 2023 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, 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
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	1517.60
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

TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)—Continued

IFQ species	Area	2023 shorebased trawl allocation (mt)	2024 shorebased trawl allocation (mt)
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) [a]	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 [a]	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

[a] Managed through an international process. These allocations will be updated when announced.

* * * * *

[FR Doc. 2023–11466 Filed 5–30–23; 8:45 am]
BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD009]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Using Jig Gear in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of Pacific cod by vessels using jig gear in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2023 total allowable catch of Pacific cod apportioned to vessels using jig gear in the Central Regulatory Area of the GOA has been reached.

DATES: Effective 12 p.m. Alaska local time (A.l.t.), June 10, 2023, through 12 a.m., A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–581–7241.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 Pacific cod total allowable catch (TAC) apportioned to vessels using jig gear in the Central Regulatory Area of the GOA is 111 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS has determined that the 2023 Pacific cod TAC apportioned to vessels using jig gear in the Central Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that Pacific cod caught by vessels using jig gear in the Central Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(a).

Classification

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion, and would delay prohibiting the retention of Pacific cod by vessels using jig gear in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of May 24, 2023.

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

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

Dated: May 25, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–11491 Filed 5–30–23; 8:45 am]
BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 104

Wednesday, May 31, 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.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 721

[NCUA–2023–0043]

RIN 3133–AF56

Charitable Donation Accounts

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA Board (Board) is proposing to amend the charitable donation accounts (CDA) section of the NCUA's incidental powers regulation. Specifically, the Board is proposing to add ''war veterans' organizations'' (''veterans' organizations''), as defined under section 501(c)(19) of the Internal Revenue Code, to the definition of a ''qualified charity'' that a federal credit union may contribute to using a CDA. The Board is also asking if there are other groups, entities, or organizations the Board should consider adding to the definition of a ''qualified charity'' to inform potential future rulemaking in this area.

DATES: Comments must be received on or before July 31, 2023.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF56, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments on Docket NCUA–2023–0043.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery or Courier:* Same as mail address.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *https://www.regulations.gov,* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you are unable to access public comments on the internet, you may contact the NCUA for alternative access by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: *Policy:* Rick Mayfield, Senior Capital Markets Specialist, Office of Examination and Insurance; Heather Murphy, Consumer Compliance Policy and Outreach Officer, Office of Consumer Financial Protection. *Legal:* Justin M. Anderson, Senior Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, VA 22314–3428. Rick Mayfield can be reached at (703) 518–1179; Heather Murphy can be reached at (703) 664–3102; and Justin Anderson can be reached at (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

A. History of the Current Rule

The Board approved the current CDA rule at its December 2013 meeting (current CDA rule or 2013 final rule).[1] This rule permitted federal credit unions to fund a CDA, which may hold investments that are otherwise impermissible for federal credit unions, for use as a charitable contribution or donation under their incidental powers authority. The rule defined a CDA as a hybrid charitable and investment vehicle that a federal credit union may fund to provide charitable contributions and donations to a qualified charity. The rule further defined ''qualified charity'' [2] as a charitable organization or other non-profit entity recognized as exempt from taxation under section 501(c)(3) of the Internal Revenue Code.[3] As noted in the 2013 proposed version of the current CDA rule (2013 proposed rule), ''[t]he exempt purposes set forth in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals.'' The 2013 proposed rule further explained that the Board used the word ''charitable'' in its generally accepted legal sense and enumerated what the term encompassed, which ''includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.'' [4]

B. Scope of ''Qualified Charity''

As noted in the preceding section, the 2013 final rule permitted the use of CDAs as an incidental power for federal credit unions. As CDAs can be funded with investments that are impermissible for federal credit unions, the Board limited the scope of organizations that could be considered a ''qualified charity'' for purposes of the CDA rule. The 2013 final rule required that a ''qualified charity'' be a section 501(c)(3) entity as defined by the Internal Revenue Code. These organizations are non-profit and organized and operated exclusively for charitable purposes. Because CDAs can be funded with impermissible investments, the Board believes it is necessary to keep in place distinct limits on groups that are beneficiaries of a CDA. As such, any group the Board would consider adding as a ''qualified charity'' must be both a non-profit and be organized for a charitable purpose.

II. Proposed Changes

A. Veterans' Organizations as a Qualified Charity

While section 501(c)(3) entities are, by title and definition, charitable organizations, the Board recognizes that there may be other non-profit, charitable entities outside of section 501(c)(3) that could be included as a ''qualified charity'' as defined in the current CDA rule to fulfill the rule's purpose. Still, because the current CDA rule permits federal credit unions to purchase investments that would otherwise be impermissible, it is necessary to limit the use of CDA funds to making charitable contributions or donations to organizations that are both non-profit and charitable in nature. For purposes of this proposal, the Board is focusing

[1] 78 FR 76728 (Dec. 19, 2013).

[2] 12 CFR 721.3(b)(2).

[3] 26 U.S.C. 503(c)(19).

[4] 78 FR 57539 (Sept. 19, 2013).

on ''veterans' organizations'' as defined by section 501(c)(19) of the Internal Revenue Code. The Board has been made aware that some federal credit unions want to donate to veterans' organizations through CDAs. Under section 501(c)(19), a ''veterans' organization'' must meet the following requirements:

- It must be organized in the United States or any of its possessions;
- At least 75 percent of its members must be past or present members of the United States Armed Forces;
- At least 97.5 percent of its members must be:
  - present or former members of the United States Armed Forces,
  - cadets (including only students in college or university ROTC programs or at Armed Services academies), or
  - spouses, widows, widowers, ancestors, or lineal descendants of individuals referred to in the first or second bullet;
- It must be operated exclusively for one or more of the following purposes:
  - to promote the social welfare of the community (*e.g.,* to promote the common good and general welfare of the people of the community);
  - to assist disabled and needy war veterans and members of the United States Armed Forces and their dependents—and the widows and orphans of deceased veterans;
  - to provide entertainment, care, and assistance to hospitalized veterans or members of the United States Armed Forces;
  - to carry on programs to perpetuate the memory of deceased veterans and members of the United States Armed Forces and comfort their survivors;
  - to conduct programs for religious, charitable, scientific, literary or educational purposes;
  - to sponsor or participate in activities of a patriotic nature;
  - to provide insurance benefits for members or their dependents; or
  - to provide social and recreational activities for members.
- No part of its net earnings may inure to the benefit of any private shareholder or individual.

An organization may also be exempt under section 501(c)(19) as an auxiliary unit or society of a veterans' post or organization if it meets the following requirements:

- It is affiliated with, and organized in accordance with the bylaws and regulations of, a veterans' post or organization described above;
- At least 75 percent of its members are veterans, spouses of veterans, or related to a veteran within two degrees of consanguinity (*i.e.,* grandparent, brother, sister, grandchild represent the most distant allowable relationships);
- All members are either members of a veterans' post or organizations described above, or spouses of a member of such post or organization, or are related to a member of such post or organization within two degrees of consanguinity;
- No part of its net earning inures to the benefit of any private shareholder or individual.

Finally, an organization may be exempt under section 501(c)(19) as a trust or foundation for a veterans' post or organization if it meets the following requirements:

- It is valid under local law and, if organized for charitable purposes, has a dissolution provision described in section 1.501(c)(3)–1(b)(4) of the Income Tax Regulations;
- The corpus or income cannot be diverted or used other than to fund a veterans' post or organization for charitable purposes or as an insurance set-aside;
- The trust income is not unreasonably accumulated, and a substantial portion of the income is distributed to such veteran post or organization, or for exclusively religious, charitable, scientific, literary, educational or prevention of cruelty to children or animal purposes;
- It is organized exclusively for one or more of those purposes enumerated above for which a veterans' post or organization itself may be organized.[5]

The Board believes that the attributes listed above of section 501(c)(19) organizations are aligned with the purposes of the current CDA rule. As such, the Board is proposing to add ''veterans' organizations'' meeting the criteria of section 501(c)(19) to the definition of a ''qualified charity.''

B. Questions on Other Organizations

The Board believes section 501(c) of the Internal Revenue Code is a good starting point for determining whether there may be other types of organizations that could be included in the definition of a ''qualified charity'' in the current CDA rule. While all section 501(c) organizations are non-profits, not all of them are charitable in nature. The Board has reviewed the list of organizations in section 501(c) and believes that several of them may be considered charitable in nature. The Board, however, is requesting feedback from stakeholders on whether any of these organizations should be considered as qualified charities in future rulemakings. In addition, the Board is requesting feedback on any other organizations the Board should consider for this purpose that are not enumerated in section 501(c). The Board, therefore, is posing the following questions and instructions to stakeholders and interested parties for use in any future amendments the Board may make to the current CDA rule.

1. Should the Board consider adding additional groups, organizations, or entities to the definition of a ''qualified charity?''
2. If yes, which other groups, organizations, or entities should the Board consider? Note, commenters are not limited only to those entities listed in section 501(c) of the Internal Revenue Code.
3. For any suggested group, organization, or entity, please describe how it is non-profit, organized for a charitable purpose, and how it otherwise meets the purposes of the current CDA rule.

III. Regulatory Procedures

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemaking in which an agency creates a new or amends existing information collection requirements.[6] For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor, and the respondent is not required to respond to an information collection, unless it displays a valid Office of Management and Budget (OMB) control number. OMB has approved the current information collection requirements and assigned them control number 3133–0133. This rule proposes to add a new entity to the definition of a ''qualified charity.'' NCUA does not anticipate an increase in the recordkeeping requirement associated with CDAs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act[7] requires the NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (defined as credit unions with under $100 million in assets).[8] This proposed rule merely adds an additional category of permissible entities to which a federal credit union may donate through

[5] 26 U.S.C. 503(c)(19); 26 CFR 1–501(c)(19)–1. *See https://www.irs.gov/charities-non-profits/other-non-profits/veterans-organizations.*

[6] 44 U.S.C. 3507(d); 5 CFR part 1320.

[7] 5 U.S.C. 601 *et seq.*

[8] *Id.* at 603(a); NCUA Interpretive Ruling and Policy Statement 15–2.

a CDA. Currently, there are 145 federal credit unions utilizing CDAs. The NCUA estimates that a small number of federal credit unions would utilize the authority granted in this rule. In addition, as the rule merely adds another category of permissible entities a federal credit union may donate to through a CDA, the NCUA does not find that this rule would impose a cost or burden on any federal credit unions. As such, this rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order to adhere to fundamental federalism principles.

This proposed rule would 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. The proposed rule would affect only federal credit unions. Federally insured, state-chartered credit unions derive their investment and incidental powers authority from state law, and the NCUA's regulations do not determine the permissibility of such investments or activities. The NCUA has therefore determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

D. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998). The proposed rule could increase charitable donations by federal credit unions to organizations that provide benefits or services to veterans' households, but the Board believes that the connection would not be direct and is uncertain. However, the Board welcomes comments on this issue to further inform its analysis of this matter.

List of Subjects in 12 CFR Part 721

Credit unions.

By the NCUA Board on May 25, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

For the reasons discussed in the preamble, the NCUA Board proposes to amend 12 CFR part 721, as follows:

PART 721—INCIDENTAL POWERS

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 12 U.S.C. 1757(17), 1766 and 1789.

■ 2. Revise § 721.3(b)(2)(vii)(B) to read as follows:

§ 721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

* * * * *

(b) * * *

(2) * * *

(vii) * * *

(B) Qualified charity is a charitable organization or other non-profit entity recognized as exempt from taxation under sections 501(c)(3) or 501(c)(19) of the Internal Revenue Code.

* * * * *

[FR Doc. 2023–11556 Filed 5–30–23; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1052; Project Identifier MCAI–2023–00260–T]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., 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 Bombardier, Inc., Model CL–600–1A11 (600), CL–600–2A12 (601), and CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes. This proposed AD was prompted by an uncommanded flap extension accompanied by a flaps fail caution message during climb. This proposed AD requires initial and repetitive operational tests of the flap control system. 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 July 17, 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–2023–1052; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.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.

FOR FURTHER INFORMATION CONTACT: Chirayu Gupta, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@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–2023–1052; Project Identifier MCAI–2023–00260–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 the 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 Chirayu Gupta, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued AD CF–2023–07, dated February 10, 2023 (Transport Canada AD CF–2023–07) (also referred to as the MCAI), to correct an unsafe condition on certain Bombardier, Inc., Model CL–600–1A11 (600), CL–600–2A12 (601), and CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes. The MCAI states a Model CL–600–2B16 airplane experienced an uncommanded flap extension from 0 to 45 degrees, accompanied by a flaps fail caution message during climb. The airplane returned to the departure airport without further incident. The investigations found that the flap control system failed to arrest the uncommanded movement due to a failed retract relay. The failed retract relay also caused the flap control system to operate at half speed, which was undetected during previous flights. The root cause of the uncommanded flap extension remains under investigation. Transport Canada considers its AD to be an interim action, and further AD action may follow. See Transport Canada AD CF–2023–07 for additional background information.

The FAA is proposing this AD to address the failure of the flap control system to arrest the uncommanded flap extension. The unsafe condition, if not addressed, could lead to the loss of control of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1052.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following service information, which specifies procedures for performing initial and repetitive operational tests of the inboard and outboard flaps to verify the functionality of the retract relays. The service information also specifies contacting the manufacturer for corrective action for any anomaly found during an operational test. These documents are distinct since they apply to different airplane models.

- Bombardier Service Bulletin 600–0780, dated December 29, 2022.
- Bombardier Service Bulletin 601–1112, Revision 01, dated February 23, 2023.
- Bombardier Service Bulletin 604–27–040, dated December 29, 2022.
- Bombardier Service Bulletin 605–27–011, dated December 29, 2022.
- Bombardier Service Bulletin 650–27–004, dated December 29, 2022.

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 the **ADDRESSES** section.

FAA's Determination

These products have been approved by the aviation authority of another country, and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information referenced above. 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 accomplishing the actions specified in the service information already described.

Interim Action

The FAA considers this proposed AD would be an interim action. If final action is later identified, the FAA might consider further rulemaking then.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 1,124 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$0	$85	$95,540 per test cycle.

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:

Bombardier, Inc.: Docket No. FAA–2023–1052; Project Identifier MCAI–2023–00260–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by July 17, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., airplanes, certificated in any category, identified in paragraphs (c)(1) through (3) of this AD.

(1) Model CL–600–1A11 (600) airplanes, serial numbers 1004 through 1085 inclusive.

(2) Model CL–600–2A12 (601) airplanes, serial numbers 3001 through 3066 inclusive.

(3) Model CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes, serial numbers 5001 through 5194 inclusive, 5301 through 5665 inclusive, 5701 through 5988 inclusive, and 6050 through 6999 inclusive.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a Model CL–600–2B16 airplane that experienced an uncommanded flap extension from 0 to 45 degrees, accompanied by a flaps fail caution message during climb. The FAA is issuing this AD to address the failure of the flap control system to arrest the uncommanded flap extension. The unsafe condition, if not addressed, could lead to the loss of control of the airplane.

(f) Compliance

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

(g) Initial Operational Test

Within 100 flight hours or 15 months, whichever occurs first after the effective date of this AD, perform an initial operational test of the inboard and outboard flaps, and all applicable corrective actions, in accordance with Section 2.B. of the Accomplishment Instructions of the applicable service information identified in paragraphs (g)(1) through (5) of this AD. Corrective actions must be done before further flight after the test.

(1) For Model CL–600–1A11 (Challenger 600) airplanes, serial numbers 1004 through 1085 inclusive: Use Bombardier Service Bulletin 600–0780, dated December 29, 2022.

(2) For Model CL–600–2A12 (Challenger 601) airplanes, serial numbers 3001 through 3066 inclusive, and Model CL–600–2B16 (Challenger 601) airplanes, serial numbers 5001 through 5194 inclusive: Use Bombardier Service Bulletin 601–1112, Revision 01, dated February 23, 2023.

(3) For Model CL–600–2B16 (Challenger 604) airplanes, serial numbers 5301 through 5665 inclusive: Use Bombardier Service Bulletin 604–27–040, dated December 29, 2022.

(4) For Model CL–600–2B16 (Challenger 605) airplanes, serial numbers 5701 through 5988 inclusive: Use Bombardier Service Bulletin 605–27–011, dated December 29, 2022.

(5) For Model CL–600–2B16 (Challenger 650) airplanes, serial numbers 6050 through 6999 inclusive: Use Bombardier Service Bulletin 650–27–004, dated December 29, 2022.

(h) Repetitive Operational Tests

Repeat the operational test required by paragraph (g) of this AD at the applicable time specified in paragraph (h)(1) through (3) of this AD.

(1) For Model CL–600–1A11 airplanes: Repeat at intervals not to exceed 100 flight hours.

(2) For the airplanes identified in paragraphs (h)(2)(i) and (ii) of this AD: Repeat within the repetitive intervals specified in Section 1.D. of Bombardier Service Bulletin 601–1112, Revision 01, dated February 23, 2023.

(i) Model CL–600–2A12 airplanes.

(ii) Model CL–600–2B16 airplanes, serial numbers 5001 through 5194.

(3) For the airplanes identified in paragraphs (h)(3)(i) through (iii) of this AD: Repeat the test at intervals not to exceed 400 flight hours.

(i) Model CL–600–2B16 airplanes, serial numbers 5301 through 5665.

(ii) Model CL–600–2B16 airplanes, serial numbers 5701 through 5988.

(iii) Model CL–600–2B16 airplanes, serial numbers 6050 through 6999.

(i) Credit for Previous Actions

For the airplanes identified in paragraph (h)(2) of this AD: This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Bombardier Service Bulletin 601–1112, dated December 29, 2022.

(j) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York 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 New York ACO Branch, mail it to ATTN: Program Manager, Continuing Operational Safety, at the address identified in paragraph (k)(2) of this AD or email to: *9-avs-nyaco-cos@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Additional Information

(1) Refer to Transport Canada AD CF–2023–07, dated February 10, 2023, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1052.

(2) For more information about this AD, contact Chirayu Gupta, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov.*

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (4) of this AD.

(l) 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 this AD specifies otherwise.

(i) Bombardier Service Bulletin 600–0780, dated December 29, 2022.

(ii) Bombardier Service Bulletin 601–1112, Revision 01, dated February 23, 2023.

(iii) Bombardier Service Bulletin 604–27–040, dated December 29, 2022.

(iv) Bombardier Service Bulletin 605–27–011, dated December 29, 2022.

(v) Bombardier Service Bulletin 650–27–004, dated December 29, 2022.

(3) For service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.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, email *fr.inspection@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on May 24, 2023.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–11439 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 1

[File No. R307002]

Petition for Rulemaking of National Association of Consumer Advocates, Consumer Federation of America, Center for Responsible Lending, Consumers for Auto Reliability and Safety, National Consumer Law Center, and U.S. PIRG

AGENCY: Federal Trade Commission.

ACTION: Petition for rulemaking; request for comment.

SUMMARY: Please take notice that the Federal Trade Commission (''Commission'') received a petition for rulemaking from the National Association of Consumer Advocates, Consumer Federation of America, Center for Responsible Lending, Consumers for Auto Reliability and Safety, National Consumer Law Center, and U.S. PIRG, and has published that petition online at *https://www.regulations.gov.* The Commission invites written comments concerning the petition. Publication of this petition is pursuant to the Commission's Rules of Practice and Procedure and does not affect the legal status of the petition or its final disposition.

DATES: Comments must identify the petition docket number and be filed by June 30, 2023.

ADDRESSES: You may view the petition, identified by docket number FTC–2023–0035, and submit written comments concerning its merits by using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit sensitive or confidential information. You may read background documents or comments received at *https://www.regulations.gov* at any time.

FOR FURTHER INFORMATION CONTACT: Daniel Freer, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, *dfreer@ftc.gov,* (202) 326–2663.

SUPPLEMENTARY INFORMATION: Pursuant to Section 18(a)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 57a(1)(B), and FTC Rule 1.31(f), 16 CFR 1.31(f), notice is hereby given that the above-captioned petition has been filed with the Secretary of the Commission and has been placed on the public record for a period of thirty (30) days. Any person may submit comments in support of or in opposition to the petition. All timely and responsive comments submitted in connection with this petition will become part of the public record. The Commission will not consider the petition's merits until after the comment period closes.

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 Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2).

Authority: 15 U.S.C. 46; 15 U.S.C. 57a; 5 U.S.C. 601 note.

April J. Tabor,

Secretary.

[FR Doc. 2023–11445 Filed 5–30–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0380]

RIN 1625–AA00

Safety Zone; Hurricanes, Tropical Storms and Other Disasters in Southeast Texas and Southwest Louisiana

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a permanent safety zone to be enforced in the event of hurricanes, tropical storms, and other disasters in southeast Texas and southwest Louisiana. This action is necessary to ensure the safety of the waters of the Port Arthur Captain of the Port (COTP) zone Port Arthur, TX. This proposed rulemaking would establish actions to be completed by industry and vessels in the COTP zone prior to landfall of hurricanes, tropical storms, and other disasters threatening Port Arthur, TX. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before June 15, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0380 using the Federal Decision-Making 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: If you have questions about this proposed rulemaking, call or email Mr. Scott Whalen, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409–719–5086, email *douglas.g.hendrix2@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

Southeast Texas and southwest Louisiana has the potential to be affected by hurricanes, tropical storms and other disasters on a yearly basis, especially between the months of June and November. The Captain of the Port (COTP) Port Arthur proposes establishing a safety zone to provide for the safety of life during and subsequent to such storms.

The purpose of this rulemaking is to protect mariners, port infrastructure and the environment during and after extreme weather and other natural disasters. The Coast Guard is proposing this rulemaking under the authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The COTP Port Arthur is proposing to establish a safety zone to be enforced in case of hurricanes, tropical storms, and other disasters in southeast Texas and southwest Louisiana. This action is necessary to ensure the safety of the waters of the COTP Port Arthur zone. This proposed rule would establish actions to be completed by local industry and vessels in the COTP zone prior to landfall of hurricanes, tropical storms, and other disasters threatening the COTP zone. The proposed safety zone would consist of all navigable waters of the Port Arthur COTP zone, as prescribed in 33 CFR 3.40–25(b). The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

We expect the economic impact of this rule to be non-significant for the following reasons: (1) Vessel traffic and facilities would be impacted by this rule only during limited times while heavy weather or other disaster is expected to impact the Port Arthur COTP zone; (2) vessel traffic would be secured only during port conditions Yankee, Zulu, and Recovery and only in port areas potentially affected by gale force winds; and (3) the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the safety zone, and this rule would allow vessels to seek permission to remain in port.

B. Impact on Small Entities

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

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

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on

the human environment. This proposed rule involves a safety zone that would prohibit entry in certain waters of the Port Arthur COTP Zone for the duration needed to ensure safe transit of vessels and industry post hurricane, post storm, and post emergency. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG- 2023–0380 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. 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 to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 6 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add new § 165.804 to read as follows:

§ 165.804 Safety Zone; Hurricanes, Tropical Storms and Other Disasters in Southeast Texas and Southwest Louisiana.

(a) *Regulated Areas.* All navigable waters within the Port Arthur Captain of the Port (COTP) Zone, MSU Port Arthur, TX, as described in 33 CFR 3.40–28(b), during specified conditions.

(b) *Definitions.*

(1) *Designated Representative* means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the COTP Port Arthur, in the enforcement of the regulated areas.

(2) *Port Condition WHISKEY* means a condition set by the COTP when weather advisories indicate sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 72 hours.

(3) *Port Condition X–RAY* means a condition set by the COTP when weather advisories indicate sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 48 hours.

(4) *Port Condition YANKEE* means a condition set by the COTP when weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 24 hours.

(5) *Port Condition ZULU* means a condition set by the COTP when weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) from a tropical or hurricane force storm are predicted to make landfall at the port within 12 hours.

(6) *Port Condition RECOVERY* means the condition set when weather advisories indicate that sustained gale force winds from a tropical hurricane force storm are no longer predicted for the designated area. This port condition remains in effect until the regulated areas are safe and reopened to normal operations.

(c) Regulations.

(1) *Port Condition WHISKEY.* All vessel and port facilities must exercise due diligence in preparation for potential storm impacts. Ports and waterfront facilities must begin removing all debris and securing potential flying hazards. Oceangoing vessels 500 gross tons (GT) and above must make plans to depart no later than the setting of Port Condition Yankee unless authorized by the COTP. Vessels wishing to remain in port are required to submit a Notice of Intent to Remain In Port to the COTP prior to setting Port Condition X–Ray.

(2) *Port Condition X–RAY.* All vessels and port facilities must ensure that potential flying debris is removed or secured. Hazardous materials/pollution hazards must be secured in a safe manner and away from waterfront areas. Vessels over 500GT without an approval to remain in port must depart prior to the setting of Port Condition YANKEE. Vessels with the COTP's permission to remain in port must implement their pre-approved mooring arrangement. Terminal operators must prepare to terminate all cargo operations. The COTP may require additional precautions to ensure the safety of the ports and waterways.

(3) *Port Condition YANKEE.* Affected ports are closed to inbound vessel traffic. All oceangoing vessels greater than 500 Gross Tons must depart designated ports prior to the setting of Port Condition ZULU. Terminal operators must terminate all cargo operations not associated with storm preparations. Cargo operations associated with storm preparations include moving cargo within or off the port for securing purposes, port/facility equipment preparations, and similar activities, but do not include moving cargo onto the port or vessel loading/discharging operations unless specifically authorized by the COTP. All facilities must continue to operate in accordance with approved Facility Security Plans and comply with the requirements of the Maritime Transportation Security Act.

(4) *Port Condition ZULU.* Designated areas are closed to all vessel traffic except those specifically authorized by the COTP. Cargo operations are suspended, including bunkering and lightering. Waivers may be granted unless Cargo of Particular Hazard or Certain Dangerous Cargo is involved.

(5) *Port Condition RECOVERY.* Designated areas are closed to all commercial traffic and recreational vessels 65-feet in length and greater. Based on assessments of channel conditions, navigability concerns, and hazards to navigation, the COTP may permit vessel movements with restrictions. Restrictions may include, but are not limited to, preventing vessel movements, imposing draft, speed, size, horsepower or daylight restrictions or directing the use of specific routes. Vessels permitted to transit the regulated area shall comply with the lawful orders or directions given by the COTP or designated representative.

(6) *Safety Zones Notice.* The Coast Guard COTP will notify the maritime community of periods during which these safety zones will be in effect via Broadcast Notice to Mariners and Marine Safety Information Bulletin or by on-scene designated representatives.

(7) *Regulated Area Notice.* The Coast Guard will provide notice of the regulated area via Broadcast Notice to Mariners, Marine Safety Information Bulletin or by on-scene designated representatives.

(8) *Exception.* This regulation does not apply to authorized law enforcement agencies operating within the regulated area.

Dated: May 24, 2023.

Molly A. Wike,

Captain, U.S. Coast Guard, Captain of the Port Marine Safety Unit Port Arthur.

[FR Doc. 2023–11481 Filed 5–30–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2023–0053; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BG55

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Sira Curassow and Southern Helmeted Curassow

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the Sira curassow (*Pauxi koepckeae*) and southern helmeted curassow (*Pauxi unicornis*), two bird species from South America, as endangered species under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would add these species to the List of Endangered and Threatened Wildlife and extend the Act's protections to these species.

DATES: We will accept comments received or postmarked on or before July 31, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by July 17, 2023.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2023–0053, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2023–0053, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: Supporting materials, such as the species status assessment report, are available at *https://www.regulations.gov* at Docket No. FWS–HQ–ES–2023–0053.

FOR FURTHER INFORMATION CONTACT: Rachel London, Chief, Branch of Delisting and Foreign Species, Ecological Services Program, U.S. Fish and Wildlife Service, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2171. 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:

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any populations of these species;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, their habitats, or both.

(2) Threats and conservation actions affecting the species, including:

(a) Factors that may be affecting the continued existence of the species,

which may include habitat destruction, modification, or curtailment; overutilization; disease; predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors.

(b) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species.

(c) Existing regulations or conservation actions that may be addressing threats to these species.

(d) Existing regulations whether either of these species are protected species in their range countries.

(3) Additional information concerning the historical and current status of these species.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act (16 U.S.C. 1533(b)(1)(A)) directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that these species are threatened instead of endangered, or we may conclude that these species do not warrant listing as either an endangered species or a threatened species.

Public Hearing

Section 4(b)(5) of the Act (16 U.S.C. 1533(b)(5)) provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

We received a petition from the International Council for Bird Preservation to add 53 foreign bird species, including the southern helmeted curassow, to the List of Endangered and Threatened Wildlife on May 6, 1991. On December 16, 1991 (56 FR 65207), we made a substantial 90-day finding that the 53 species may be warranted for listing. On March 28, 1994 (59 FR 14496), we identified the southern helmeted curassow as a candidate under the Act. Candidates are those fish, wildlife, and plants for which we have on file sufficient information on biological vulnerability and threats to support preparation of a listing proposal, but for which development of a listing rule is precluded by other higher priority listing activities. Subsequently, on May 21, 2004, we considered new information for 73 foreign taxa, including the southern helmeted curassow, for which we had previously found listing to be warranted but precluded (69 FR 29354). The 2004 notice retained warranted but precluded findings for 51 of the 73 foreign taxa based on information gathered since 1995; we determined that the southern helmeted curassow should retain its status as a candidate species.

At the time we identified the southern helmeted curassow (*Pauxi unicornis*) as a candidate in 1994 and the subsequent review in 2004, the southern helmeted curassow and Sira curassow were considered subspecies of *Pauxi unicornis.* However, in 2014, the Sira curassow (*Pauxi koepckeae*) was recognized as a full species and became a candidate species under the Act in 2016 (81 FR 71457; October 17, 2016).

Peer Review

In 2022, a species status assessment (SSA) team prepared an SSA report for the Sira curassow and southern helmeted curassow. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the SSA report. The Service sent the SSA report to five independent peer reviewers and received one response. Results of this structured peer-review process can be found at Docket No. FWS–HQ–ES–2023–0053 on *https://www.regulations.gov.* In preparing this proposed rule, we incorporated the results of the review, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed in Peer Review above, we received comments from one peer reviewer on the draft SSA report. We reviewed all comments we received from the peer reviewer for substantive issues and new information regarding the information contained in the SSA report.

The peer reviewer generally concurred with our methods and conclusion, and provided additional information, clarifications, and suggestions, including updates on the threat of forest loss within the range of the southern helmeted curassow. Additionally, the peer reviewer provided updated observations and distribution of the southern helmeted curassow throughout its range, particularly in the northern extent of its range. The peer reviewer's comments did not result in substantive changes to our analysis and conclusions within the SSA report. We did not receive any peer-review comments regarding the Sira curassow.

Proposed Listing Determination

Background

The Sira curassow (*Pauxi koepckeae*), which is endemic to central Peru, and

southern helmeted curassow (or horned curassow; *Pauxi unicornis*), which is endemic to central Bolivia, are gallinaceous birds (relating to the order Galliformes of heavy-bodied, largely terrestrial birds in the Cracidae family (subfamily Cracinae; del Hoyo 1994, in Hosner et al. 2016, p. 6; del Hoyo et al. 2020a, unpaginated)). Both species are large (83–94 centimeters (32–37 inches) in length) and relatively heavy-bodied (about 3.6 kilograms (8 pounds)) with bright red bills and a pale blue ''helmet'' (casque) atop their heads (del Hoyo et al. 2020b, unpaginated).

Both curassow species occur on the eastern side of the Andes Mountains of South America, although their ranges do not overlap and are separated by more than 1,000 kilometers (621 miles) (Gastañaga et al. 2007, p. 63). The Sira curassow is resident in cloud forests at mid to high elevation (1,100 to 1,500 meters (3,609 to 4,921 feet) above sea level (asl); Begazo 2022, unpaginated; Beirne et al. 2017, p. 150; Gastañaga et al. 2011, p. 268) and is known only from the Cerros del Sira in central Peru, which is an isolated mountain outcrop of the Peruvian Andes. Almost all the species' range in the El Sira Communal Reserve (Birdlife International (BLI) 2023a, unpaginated; Gastañaga et al. 2011, p. 269; Gastañaga et al. 2007, p. 63; Tobias and del Hoyo 2006, p. 61). The southern helmeted curassow is resident at lower elevations (400 to 1,400 meters (1,312 to 4,593 feet) asl) in upper tropical and lower montane zones in central Bolivia (Herzog and Kessler 1998, pp. 46–47; Cox et al. 1997, p. 200; Cordier 1971, p. 10; Birds of Bolivia 2019, unpaginated; Beirne et al. 2017, p. 150), although most observations are between 500 and 900 meters (1,640 to 2,953 feet) asl (Armonía 2021, p. 3). The species occurs only within three national parks in central Bolivia: Amboró, Carrasco, and Isiboro-Securé Indigenous Territory and National Park (TIPNIS) (BLI 2023b, unpaginated).

Both the Sira curassow and southern helmeted curassow are endemic to small areas in relatively narrow elevational bands and are considered rare, locally uncommon, and their populations are decreasing (BLI 2023a, unpaginated; 2023b, unpaginated). Population densities for both species are estimated at less than one individual per square kilometer. The Sira curassow was surveyed in 2006 and 2008, but rangewide surveys have not occurred for this species (Gastañaga et al. 2011, p. 273). The species was observed in one population at four locations, all located within 30 km of each other (Gastañaga et al. 2011, p. 273). The Sira curassow's population is very small (50–249 mature individuals) and occurs within 550 square kilometers (212 square miles) (BLI 2023a, unpaginated; MacLeod and Gastañaga in litt. 2014, cited in BLI 2018a, unpaginated). The southern helmeted curassow was surveyed in 2018 and 2021 in the three national parks where the species resides. The southern helmeted curassow's population is also small and is less than what it was historically, including declining by 90 percent over the past 20 years (Boorsma 2023, pers. comm., unpaginated). The population is currently estimated at 1,000–4,999 individuals within 10,700 square kilometers (4,131 square miles) (BLI 2023b, unpaginated; Armonía 2018, pp. 3–4; Boorsma 2023, pers. comm., unpaginated). Information about the status of both species populations is supplemented with anecdotal information based on interviews with local indigenous communities. The following table presents population information for each species:

TABLE—SIRA CURASSOW AND SOUTHERN HELMETED CURASSOW POPULATION SIZE, COUNTRY OF ORIGIN, AND DISTRIBUTION. AS NOTED ABOVE, THE POPULATION TREND FOR THESE SPECIES IS DECREASING

Species	Population	Country	Range/distribution
Sira curassow	50 to 249 mature individuals	Peru	Cerros del Sira; in the El Sira Communal Reserve.
Southern helmeted curassow	1,000 to 4,999 individuals	Bolivia	Amboró and Carrasco National Parks and Isiboro-Securé Indigenous Territory and National Park (TIPNIS).

The Sira curassow and southern helmeted curassows are both large, ground-dwelling birds very similar in appearance and life history. Large body size in tropical birds is often associated with large territory size, small population size, and low reproductive rate (Pearson et al. 2010, p. 508). The Sira curassow and southern helmeted curassow likely take at least 2 to 3 years to reach sexual maturity and have low reproductive outputs as females lay one egg per clutch (Cox et al. 1997, p. 207; Banks 1998, p. 154). We are not aware of how many clutches per year these species produce in the wild; however, in captivity, the southern helmeted curassow produced four clutches within one year, each with one egg per clutch (Banks 1998, p. 154). Generation time, which is the average time between two consecutive generations in lineages of a population, is estimated at 14.5 years (BLI 2023a and 2023b, unpaginated). Detailed information on the biology of both species is limited because, despite their relatively large size, these species are difficult to detect and not well studied.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, no longer automatically applied the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the viability of Sira curassow and southern helmeted curassow, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in (or decrease with decreases in) resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available data to characterize viability as the ability of a species to sustain populations in the wild over time. We use this data to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–HQ–ES–2023–0053 on *https://www.regulations.gov.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and their resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

The Sira curassow and southern helmeted curassows are both large, ground-dwelling birds very similar in appearance and life history. These species occur in the Yungas forests and adjacent evergreen forest and rely on dense to semi-open primary forested areas with relatively open understory.

Large tropical birds, such as the two curassow species, are often associated with large territory size (Pearson et al. 2010, p. 508; Thorton et al. 2012, p. 572; Rios et al. 2021, p. 418). However, the forest area or patch size required for the Sira curassow and southern helmeted curassow is unknown. These species are primarily frugivores (fruit-eaters) and they require larger forested patch sizes than non-frugivores because they depend on naturally patchy resources in larger home ranges. Fragmentation into smaller forest patches could cause scarcity and a reduction of food resources within those smaller fragments. As patch size decreases, large-bodied species are generally at a disadvantage because they need more space to nest and forage compared to small-ranging species (Kattan et al.

1994, pp. 141–143; Lees and Peres 2009, pp. 286–288; Lees and Peres 2010, p. 619; Vetter et al. 2011, p. 6; Thorton et al. 2012, p. 572; Kattan et al. 2016, pp. 27–28; Rios et al. 2021, pp. 416–418). The forested and steep slopes where the species occur may provide some protection from human influence.

Hunting, habitat loss and degradation, small population size, climate change, and protected areas are the main factors that affect the species' viability throughout their ranges. Hunting is the primary factor that negatively affects the Sira curassow and southern helmeted curassow throughout their respective ranges (del Hoyo et al. 2020a, 2020b, unpaginated). Habitat loss and degradation affect both species, although to a lesser degree than hunting (Rios et al. 2021, p. 418). Limited loss of forest cover and degradation has occurred within the range of these species because of small-scale agriculture such as coca plantations and roadbuilding. However, human incursions into the protected areas are likely to increase. Because habitat loss and hunting pressure often work in tandem, further human encroachment into their habitats that results in deforestation, roadbuilding, and other land clearance creates opportunities to increase human encounters and hunting opportunities (Laurance et al. 2009, p. 662). Literature reviews of several species in the cracid family, including curassows, demonstrate that they are more likely to persist in forested landscapes with low human density and greater distance from human settlements, primarily because these forested areas would be unaffected, or minimally affected by hunting pressure (Thorton et al. 2012, p. 572; Kattan et al. 2016, pp. 27–28; Rios et al. 2021, pp. 416–418).

Climate change will result in additional loss of forested habitat for these species by shifting these species' habitat upslope, reducing these species' range because the geometric shape of mountains means there is less area on mountain slopes as elevation increases (Chen et al. 2011, entire; Freeman et al. 2018, p. 11983; Forero-Medina et al. 2011, entire; Sekercioglu et al. 2012, p. 3). A meta-analysis of existing data for a suite of taxonomic groups across multiple geographic regions and a study of tropical birds within the El Sira Communal Reserve in Peru showed a median shift to higher elevations of approximately 10 meters per decade (Chen et al 2011, p. 1024; Forero-Medina et al. 2011, p. 4). In the case of tropical bird species in the El Sira Communal Reserve, a gradual, upward shift occurred because of changes in temperature, habitat conditions, and the availability of food resources (Forero-Medina et al. 2011, p. 4). Because birds are endothermic and may tolerate a wider range of temperatures, species that shift their ranges may be responding more to gradual changes in habitat availability, food resources based on long-lived elements of their ecosystem (trees), and response of competitors, than to temperatures, per se (Forero-Medina et al. 2011, p. 4). However, habitat expansion to newly suitable areas will not take place at the same rate as habitat loss due to climate change, especially for relatively sedentary tropical forest species (Sekercioglu et al. 2012, p. 12). Vegetation changes makes it more difficult for species to find suitable habitat that will provide their preferred climate envelope and nesting and foraging needs (Forero-Medina et al. 2011, p. 4).

Almost all the Sira curassow's range is within the El Sira Communal Reserve in Peru. The southern helmeted curassow's range in Bolivia is within three national parks: Amboró, Carrasco, and TIPNIS. The protected areas where these species occur were designated by laws in Peru and Bolivia and are primarily inhabited by local indigenous communities that share management responsibilities with government ministries. The protected areas have been somewhat successful at limiting the magnitude of negative effects to biodiversity within the protected area boundaries. However, the lack of personnel and financial resources make the enforcement of the protected area boundaries difficult, which has resulted in the loss of wildlife because of continued hunting by locals and people from outside the protected areas and loss of primary forest resulting from small-scale agriculture, illegal logging, and roadbuilding within the protected area boundaries (Bucklin 2010, p. 44; Solano 2010, p. 37).

Conservation Efforts and Regulatory Mechanisms

Our evaluation of the status of the species takes into account the extent to which threats are reduced or removed as a result of conservation efforts or existing regulatory mechanisms.

Within Peru and Bolivia, we do not have information on whether either of these species are protected species under existing laws in their range countries. However, the Sira curassow and southern helmeted curassow reside in protected areas throughout their respective ranges. Almost all the Sira curassow's range is within the El Sira Communal Reserve in Peru. The southern helmeted curassow's range in Bolivia is within three national parks: Amboró, Carrasco, and TIPNIS.

In Peru, policies on protected areas were established in the Natural Protected Areas Act (1997), the Master Plan for Natural Protected Areas (1999), and the General Environmental Act (2005) (Solano 2010, pp. 6–7, 46–49). The primary objective of the protected areas is the conservation of biological diversity (Solano 2010, pp. 12–13). Protected areas are monitored by the Intendancy of Protected Natural Areas and managed by the National Service for Natural Protected Areas, a specialized technical body under the Ministry of the Environment (Solano 2010, p. 6; Parkswatch 2003, p. 6).

The El Sira Communal Reserve was established in 2001 by a Supreme Decree (038–2001–AG). The reserve is 616,413 hectares (1.5 million acres) and was established for the conservation of wildlife and to acknowledge the rights of indigenous communities on their lands and consider the traditions and cultures of the local communities (Solano 2010, pp. 10–15, 50; WorldBank 2007, pp. 13–15; Parkswatch 2003, p. 5). The reserve is classified as an International Union for Conservation of Nature (IUCN) category VI protected area, which are protected areas that conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems (IUCN 2008, p. 2). A portion of the area is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area (IUCN 2023, unpaginated; UN Environment Programme 2020, unpaginated).

In Bolivia, the Political Constitution of the State (2009) defines protected areas as a common good that is part of the natural and cultural heritage of the country and that fulfills environmental, cultural, social, and economic functions for sustainable development. Likewise, the Framework Law of Mother Earth and Integral Development for Living Well (No. 300; 2012) indicates the System of Protected Areas as one of the main instruments for biodiversity (Elkins et al. 2014, p. 102; Lexivox 2023, unpaginated).

The Bolivian National Protected Area System was established in 1992 through Environmental Law No. 1333 as a collective of interlinked protected areas of different categories (Wildlife Conservation Society (WCS) 2017, unpaginated). The core of the system is the national protected areas, which

includes Amboró, Carrasco, and TIPNIS and covers a total of 20 percent of Bolivia. The National Service of Protected Areas (Sernap) oversees the protected areas of national interest to conserve biological and cultural diversity (Sernap 2023, unpaginated). The involvement of local and indigenous communities in park management plays a vital role to recognize the rights of indigenous and local communities to preserve their cultural identity, value systems, knowledge and traditions, and territory (WCS 2017, unpaginated).

Overall, the protected areas in Peru and Bolivia were designated by laws and have been somewhat successful to limit the magnitude of negative effects to biodiversity within the protected area boundaries. The protected areas are in remote areas and far from government services, which makes enforcement of the protected area boundaries difficult because there is a lack of personnel and financial resources. This has resulted in loss of wildlife because of continued hunting and loss of primary forest within the protected area boundaries (Solano 2010, p. 37; Armonía 2018, p. 7).

The nonprofit, nongovernmental organization Asociatión Armonía (Armonía) has initiated educational campaigns to raise awareness and discourage hunting of both species. The program works with local and indigenous communities to protect wild bird populations through management of protected areas and reducing threats (Armonía 2018, p. 1; Gastañaga et al. 2011, p. 277; Gastañaga 2006, p. 11; Gastañaga and Hennessey 2005, p. 21).

The Sira curassow is classified as critically endangered on the IUCN Red List (IUCN 2023a, unpaginated). Sira curassow is not known to be in international trade and is not included in the Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The southern helmeted curassow is classified as critically endangered on the IUCN Red List (IUCN 2023b, unpaginated). Trade has not been noted internationally and the species is not included in the Appendices to CITES. The species is listed on Annex D of the European Union Wildlife Trade Regulations; species listed on Annex D require the importer to complete an import-notification form.

Current Condition

We considered the ecology of the Sira curassow and southern helmeted curassow and factors that influence their viability to assess their current conditions, including their resiliency, redundancy, representation, and their overall viability. We know of minimal occurrence records and both species are narrow endemics; thus, we assess resiliency, redundancy, and representation range wide for both species.

We gauge resiliency for the Sira curassow and southern helmeted curassow by evaluating their population abundance, the availability and condition of habitat throughout their respective ranges, and these species' life history traits that minimize their ability to rapidly recover from disturbances and population losses.

Both the Sira curassow and southern helmeted curassow are considered rare, locally uncommon, and decreasing (BLI 2023a, 2023b). The Sira curassow's population is very small (50–249 mature individuals); the southern helmeted curassow's population is also small, declined by 90 percent over the past 20 years, and is currently estimated at 1,000–4,999 individuals. The species are endemic to small areas in relatively narrow elevational bands. The species' ranges are mostly within protected areas that are intact forest landscapes that show no to minimal signs of human alteration. However, the species' habitats are subject to some deforestation resulting from small-scale illegal agriculture and road construction that spawns additional small-scale development. Over a 20-year period between 2000 and 2020, only 62 hectares (153 acres), or 0.16 percent, of forest cover has been lost within the range of the Sira curassow, and 27,320 hectares (67,509 acres), or 3.33 percent, of forest cover has been lost within the range of the southern helmeted curassow. Most of the forest cover loss in the region is outside the range of the species and outside the protected areas where the species occur. Although, human encroachment is increasing into the protected areas, particularly because of small-scale coca plantations.

Hunting is ongoing and will continue in the future. Both species are more likely to persist in patches located further from settlements and in forested landscapes with low human density, primarily because these areas would be unaffected, or minimally affected by hunting. The presence of local indigenous communities in addition to people from outside the protected areas that engage in small-scale agricultural activities or create inroads that further increase human presence into the species' habitats results in overexploitation of these species. Low rates of reproduction and slow recovery of these species' populations make it difficult for these species to tolerate high levels of continuous hunting. Because these species are endemic to small ranges and have population sizes that are decreasing, combined with low rates of reproduction and recovery, the Sira curassow and southern helmeted curassow are not likely to be resilient to ongoing threats.

We gauge redundancy of these species by assessing the number and distribution of their populations relative to any anticipated catastrophic events within the species' ranges. Redundancy also depends on availability of quality habitat throughout these species' respective ranges. Because most of the current habitat is intact, even though the species are restricted to relatively narrow ranges, we expect the species to have some level of redundancy. An increase of fires in humid forest habitat and road building that are directly drying the landscape, combined with climate change that causes suitable habitat to shift upslope and is expected to result in the loss of a substantial amount of montane forest ecosystems within these species' ranges in the future, could be catastrophic for these species in the future. We are not aware of any other catastrophic events anticipated within the range of these species that could lead to collapse of these species' populations.

The Sira curassow is known only from the Cerros del Sira region of central Peru in the El Sira Communal Reserve. Surveys in 2006 and 2008 observed the species in one population at four locations, all located within 30 km of each other (Gastañaga et al. 2011, p. 273). Because the population and range are very small, we assume the species has minimal redundancy. The southern helmeted curassow has moderate redundancy and is known to occur at 10 total sites in Amboró, Carrasco, and TIPNIS, which is an area that is likely to hold the largest remaining population (Armonía 2018, pp. 3–4; Armonía 2021, entire; Armonía 2022, unpaginated; Boorsma 2023, pers. comm). We have no information on the connectivity between populations (Armonía 2018, p. 7). The available data of population size and distribution for these species is minimal and there is uncertainty regarding the number of extant populations for both species throughout their ranges.

We gauge representation of these species by assessing their ability to adapt to changes in their physical and biological environments because the ability to adapt is essential for species' viability. Both species are restricted to narrow elevational bands of Yungas Forest and adjacent evergreen forest on

the east side of the Andes Mountains. Microhabitats within these species' ranges are likely present because the birds move within their respective habitats in response to patchy resource availability. In 2014, these species were determined to be distinct species, but we have no information about the genetic diversity within each species and there is no information on the degree to which these species exhibit behavioral plasticity, so the ability to assess representation is limited.

As part of the SSA, we developed two future-condition scenarios to capture the range of uncertainties regarding future threats and the projected responses by the Sira curassow and southern helmeted curassow. The scenarios assumed an increased probability of forest cover loss, continued hunting pressure, and ongoing designation of the protected areas where the species occur. The best available information indicates that both species' populations and distributions will decline in the future. However, because we have determined that the Sira curassow and southern helmeted curassow meet the definition of an endangered species based on their current conditions (see Determinations for the Status of Sira Curassow and Southern Helmeted Curassow, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2023, entire) for the full analysis of future scenarios.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative-effects analysis.

Determinations for the Status of Sira Curassow and Southern Helmeted Curassow

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range—Sira Curassow

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to the Sira curassow. The best available information indicates that the Sira curassow is a narrow endemic with a very small population size of 50 to 249 mature individuals that is decreasing (BLI 2023a; unpaginated; MacLeod and Gastañaga in litt. 2014, cited in BLI 2018a, unpaginated).

The species is known only from the Cerros del Sira region of central Peru in the El Sira Communal Reserve. The Sira curassow is not likely to be highly resilient to ongoing threats. The resilience of the Sira curassow is based on population abundance, the availability of quality habitat throughout its range, and the species' life history traits that minimize recovery from disturbances and population losses. The El Sira Communal Reserve has been somewhat successful at limiting the loss of forest cover from small-scale agriculture activities, although small-scale agriculture is increasing within the protected area. Over a 20-year period between 2000 and 2020, only 62 hectares (153 acres), or 0.16 percent, of forest cover has been lost within the range of the species. However, the species has historically faced and continues to face hunting pressure, and human incursions into the protected area are increasing.

Precise estimates of hunting pressure on the Sira curassow do not exist given the difficulty of monitoring and documenting hunting activities. Generally, curassows rank as the highest category of avian biomass taken by subsistence hunters (Strahl and Grajal 1991, p. 51). Local indigenous communities in addition to people from outside the protected areas that encroach into the species' habitat results in overexploitation of the species. Literature reviews of several species in the cracid family, including curassows, demonstrate that they are more likely to occur in forested landscapes with low human density and in patches located further from settlements, primarily because these forested areas would be unaffected, or minimally affected by hunting pressure (Kattan et al. 2016, pp. 27–28; Rios et al. 2021, pp. 416–418; Thorton et al. 2012, p. 572). The viability of the Sira curassow is likely more affected by hunting than habitat loss and degradation, although habitat loss and hunting pressure often work in tandem because incursions into forested areas for small-scale agriculture and roadbuilding create more opportunities for hunters (Rios et al. 2021, p. 418).

Climate change has caused and will cause a loss of the species' habitat, which is particularly detrimental to endemic species that are restricted to narrow elevational bands (Velasquez-Tibata et al. 2012, p. 235). Climate change shifts the species' habitat upslope, reducing the species' range because the geometric shape of mountains means there is less area on mountain slopes as elevation increases (Chen et al. 2011, entire; Freeman et al. 2018, p. 11983; Forero-Medina et al. 2011, entire; Sekercioglu et al. 2012, p. 3). Even though birds are endothermic and may tolerate a wider range of temperatures, the Sira curassow is not known to have great dispersal capabilities, making them unlikely to colonize new areas if their current habitat is damaged by climate change and other anthropogenic factors (Foster 2001, p. 73).

We are not aware of the number of Sira curassow populations that occur within its limited range in the El Sira Mountains because the species is not well studied and rangewide surveys for the species do not exist, but the best available information indicates that the species has a low area of occurrence and occupancy. Because the population size and its range are very small, we find the species likely has minimal redundancy throughout its range. We are also not aware of any information about the genetic diversity in the Sira curassow, and there is no information on the degree to which the species exhibits behavioral plasticity, so the ability to assess representation is limited for the species. However, the species likely has low representation because it is endemic to the El Sira Mountains and occurs only within 550 square kilometers (212 square miles) in a narrow elevational band.

Overall, the species has a very small population and is considered rare, locally uncommon, and its population is decreasing (BLI 2023a, unpaginated). The species is long-lived, has a long generation time and low reproductive output. Low reproductive output in conjunction with other factors like a high degree of habitat specialization, small population size, and low vagility (ability of an organism to move freely) typically equate to low innate adaptive capacity (Thurman et al. 2020, entire). The Sira curassow's low redundancy combined with the species not likely being highly resilient to ongoing threats and having minimal capacity to adapt to ongoing threats limits the viability of the Sira curassow in the face of ongoing threats. After assessing the best scientific and commercial information available, we conclude that the Sira curassow currently lacks sufficient resiliency, redundancy, and representation for its continued existence to be secure.

Thus, after evaluating the best scientific and commercial data available regarding threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we determine that the Sira curassow is in danger of extinction throughout all of its range. The species does not fit the statutory definition of a threatened species because it is currently in danger of extinction, whereas threatened species are those likely to become in danger of extinction within the foreseeable future.

Status Throughout All of Its Range—Southern Helmeted Curassow

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the southern helmeted curassow. The best available information indicates that the southern helmeted curassow is a narrow endemic with a small population size of 1,000 to 4,999 mature individuals that is decreasing (BLI 2023b, unpaginated; BLI 2018b, unpaginated).

The southern helmeted curassow is not likely to be highly resilient to ongoing threats. The species' resiliency is based on population abundance, the availability of quality habitat throughout its range, and the species' life history traits that minimize recovery from disturbances and population losses. Even though the species resides in three national parks in central Bolivia that have been somewhat successful at limiting the loss of forest cover from small-scale agriculture activities, small-scale agriculture is increasing within the protected areas, particularly because of coca plantations. Over a 20-year period between 2000 and 2020, 27,320 hectares (67,509 acres), or 3.33 percent, of forest cover has been lost within the range of the species. The southern helmeted curassow is likely more affected by hunting than habitat loss and degradation (Rios et al. 2021, p. 418). The species has historically faced and continues to face hunting pressure. Hunting increases with associated habitat loss, and human incursions into the protected areas are increasing.

Precise estimates of hunting pressure do not exist given the difficulty of monitoring and documenting hunting activities. Between 2001 and 2004, surveys showed that the largest known population of southern helmeted curassow declined from 20 singing males to zero because the birds were hunted by incursions of coca growers into the area (MacLeod et al. 2006, p. 62; MacLeod 2009, p. 16). However, in 2017–2018, curassows were observed at this site (Boorsma 2023, pers. comm.). Additionally, in TIPNIS, there are records of southern helmeted curassows being hunted and eaten by community members (Boorsma 2023, pers. comm.). Local indigenous communities in addition to people from outside the protected areas that encroach into the species' habitat results in overexploitation of the species. Generally, curassows rank as the highest category of avian biomass taken by subsistence hunters (Strahl and Grajal 1991, p. 51). Literature reviews of several cracid species, including curassows, demonstrate that they are more likely to occur in forested landscapes with low human density and in patches located further from settlements (Kattan et al. 2016, pp. 27–28; Rios et al. 2021, pp. 416–418; Thorton et al. 2012, p. 572).

Climate change has caused and will cause a loss of the species' habitat, which is particularly detrimental to endemic species that are restricted to narrow elevational bands (Velasquez-Tibata et al. 2012, p. 235). Climate change shifts the species' habitat upslope, reducing the species' range because the geometric shape of mountains means there is less area on mountain slopes as elevation increases (Chen et al. 2011, entire; Freeman et al. 2018, p. 11983; Forero-Medina et al. 2011, entire; Sekercioglu et al. 2012, p. 3). Even though birds are endothermic and may tolerate a wider range of temperatures, the southern helmeted curassow is not known to have great dispersal capabilities, making them unlikely to colonize new areas if their current habitat is damaged by climate change and other anthropogenic factors (Foster 2001, p. 73).

The best available data indicates the southern helmeted curassow is known from 10 locations spread throughout the 3 national parks; we are not aware of any information regarding the connectivity between the known occurrences. Therefore, even though the species' population and range are small, the species has some redundancy throughout its range. However, the species' range is smaller than it was historically, and its population has been reduced by 90 percent over the past 20 years (Armonía 2018, p. 7; Boorsma 2023, pers. comm). We are not aware of any information about the genetic diversity in the southern helmeted curassow, and there is no information on the degree to which the species exhibits behavioral plasticity, so the ability to assess representation is limited for the species. However, the species likely has low representation because it is endemic to the three national parks within a narrow elevational band and occurs only within 10,700 square kilometers (2,644,028 acres).

Overall, the species has a small population and is considered rare, locally uncommon, and its population is decreasing (BLI 2018b, unpaginated; Birds of Bolivia 2019, unpaginated; BLI 2023b, unpaginated). The species is long-lived, has a long generation time, and low reproductive output. Low reproductive output in conjunction with other factors like a high degree of habitat specialization, small population size, and low vagility typically equates to low innate adaptive capacity (Thurman et al. 2020, entire). The southern helmeted curassow's moderate redundancy combined with the species not likely being highly resilient to ongoing threats and having minimal capacity to adapt to ongoing threats limits the viability of the southern helmeted curassow in the face of ongoing threats. After assessing the best scientific and commercial information available, we conclude that the southern helmeted curassow currently lacks sufficient resiliency, redundancy, and representation for its continued existence to be secure.

Thus, after evaluating the best scientific and commercial data available regarding threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we determine that the southern helmeted curassow is in danger of extinction throughout all of its range. The species does not fit the statutory definition of a threatened species because it is currently in danger of

extinction, whereas threatened species are those likely to become in danger of extinction within the foreseeable future.

Status Throughout a Significant Portion of Their Ranges

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the Sira curassow is in danger of extinction throughout all of its range, and the southern helmeted curassow is in danger of extinction throughout all of its range, and accordingly did not undertake an analysis of any significant portion of their ranges. Because the Sira curassow and southern helmeted curassow warrant listing as endangered throughout all of their ranges, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020), which vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578, July 1, 2014) providing that if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status for the Sira Curassow and Southern Helmeted Curassow

Our review of the best available scientific and commercial data indicates that both the Sira curassow and the southern helmeted curassow meet the definition of an endangered species. Therefore, in accordance with sections 3(6) and 4(a)(1) of the Act, we propose to add the Sira curassow and southern helmeted curassow as endangered species to the List of Endangered and Threatened Wildlife in 50 CFR 17.11(h).

Available Conservation Measures

The purposes of the Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the Act. Under the Act, a number of steps are available to advance the conservation of species listed as endangered or threatened species. As explained further below, these conservation measures include: (1) recognition, (2) recovery actions, (3) requirements for Federal protection, (4) financial assistance for conservation programs, and (5) prohibitions against certain activities.

Recognition through listing results in public awareness, as well as in conservation by Federal, State, Tribal, and local agencies, foreign governments, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species.

Our regulations at 50 CFR part 402 implement the interagency cooperation provisions found under section 7 of the Act. Under section 7(a)(1) of the Act, Federal agencies are to use, in consultation with and with the assistance of the Service, their authorities in furtherance of the purposes of the Act. Section 7(a)(2) of the Act, as amended, requires Federal agencies to ensure, in consultation with the Service, that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of its critical habitat.

A Federal ''action'' that is subject to the consultation provisions of section 7(a)(2) is defined in our implementing regulations at 50 CFR 402.02 as all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. With respect to the Sira curassow and southern helmeted curassow, no known actions require consultation under section 7(a)(2) of the Act. Given the regulatory definition of ''action,'' which clarifies that it applies to activities or programs ''in the United States or upon the high seas,'' the Sira curassow and southern helmeted curassow are unlikely to be the subject of section 7 consultations, because the entire life cycles of the species occur in terrestrial areas outside of the United States and are unlikely to be affected by U.S. Federal actions. Additionally, no critical habitat will be designated for these species because, under 50 CFR 424.12(g), we will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States.

Section 8(a) of the Act (16 U.S.C. 1537(a)) authorizes the provision of limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered or threatened species in foreign countries. Sections 8(b) and 8(c) of the Act (16 U.S.C. 1537(b) and (c)) authorize the Secretary to encourage conservation programs for foreign listed species, and to provide assistance for such programs, in the form of personnel and the training of personnel.

The Act puts in place prohibitions against particular actions. When a species is listed as endangered, certain actions are prohibited under section 9 of the Act and are implemented through our regulations in 50 CFR 17.21. For endangered wildlife, these include prohibitions under section 9(a)(1) of the Act on import; export; delivery, receipt, carriage, transport, or shipment in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity; and sale or offer for sale in interstate or foreign commerce of any endangered species. It is also illegal to take within the United States or on the high seas; or to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any endangered species that have been taken in violation of the Act. It is unlawful to attempt to commit, to solicit another to commit or to cause to be committed, any of these acts. Exceptions to the prohibitions for endangered species may be granted in accordance with section 10 of the Act and our regulations at 50 CFR 17.22.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits for endangered species are codified at 50 CFR 17.22, and general Service permitting regulations are codified at 50 CFR part 13. With regard to endangered wildlife, a permit may be issued: for scientific purposes, for enhancing the propagation or survival of the species, or for take incidental to otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

The Service may also register persons subject to the jurisdiction of the United States through its captive-bred wildlife (CBW) program if certain established requirements are met under the CBW regulations (see 50 CFR 17.21(g)). Through a CBW registration, the Service may allow a registrant to conduct certain otherwise prohibited activities under certain circumstances to enhance the propagation or survival of the affected species, including take; export or re-import; delivery, receipt, carriage, transport, or shipment in interstate or foreign commerce in the course of a commercial activity; or sale or offer for sale in interstate or foreign commerce. A

CBW registration may authorize interstate purchase and sale only between entities that both hold a registration for the taxon concerned. The CBW program is available for species having a natural geographic distribution not including any part of the United States and other species that the Service Director has determined to be eligible by regulation. The individual specimens must have been born in captivity in the United States.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of the species.

At this time, we are unable to identify specific activities that will not be considered likely to result in a violation of section 9 of the Act beyond what is already clear from the descriptions of prohibitions or already excepted through our regulations at 50 CFR 17.21. Also, as discussed above, certain activities that are prohibited under section 9 may be permitted under section 10 of the Act. Additionally, we are unable to identify specific activities that will be considered likely to result in a violation of section 9 of the Act beyond what is already clear from the descriptions of the prohibitions at 50 CFR 17.21.

Applicable wildlife import/export requirements established under Section 9(d)–(f) of the Act, the Lacey Act Amendments of 1981 (16 U.S.C. 3371, *et seq.*), and 50 CFR part 14 must also be met for the Sira curassow and southern helmeted curassow imports and exports. Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Management Authority (*managementauthority@fws.gov;* 703–358–2104).

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;
(2) Use the active voice to address readers directly;
(3) Use clear language rather than jargon;
(4) Be divided into short sections and sentences; and
(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in ADDRESSES. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* in Docket No. FWS–HQ–ES–2023–0053 and upon request from the Headquarters Ecological Services Field Office (see FOR FURTHER INFORMATION CONTACT).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Branch of Delisting and Foreign Species.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to 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, amend paragraph (h) by adding an entry for ''Curassow, Sira'' and an entry for ''Curassow, southern helmeted'' to the List of Endangered and Threatened Wildlife in alphabetical order under BIRDS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * * * *				
BIRDS				
* * * * * * *				
Curassow, Sira	*Pauxi koepckeae*	Wherever found	E	[**Federal Register** citation when published as a final rule].
Curassow, southern helmeted (=horned curassow).	*Pauxi unicornis*	Wherever found	E	[**Federal Register** citation when published as a final rule].
* * * * * * *				

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–11471 Filed 5–30–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230524–0138]

RIN 0648–BL95

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 65

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

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes to approve and implement Framework Adjustment 65 to the Northeast Multispecies Fishery Management Plan. This rule proposes to revise the rebuilding plan for Gulf of Maine cod, set catch limits for 16 of the 20 multispecies (groundfish) stocks, and make a temporary modification to the accountability measures for Georges Bank cod. This action also corrects erroneous regulations and removes outdated regulations. This action is necessary to respond to updated scientific information and to achieve the goals and objectives of the fishery management plan. The proposed measures are intended to help prevent overfishing, rebuild overfished stocks, achieve optimum yield, and ensure that management measures are based on the best scientific information available.

DATES: Comments must be received by 5 p.m. EST on June 15, 2023.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2023–0021, by the following method:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter NOAA–NMFS–2023–0021 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. You may submit anonymous comments by entering ''N/A'' in the required fields if you wish to remain anonymous.

Copies of Framework Adjustment 65, including the draft Environmental Assessment, the Regulatory Impact Review, and the Regulatory Flexibility Act Analysis prepared by the New England Fishery Management Council in support of this action, are available from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The supporting documents are also accessible via the internet at: *http://www.nefmc.org/management-plans/northeast-multispecies* or *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Liz Sullivan, Fishery Policy Analyst, phone: 978–282–8493; email: *Liz.Sullivan@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Summary of Proposed Measures

This action would implement the management measures in Framework Adjustment 65 to the Northeast Multispecies Fishery Management Plan (FMP). The New England Fishery Management Council reviewed the proposed regulations and deemed them consistent with, and necessary to implement, Framework 65 in a May 4, 2023, letter from Council Chairman Eric Reid to Regional Administrator Michael Pentony. Under the Magnuson-Stevens Act, on behalf of the Secretary of Commerce, the Greater Atlantic Regional Fisheries Office's Regional Administrator approves, disapproves, or partially approves measures that the Council proposes, based on consistency with the Act and other applicable law. NMFS reviews proposed regulations for consistency with the fishery management plan, plan amendment, the Magnuson-Stevens Act and other applicable law. The Regional Administrator is seeking comments on these proposed regulations and intends to promulgate the final regulations after careful consideration of any submitted comments. Through Framework 65, the Council proposes to:

- Revise the rebuilding plan for Gulf of Maine (GOM) cod;
- Set shared U.S./Canada quotas for Georges Bank (GB) yellowtail flounder and eastern GB cod and haddock for fishing years 2023 and 2024;
- Set specifications, including catch limits for 16 groundfish stocks: GB haddock, GOM haddock, Southern New England/Mid-Atlantic (SNE/MA) yellowtail flounder, Cape Cod (CC)/GOM yellowtail flounder, American plaice, witch flounder, GB winter flounder, GOM winter flounder, SNE/MA winter flounder, pollock, ocean pout, Atlantic halibut, and Atlantic wolffish for fishing years 2023–2025, GB cod and GB yellowtail flounder for fishing years 2023–2024; and white hake for fishing year 2023;
- Remove the management uncertainty buffer for sectors for GOM haddock and white hake, if the at-sea monitoring (ASM) target coverage level is set at 90 percent or greater for the 2023 fishing year only; and
- Make a temporary modification to the accountability measures (AM) for GB cod.

This action also proposes regulatory corrections that are not part of Framework 65, but that may be considered and implemented under section 305(d) authority in the Magnuson-Stevens Act to make changes necessary to carry out the FMP. NMFS is proposing these corrections in conjunction with the Framework 65 proposed measures for expediency purposes. These proposed corrections are described in Regulatory Corrections under Secretarial Authority.

Rebuilding Plan for Gulf of Maine Cod

Framework 65 would revise the rebuilding plan for GOM cod. The current rebuilding plan for GOM cod, as implemented by Framework 51 to the FMP (79 FR 22421, April 22, 2014), has a target date of 2024. On August 13, 2021, the Regional Administrator notified the Council that the stock was not making adequate rebuilding progress. The deadline to implement a rebuilding plan is August 13, 2023.

The Magnuson-Stevens Act requires that overfished stocks be rebuilt as quickly as possible, not to exceed 10 years when biologically possible, accounting for the status and biology of the stocks, the needs of fishing communities, and the interaction of the overfished stock within the marine ecosystem. Rebuilding plans must have at least a 50-percent probability of success. Selection of a rebuilding plan with a higher probability of success is one way of addressing uncertainty, but this does not affect the standard used in the future to determine whether a stock is rebuilt. The minimum rebuilding time

(T_{min}) is the amount of time a stock is expected to take to rebuild to the biomass (B) associated with maximum sustainable yield (MSY) in the absence of any fishing mortality (F). The actual timeline set with a rebuilding plan (T_{target}) may be greater than T_{min}, but cannot exceed the maximum rebuilding time (T_{max}). T_{max} is 10 years if T_{min} is less than 10 years. In situations where T_{min} exceeds 10 years, T_{max} establishes a maximum time for rebuilding that is linked to the biology of the stock.

The GOM cod rebuilding program proposed in this action would rebuild the stock within 10 years, or by 2033, which is the maximum time period allowed by the Magnuson-Stevens Act. Projections suggest the stock could rebuild in 7 years at an F of zero. Fishing mortality of zero for GOM cod is currently technologically and economically impracticable given available gear, fishing methods, fishery management capability, and the multispecies nature of the commercial and recreational fishery. In addition to these factors, other biological and economic factors were identified and considered by the Council in setting $T_{target} = T_{max}$. First, recent recruitment estimates for this stock have been below average, and recruitment may be lower than assumed in the rebuilding projections, making the T_{min} projections (7 years at F = 0) likely to be overly optimistic. There is uncertainty around the stock's natural mortality, and under one of the two approved models (M-ramp, M=0.4), the stock cannot rebuild in the rebuilding projections. Long-term projections for many groundfish stocks have tended to be overly optimistic, such that future levels of biomass are overestimated and fishing mortality is underestimated. Additionally, recent commercial utilization of the GOM cod annual catch limit (ACL) is high, indicating that the stock is an important component of the fishing industry; a longer rebuilding period considers the needs of the fishing communities as much as practicable. The proposed rebuilding plan for GOM cod would set $F_{rebuild}$ at 60 percent of F_{MSY} with a 70-percent probability of achieving B_{MSY} under the M=0.2 model.

As part of the revised rebuilding plan for GOM cod, we propose to remove regulations at 50 CFR 648.90(a)(2)(iv), which include a review process for the rebuilding plans for GOM cod and American plaice. The revised rebuilding plan for GOM cod does not contain this Council review process, but is still subject to Secretarial review for determining adequate rebuilding progress. As of 2019, American plaice is rebuilt and no longer in a rebuilding plan, making this regulation unnecessary.

Fishing Years 2023 and 2024 Shared U.S./Canada Quotas

Management of Transboundary Georges Bank Stocks

Eastern GB cod, eastern GB haddock, and GB yellowtail flounder are jointly managed with Canada under the United States/Canada Resource Sharing Understanding. The Transboundary Management Guidance Committee (TMGC) is a government-industry committee made up of representatives from the United States and Canada. For historical information about the TMGC see: *http://www.bio.gc.ca/info/intercol/tmgc-cogst/index-en.php.* Each year, the TMGC recommends a shared quota for each stock based on the most recent stock information and the TMGC's harvest strategy. The TMGC's harvest strategy for setting catch levels is to maintain a low to neutral risk (less than 50 percent) of exceeding the fishing mortality limit for each stock. The harvest strategy also specifies that when stock conditions are poor, fishing mortality should be further reduced to promote stock rebuilding. The shared quotas are allocated between the United States and Canada based on a formula that considers historical catch (10-percent weighting) and the current resource distribution (90-percent weighting).

For GB yellowtail flounder, the Council's Scientific and Statistical Committee (SSC) also recommends an acceptable biological catch (ABC) for the stock. The ABC is typically used to inform the U.S. TMGC's discussions with Canada for the annual shared quota. Although the stock is jointly managed with Canada, and the TMGC recommends annual shared quotas, the Council may not set catch limits that would exceed the SSC's recommendation. The SSC does not recommend ABCs for eastern GB cod and haddock because they are management units of the total GB cod and haddock stocks. The SSC recommends overall ABCs for the total GB cod and haddock stocks. The shared U.S./Canada quota for eastern GB cod and haddock is included in these overall ABCs, and must be consistent with the SSC's recommendation for the total GB stocks.

2023 and 2024 U.S./Canada Quotas

The Transboundary Resources Assessment Committee assessed the three transboundary stocks in July 2022, and detailed summaries of these assessments can be found at: *https://www.nefsc.noaa.gov/assessments/trac/.* The TMGC met in September 2022 to recommend shared quotas for 2023 based on the updated assessments, and made recommendations for eastern GB cod and GB yellowtail flounder. The Council adopted the TMGC's recommendations in Framework 65. The TMGC was unable to reach consensus on the most appropriate combined Canada/U.S. quota for eastern GB haddock. Instead, the Council selected a U.S. quota based on the shared quota supported by the U.S. delegation and the established method of determining the allocation for each country (42 percent of 3,619 mt), and supported using 2,320 mt as an estimate of possible Canadian catch.

Framework 65 proposes to set the same shared quotas for a second year (*i.e.,* for fishing year 2024) as placeholders, with the expectation that those quotas will be reviewed annually and new recommendations will be received from the TMGC. The proposed 2023 and 2024 shared U.S./Canada quotas, and each country's allocation, are listed in Table 1.

TABLE 1—PROPOSED 2023 AND 2024 FISHING YEARS U.S./CANADA QUOTAS (MT, LIVE WEIGHT) AND PERCENT OF QUOTA ALLOCATED TO EACH COUNTRY

Quota	Eastern GB cod	Eastern GB haddock	GB Yellowtail flounder
Total Shared Quota	520	*No agreement*	200.
U.S. Quota	135 (26 percent)	1,520	106 (53 percent).
Canadian Quota	385 (74 percent)	*2,320 (estimate)*	94 (47 percent).

The proposed 2023 U.S. quotas for the three shared stocks represent decreases compared to 2022: Eastern GB cod by 15.6 percent, eastern GB haddock by 77 percent, and GB yellowtail flounder by 13 percent. For a more detailed discussion of the TMGC's 2023 catch advice, including a description of each country's quota share, see the TMGC's guidance document that will be posted at: *https://www.greateratlantic.fisheries.noaa.gov/.*

The regulations implementing the U.S./Canada Resource Sharing Understanding require deducting any overages of the U.S. quota for eastern GB cod, eastern GB haddock, or GB yellowtail flounder from the U.S. quota in the following fishing year. If catch information for the 2022 fishing year indicates that the U.S. fishery exceeded its quota for any of the shared stocks, we will reduce the respective U.S. quotas for the 2023 fishing year in a future management action, as close to May 1, 2023, as possible. If any fishery that is allocated a portion of the U.S. quota exceeds its allocation and causes an overage of the overall U.S. quota, the overage reduction would be applied only to that fishery's allocation in the following fishing year. This ensures that catch by one component of the overall fishery does not negatively affect another component of the overall fishery.

Catch Limits for Fishing Years 2023–2025

Summary of the Proposed Catch Limits

Tables 2 through 11 show the proposed catch limits for the 2023–2025 fishing years. A brief summary of how these catch limits were developed is provided below. More details on the proposed catch limits for each groundfish stock can be found in Appendix II (Calculation of Northeast Multispecies Annual Catch Limits, FY 2023–FY 2025) to the Framework 65 Environmental Assessment (see **ADDRESSES** for information on how to get this document).

Through Framework 65, the Council proposes to adopt catch limits for 13 stocks for the 2023–2025 fishing years and for white hake for the 2023 fishing year, based on stock assessments completed in 2022, and catch limits for GB cod and GB yellowtail flounder for fishing years 2023–2024. Framework 61 (86 FR 40353, July 28, 2021) previously set 2023 quotas for redfish, northern windowpane flounder, and southern windowpane flounder based on assessments conducted in 2020, and those would remain in place. Framework 63 (87 FR 42375, July 15, 2022) previously set the 2023–2024 quota for GOM cod, based on an assessment conducted in 2021, and that would also remain in place. Table 2 provides an overview of which catch limits, if any, would change, as proposed in Framework 65, as well as when the stock was most recently assessed. Table 3 provides the percent change in the 2023 catch limit compared to the 2022 fishing year.

TABLE 2—CHANGES TO CATCH LIMITS, AS PROPOSED IN FRAMEWORK 65

Stock	Most recent assessment	Proposed change in framework 65
GB Cod	2021	New 2023–2024 ABC.
GOM Cod	2021	Adjust sub-components, 2023–2024 catch limit set by Framework 63.
GB Haddock	2022	New 2023–2025 ABC.
GOM Haddock	2022	New 2023–2025 ABC.
GB Yellowtail Flounder	2022	New 2023–2024 ABC.
SNE/MA Yellowtail Flounder	2022	New 2023–2025 ABC.
CC/GOM Yellowtail Flounder	2022	New 2023–2025 ABC.
American Plaice	2022	New 2023–2025 ABC.
Witch Flounder	2022	New 2023–2025 ABC.
GB Winter Flounder	2022	New 2023–2025 ABC.
GOM Winter Flounder	2022	New 2023–2025 ABC.
SNE/MA Winter Flounder	2022	New 2023–2025 ABC.
Redfish	2020	No change: 2023 catch limit set by Framework 61.
White Hake	2022	New 2023 ABC.
Pollock	2022	New 2023–2025 ABC.
N. Windowpane Flounder	2020	Adjust sub-components, 2023 catch limit set by Framework 61.
S. Windowpane Flounder	2020	Adjust sub-components, 2023 catch limit set by Framework 61.
Ocean Pout	2022	New 2023–2025 ABC.
Atlantic Halibut	2022	New 2023–2025 ABC.
Atlantic Wolffish	2022	New 2023–2025 ABC.

N = Northern; S = Southern

TABLE 3—PROPOSED FISHING YEARS 2023–2025 OVERFISHING LIMITS AND ACCEPTABLE BIOLOGICAL CATCHES

[mt, live weight]

Stock	2023		Percent change from 2022	2024		2025	
	OFL	U.S. ABC		OFL	U.S. ABC	OFL	U.S. ABC
GB Cod	UNK	519	51	UNK	519	....	....
GOM Cod	853	551	0	980	551	....	....
GB Haddock	18,482	11,901	−85	17,768	11,638	15,096	9,962
GOM Haddock	2,515	1,936	−83	2,655	2,038	2,627	2,017
GB Yellowtail Flounder	UNK	106	−13	UNK	106	....	....
SNE/MA Yellowtail Flounder	55	40	82	89	40	345	40
CC/GOM Yellowtail Flounder	1,436	1,115	35	1,279	992	1,184	915
American Plaice	7,316	5,699	102	7,091	5,520	6,763	5,270
Witch Flounder	UNK	1,256	−15	UNK	1,256	UNK	1,256
GB Winter Flounder	2,361	1,702	180	2,153	1,549	2,100	1,490

TABLE 3—PROPOSED FISHING YEARS 2023–2025 OVERFISHING LIMITS AND ACCEPTABLE BIOLOGICAL CATCHES—Continued

[mt, live weight]

Stock	2023		Percent change from 2022	2024		2025	
	OFL	U.S. ABC		OFL	U.S. ABC	OFL	U.S. ABC
GOM Winter Flounder	1,072	804	62	1,072	804	1,072	804
SNE/MA Winter Flounder	1,186	627	38	1,425	627	1,536	627
Redfish	13,229	9,967	−1				
White Hake	2,650	1,845	−13				
Pollock	19,617	15,016	−11	18,208	13,940	17,384	13,294
N. Windowpane Flounder	UNK	160	0				
S. Windowpane Flounder	513	384	0				
Ocean Pout	125	87	0	125	87	125	87
Atlantic Halibut	UNK	86	−15	UNK	86	UNK	86
Atlantic Wolffish	124	93	1	124	93	124	93

UNK = Unknown

Note: An empty cell indicates no OFL/ABC is adopted for that year. These catch limits would be set in a future action.

Overfishing Limits and Acceptable Biological Catches

The overfishing limit (OFL) is calculated to set the maximum amount of fish that can be caught in a year, without constituting overfishing. The ABC is typically set lower than the OFL to account for scientific uncertainty. For GB cod, GB haddock, and GB yellowtail flounder, the total ABC is reduced by the amount of the Canadian quota (see Table 1 for the Canadian and U.S. shares of these stocks). Although the TMGC recommendations were only for fishing year 2023, the portion of the shared quota that would be allocated to Canada (or assumed for Canada, in the case of GB haddock) in fishing year 2023 was used to project the U.S. portions of the ABCs for these three stocks for 2024. This avoids artificially inflating the U.S. ABC up to the total ABC for the 2024 fishing year. The TMGC will make new recommendations for 2024, which would replace any quotas for these stocks set in this action. Additionally, although GB winter flounder, white hake, and Atlantic halibut are not jointly managed with Canada, there is some Canadian catch of these stocks. Because the total ABC must account for all sources of fishing mortality, expected Canadian catch of GB winter flounder (38 mt), white hake (52 mt), and Atlantic halibut (74 mt) is deducted from the total ABC. The U.S. ABC is the amount available to the U.S. fishery after accounting for Canadian catch (see Table 3). For stocks without Canadian catch, the U.S. ABC is equal to the total ABC.

The OFLs are currently unknown for GB cod, GB yellowtail flounder, witch flounder, northern windowpane flounder, and Atlantic halibut. For 2023, the SSC recommended maintaining the unknown OFL for GB cod, GB yellowtail flounder, witch flounder, and Atlantic halibut. Empirical stock assessments are used for these five stocks, and these assessments can no longer provide quantitative estimates of the status determination criteria, nor were appropriate proxies for stock status determination able to be developed. In the temporary absence of an OFL, in this and previous actions, we have considered recent catch data and estimated trends in stock biomass as an indication that the catch limits derived from ABCs are sufficiently managing fishing mortality at a rate that is preventing overfishing. The SSC recommended setting the GB cod ABC based on an average between the output of the iSmooth (previously referred to as ''PlanBsmooth'') approach and the total calendar year catch from 2020, which results in an increase (approximately 20 percent) from the previously set ABC value. Despite this increase, the SSC states that its recommendation is intended to support stock rebuilding by maintaining low catches relative to historic levels. The SSC noted that the fishing mortality in the GB yellowtail flounder fishery does not appear to be limiting stock recovery. However, the continued low stock biomass and poor recruitment for this stock warrant maintaining low catch levels. For witch flounder, the SSC supported the continued use of the swept-area biomass average and fixed harvest fraction for setting the ABC, noting that the target harvest fraction is low relative to the historic harvest fraction for this stock and that the recommended ABC for witch flounder is not likely to result in overfishing. While the catch multiplier for Atlantic halibut remains below 1 for the last four years, despite reductions in ABC advice, the SSC highlighted the uncertainty of Canadian catch estimates and stated that the recommended ABC is not likely to result in overfishing. For each of these stocks, the Council has relied on the SSC to provide advice on the likelihood of preventing overfishing and promoting rebuilding under the proposed ABCs. Based on these considerations, we have preliminarily determined that these ABCs are a sufficient limit for preventing overfishing and are consistent with the National Standards. This action does not propose any changes to the status determination criteria for these stocks.

Subsequent to submitting Framework 65 to NMFS for review and rulemaking, at its April meeting the New England Council made a new request for NMFS to implement an emergency rule under section 305(c) of the Magnuson-Stevens Act to increase the ABC for GOM haddock based on concerns regarding the economic impacts of the low quota proposed in this action. We are considering this separately from Framework 65, and therefore it is not discussed further here.

ABC for Georges Bank Cod

The GB cod 2021 management track assessment followed the iSmooth approach, using updated commercial fishery catch data through calendar year 2020 and updated research survey indices of abundance through 2021. In Framework 63, the Council decided to set the GB cod ABC at 754 mt for only one year (fishing year 2022), requiring the Council to make a new recommendation for fishing years 2023 and 2024 in the current framework. The SSC met in August 2022 to discuss alternatives for the GB cod ABC for fishing years 2023 and 2024, and a majority of the SSC recommended an ABC of 904 mt, the average between the output of the iSmooth and the 2020 calendar year catch of GB cod (based on

the 2021 assessment). The Council selected 904 mt as its preferred option for the GB cod ABC.

The Council's EA for Framework 65 states that the 904 mt ABC would reduce, but not eliminate, adverse economic impacts, compared to the fishing year 2022 ABC of 754 mt. The Council included an updated analysis in its Framework 65 submission, applying the iSmooth approach using fall 2021 and spring 2022 surveys and catch data through 2021, consistent with the methodology and data sources used by the SSC when recommending the fishing year 2022 ABC. This updated analysis resulted in an amount that is 74 mt higher than the 904-mt ABC recommended by the Council. The Council did not revise its recommendation with the higher amount. Instead, it has demonstrated that the 904-mt ABC recommendation would contribute to stock rebuilding while having a low probability of overfishing. The sector component of the fishery will have a high (90-percent) target coverage level of monitoring in fishing year 2023, which is anticipated to help ensure the accuracy of commercial catch data.

Annual Catch Limits

Development of Annual Catch Limits

The U.S. ABC for each stock is divided among the various fishery components to account for all sources of fishing mortality. An estimate of catch expected from state waters and the other sub-component (*e.g.,* non-groundfish fisheries or some recreational groundfish fisheries) is deducted from the U.S. ABC. The remaining portion of the U.S. ABC is distributed to the fishery components that receive an allocation for the stock. Components of the fishery that receive an allocation have a sub-ACL set by reducing their portion of the ABC to account for management uncertainty and are subject to AMs if they exceed their respective catch limit during the fishing year. For GOM cod and haddock only, the U.S. ABC is first divided between the commercial and recreational fisheries, before being further divided into sub-components and sub-ACLs. This process is described fully in Appendix II of the Framework 65 Environmental Assessment.

Recreational Catch Target for GB Cod

GB cod is not allocated to the recreational fishery. Instead, a catch target is set and used to calculate the amount deducted to account for state and other sub-component catch. Framework 65 proposes to set the GB cod recreational catch target based on the proportional change to the GB cod U.S. ABC from fishing year 2022 to 2023. Under the Council's preferred alternative of a 904-mt GB cod ABC, the recreational catch target would be 113 mt, which is an increase from the 75-mt catch target set for fishing year 2022.

Framework 63 modified the regulatory process for the Regional Administrator to adjust recreational measures to prevent the recreational catch target from being exceeded for fishing years 2023 and 2024. Any change to the recreational measures for GB cod would be implemented through a separate rulemaking.

Sector and Common Pool Allocations

For stocks allocated to sectors, the commercial groundfish sub-ACL is further divided into the non-sector (common pool) sub-ACL and the sector sub-ACL, based on the total vessel enrollment in sectors and the cumulative potential sector contributions (PSC) associated with those sectors. The sector and common pool sub-ACLs proposed in this action are based on final fishing year 2023 sector rosters. All permits enrolled in a sector, and the vessels associated with those permits, had until April 30, 2023, to withdraw from a sector and fish in the common pool for the 2023 fishing year. In addition to the enrollment delay, all permits that change ownership after the roster deadline were able to join a sector (or change sector) through April 30, 2023.

Management Uncertainty Buffer for Sectors

In Framework 65, the Council proposes to remove the management uncertainty buffer for the sector sub-ACL for GOM haddock and white hake, for only the 2023 fishing year, if the at-sea monitoring (ASM) coverage target is 90 percent or higher. The Council's goal is to mitigate the economic impacts of the ACLs for these two stocks by increasing the sector sub-ACLs if the ASM coverage target is high enough to reduce uncertainty. Amendment 23 (87 FR 75852, December 9, 2022) implemented a measure to set the management uncertainty buffer for the sector sub-ACL for each allocated groundfish stock to zero. In years that the ASM coverage target is set at 100 percent, the management uncertainty buffer will default to zero for the sector sub-ACL for allocated stocks, unless the Council's consideration of the 100-percent coverage target warrants specifying a different management uncertainty buffer in order to prevent exceeding the sub-ACL. The process by which the Council evaluates and sets management uncertainty buffers was unchanged by Amendment 23 and the Council may adjust management uncertainty buffers in future actions.

On March 16, 2023, the Regional Administrator announced that the fishing year 2023 ASM coverage target will be 90 percent. Therefore, if this measure is approved, sectors' sub-ABCs for GOM haddock and white hake would not be reduced to account for the management uncertainty for fishing year 2023 (see Table 4). The fishery would remain accountable for remaining within the sub-ACLs allocated to it for both stocks affected by this measure, and the removal of the management uncertainty buffer for the sectors alone is not likely to cause the ABC or OFL to be exceeded. The revised management uncertainty buffers apply only to sectors and not to the common pool component of the fishery or other sub-ACLs or sub-components for any stocks. In the case of GOM haddock, the recreational fishery and common pool fishery would both retain a management uncertainty buffer; for white hake, only the common pool fishery would have a management uncertainty buffer applied. Therefore, a certain level of uncertainty buffer will continue to exist for each stock's ACL.

Common Pool Total Allowable Catches

The common pool sub-ACL for each allocated stock (except for SNE/MA winter flounder) is further divided into trimester TACs. Table 7 summarizes the common pool trimester TACs proposed in this action.

Incidental catch TACs are also specified for certain stocks of concern (*i.e.,* stocks that are overfished or subject to overfishing) for common pool vessels fishing in the special management programs (*i.e.,* special access programs (SAP) and the Regular B Days-at-Sea (DAS) Program), in order to limit the catch of these stocks under each program. Tables 8 through 11 summarize the proposed Incidental Catch TACs for each stock and the distribution of these TACs to each special management program.

TABLE 4—PROPOSED CATCH LIMITS FOR THE 2023 FISHING YEAR
[mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Sector sub-ACL	Common pool sub-ACL	Recreational sub-ACL	Midwater trawl fishery	Scallop fishery	Small-mesh fisheries	State waters sub-component	Other sub-component
	A to H	A + B + C	A	B	C	D	E	F	G	H
GB Cod	500	375	364	11					42	83
GOM Cod	522	470	268	11	192				48	3.4
GB Haddock	11,301	11,080	10,829	251		221			0	0
GOM Haddock *	1,888	1,818	1,183	25	610	18			45	6.4
GB Yellowtail Flounder	103	84	80	4.5			16.5	2.0	0.0	0.0
SNE/MA Yellowtail Flounder	38	33	25	8.1			2.7		0.2	2.0
CC/GOM Yellowtail Flounder	1,063	985	931	54					34	45
American Plaice	5,417	5,360	5,210	150					29	29
Witch Flounder	1,196	1,145	1,104	41					19	31
GB Winter Flounder	1,651	1,634	1,585	50					0	17
GOM Winter Flounder	772	607	519	88					153	12.1
SNE/MA Winter Flounder	604	441	387	53					19	144
Redfish	9,469	9,469	9,369	99					0	0
White Hake *	1,844	1,826	1,808	18					0	19
Pollock	14,325	13,124	13,001	123					676	526
N. Windowpane Flounder	150	105	na	105			31		0.8	13
S. Windowpane Flounder	371	45	na	45			129		13	184
Ocean Pout	83	49	na	49					0	34
Atlantic Halibut	83	64	na	64					17	1.3
Atlantic Wolffish	87	87	na	87					0	0

na: not allocated to sectors
* GOM haddock and white hake catch limits are based on the removal of the management uncertainty buffer.

TABLE 5—PROPOSED CATCH LIMITS FOR THE 2024 FISHING YEAR *
[mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Sector sub-ACL	Common pool sub-ACL	Recreational sub-ACL	Midwater trawl fishery	Scallop fishery	Small-mesh fisheries	State waters sub-component	Other sub-component
	A to H	A + B + C	A	B	C	D	E	F	G	H
GB Cod	500	375	364	11					42	83
GOM Cod	522	470	268	11	192				48	3
GB Haddock	11,052	10,835	10,590	245		217			0	0
GOM Haddock	1,925	1,852	1,183	26	643	19			47	7
GB Yellowtail Flounder	103	84	80	4.5			17	2.0	0	0
SNE/MA Yellowtail Flounder	38	33	25	8.1			2.7		0.2	2.0
CC/GOM Yellowtail Flounder	946	877	828	48					30	40
American Plaice	5,247	5,192	5,046	145					28	28
Witch Flounder	1,196	1,145	1,104	41					19	31
GB Winter Flounder	1,503	1,488	1,442	45					0	16
GOM Winter Flounder	772	607	519	88					153	12.1
SNE/MA Winter Flounder	604	441	387	53					19	144
Pollock	13,299	12,184	12,070	114					627	488
Ocean Pout	83	49	na	49					0	34
Atlantic Halibut	83	64	na	64					17	1.3
Atlantic Wolffish	87	87	na	87					0	0

na: not allocated to sectors
* Northeast multispecies stocks not included in Table 5 do not have catch limits approved or proposed for fishing year 2024.

TABLE 6—PROPOSED CATCH LIMITS FOR THE 2025 FISHING YEAR *

[mt, live weight]

Stock	Total ACL	Groundfish sub-ACL	Sector sub-ACL	Common pool sub-ACL	Recreational sub-ACL	Midwater trawl fishery	Scallop fishery	Small-mesh fisheries	State waters sub-component	Other sub-component
	A to H	A + B + C	A	B	C	D	E	F	G	H
GB Haddock	9,460	9,275	9,065	210		185			0	0
GOM Haddock	1,905	1,833	1,171	26	636	19			47	7
SNE/MA Yellowtail Flounder	38	33	25	8			3		0	2
CC/GOM Yellowtail Flounder	873	808	764	45					28	37
American Plaice	5,009	4,957	4,818	139					26	26
Witch Flounder	1,196	1,145	1,104	41					19	31
GB Winter Flounder	1,446	1,431	1,387	44					0	15
GOM Winter Flounder	772	607	519	88					153	12.1
SNE/MA Winter Flounder	604	441	387	53					19	144
Pollock	12,683	11,619	11,510	109					598	465
Ocean Pout	83	49	na	49					0	34
Atlantic Halibut	83	64	na	64					17	1.3
Atlantic Wolffish	87	87	na	87					0	0

na: not allocated to sectors

* Northeast multispecies stocks not included in Table 6 do not have catch limits approved or proposed for fishing year 2025.

TABLE 7—PROPOSED FISHING YEARS 2023–2025 COMMON POOL TRIMESTER TACS

[mt, live weight]

Stock	2023			2024			2025		
	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3
GB Cod	3.0	3.6	4.1	3.0	3.6	4.1			
GOM Cod	5.2	3.5	1.9	5.2	3.5	1.9			
GB Haddock	67.6	82.7	100.2	66.1	80.8	98.0	56.6	69.2	83.9
GOM Haddock	6.6	6.4	11.6	7.0	6.7	12.2	6.9	6.7	12.1
GB Yellowtail Flounder	0.9	1.4	2.3	0.9	1.4	2.3			
SNE/MA Yellowtail Flounder	1.7	2.3	4.1	1.7	2.3	4.1	1.7	2.3	4.1
CC/GOM Yellowtail Flounder	31.0	14.1	9.2	27.6	12.6	8.2	25.5	11.6	7.6
American Plaice	111.0	12.0	27.0	107.5	11.6	26.2	102.6	11.1	25.0
Witch Flounder	22.6	8.2	10.3	22.6	8.2	10.3	22.6	8.2	10.3
GB Winter Flounder	4.0	12.0	33.9	3.6	10.9	30.8	3.5	10.5	29.6
GOM Winter Flounder	32.7	33.6	22.1	32.7	33.6	22.1	32.7	33.6	22.1
Redfish	24.8	30.8	43.7						
White Hake	6.7	5.5	5.5						
Pollock	34.4	42.9	45.4	31.9	39.9	42.1	30.4	38.0	40.2

TABLE 8—PROPOSED COMMON POOL INCIDENTAL CATCH TACS FOR THE 2023–2025 FISHING YEARS

[mt, live weight]

Stock	Percentage of common pool sub-ACL	2023	2024	2025
GB Cod	1.68	0.18	0.18	
GOM Cod	1	0.11	0.11	
GB Yellowtail Flounder	2	0.09	0.09	
CC/GOM Yellowtail Flounder	1	0.54	0.48	0.45
American Plaice	5	7.50	7.27	6.94
Witch Flounder	5	2.06	2.06	2.06
SNE/MA Winter Flounder	1	0.53	0.53	0.53

TABLE 9—PERCENTAGE OF INCIDENTAL CATCH TACS DISTRIBUTED TO EACH SPECIAL MANAGEMENT PROGRAM

Stock	Regular B DAS Program (%)	Eastern U.S./CA Haddock SAP (%)
GB Cod	60	40
GOM Cod	100	n/a
GB Yellowtail Flounder	50	50
CC/GOM Yellowtail Flounder	100	n/a
American Plaice	100	n/a

TABLE 9—PERCENTAGE OF INCIDENTAL CATCH TACS DISTRIBUTED TO EACH SPECIAL MANAGEMENT PROGRAM—Continued

Stock	Regular B DAS Program (%)	Eastern U.S./CA Haddock SAP (%)
Witch Flounder	100	n/a
SNE/MA Winter Flounder	100	n/a

TABLE 10—PROPOSED FISHING YEARS 2023–2025 INCIDENTAL CATCH TACS FOR EACH SPECIAL MANAGEMENT PROGRAM

[mt, live weight]

Stock	Regular B DAS Program			Eastern U.S./Canada Haddock SAP		
	2023	2024	2025	2023	2024	2025
GB Cod	0.11	0.11		0.07	0.07	
GOM Cod	0.11	0.11		n/a	n/a	n/a
GB Yellowtail Flounder	0.05	0.05		0.05	0.05	
CC/GOM Yellowtail Flounder	0.54	0.48	0.45	n/a	n/a	n/a
American Plaice	7.50	7.27	6.94	n/a	n/a	n/a
Witch Flounder	2.06	2.06	2.06	n/a	n/a	n/a
SNE/MA Winter Flounder	0.53	0.53	0.53	n/a	n/a	n/a

TABLE 11—PROPOSED FISHING YEARS 2023–2025 REGULAR B DAS PROGRAM QUARTERLY INCIDENTAL CATCH TACS

[mt, live weight]

Stock	2023				2024				2025			
	1st Quarter (13%)	2nd Quarter (29%)	3rd Quarter (29%)	4th Quarter (29%)	1st Quarter (13%)	2nd Quarter (29%)	3rd Quarter (29%)	4th Quarter (29%)	1st Quarter (13%)	2nd Quarter (29%)	3rd Quarter (29%)	4th Quarter (29%)
GB Cod	0.01	0.03	0.03	0.03	0.01	0.03	0.03	0.03				
GOM Cod	0.01	0.03	0.03	0.03	0.01	0.03	0.03	0.03				
GB Yellowtail Flounder	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01				
CC/GOM Yellowtail Flounder	0.07	0.16	0.16	0.16	0.06	0.14	0.14	0.14	0.06	0.13	0.13	0.13
American Plaice	0.98	2.18	2.18	2.18	0.94	2.11	2.11	2.11	0.90	2.01	2.01	2.01
Witch Flounder	0.27	0.60	0.60	0.60	0.27	0.60	0.60	0.60	0.27	0.60	0.60	0.60
SNE/MA Winter Flounder	0.07	0.15	0.15	0.15	0.07	0.15	0.15	0.15	0.07	0.15	0.15	0.15

Temporary Modification to Accountability Measures for GB Cod

As described above, a portion of the ABC is set aside to account for an estimate of catch in state waters (including both commercial and recreational vessels) and catch in federal waters by the other non-specified fisheries (including non-groundfish commercial and recreational groundfish vessels). For allocated groundfish stocks, there are no accountability measures for the state and other sub-components; an overage to the ACL results in accountability measures for the allocated components of the groundfish fishery. If the overall ACL for a stock is exceeded, the amount of the overage due to catch from vessels fishing in state waters or other, non-specified fisheries is distributed between the allocated components of the groundfish fishery. Each component's attributed share of the overage is added to that component's catch to determine whether the AM for that component is triggered and the resulting overage amount. For the commercial fishery (sectors and common pool), the AM due to an overage is payback in a subsequent fishing year.

Framework 65 would temporarily modify the AMs for GB cod when an ACL overage that occurs in fishing years 2022–2024 is (in part or entirely) due to vessels fishing in state waters or other, non-specified fisheries. If in the year following the overage (Year 2), the ACL is not achieved or exceeded by any amount, the ACL underage would be proportionately applied to each component's share of the overage from Year 1. While the preliminary AM (*i.e.,* payback) would be implemented at the beginning of Year 3, any reduction to the overage (due to the underage in Year 2) would be made through an in-season adjustment as soon as possible in Year 3.

For example, if an ACL overage occurred in fishing year 2022, due to (in part or entirely) excess catch from the state or other sub-components, NMFS would determine the amount of this overage after the end of fishing year 2022, *i.e.,* in fishing year 2023. NMFS would then proportionately apply the excessive catch attributed to the state and other-subcomponents to catch from the allocated groundfish fisheries; in the case of GB cod, this would be sectors and the common pool. If the resulting sum of sector catch plus the sectors' share of the state or other sub-component's overage resulted in an overage of the sector sub-ACL, sectors would be required to pay back this overage, pound for pound. The same

would be done for the common pool's catch and share of the state and other sub-components' overage. Under the modification proposed in this action, however, if there were an underage of the ACL in fishing year 2023, this underage would be distributed between sectors and the common pool. The overage payback would be implemented at the start of fishing year 2024, but NMFS would implement the reduction of the payback due to the 2023 ACL underage through an in-season adjustment in 2024.

Regulatory Corrections Under Secretarial Authority

This rule corrects an error in the northeast regulations for monitoring service providers. We are making this correction consistent with section 305(d) of the Magnuson-Stevens Act, which provides that the Secretary of Commerce may promulgate regulations necessary to ensure that amendments to an FMP are carried out in accordance with the FMP and the Magnuson-Stevens Act. This change is necessary to correct the regulations detailing insurance requirements for monitoring companies to reference the national requirements.

On September 8, 2022, NMFS published a final rule (87 FR 54902) that implemented national insurance requirements for observer providers at 50 CFR 600.748 and revised the northeast regional monitoring program regulations at § 648.11(h)(3)(vii) to reference the newly established national insurance requirements. The final rule implementing Amendment 23 to the Northeast Multispecies FMP (87 FR 75852, December 9, 2022) inadvertently overwrote the northeast regional monitoring program regulations that referred to the national insurance requirements. This rule corrects the regulations at § 648.11(h)(3)(vii)(A) to reference the national insurance requirements. This correction is necessary to eliminate confusion and ensure the northeast monitoring program is consistent with the national insurance requirements.

Framework 65 would also make minor changes in the regulations. It would remove regulatory text that is specific to previous fishing years. Specifically, this action would remove a sentence in 50 CFR 648.90(a)(4)(iii)(H)(*2*) that is specific to the allocation of certain stocks for fishing years 2010 and 2011, and remove the paragraphs at § 648.90(a)(5)(iv)(B) through (D) that are specific to temporary (up through fishing year 2020) modifications to the triggers for the Atlantic sea scallop fishery's AMs for certain flatfish stocks. It would correct sections of the regulations (§§ 648.87(b)(1)(i)(A) and 648.90(a)(4)(iii)(F)) that refer to the northern and southern windowpane flounder as GOM/GB and SNE/MA windowpane flounder, respectively, which is inconsistent with other sections of the regulations. It would remove a section of text that describes the Fippenies Ledge Area that was moved to a different section of the regulations, but not deleted from § 648.87(c)(2)(i)(A). It would correct several citations in §§ 648.87(c)(2)(i) and 648.86(c) to paragraphs within § 648.90(a)(5)(i) that were redesignated in a previous action, but the citations were not updated.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has made a preliminary determination that this proposed rule is consistent with Framework 65, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making the final determination, the Regional Administrator will consider the data, views, and comments received during the public comment period.

NMFS finds that a 15-day comment period for this action provides a reasonable opportunity for public participation in this action, while also ensuring that the final specifications are in place as close to start of the groundfish fishing year on May 1, 2023, as possible. This action was developed by the New England Fishery Management Council as part of the annual Framework Adjustment process, during which final action was taken in December 2022. However, due to the need for additional analysis regarding the measures proposed in Framework 65, the Council was not able to submit the final Framework until April 18, 2023. This action could not be proposed sooner as a result of the delays in submission. Stakeholder and industry groups have been involved with the development of this action and have participated in public meetings throughout the past year. A prolonged comment period and subsequent potential delay in implementation would be contrary to the public interest, as it would leave in place default quotas for some stocks that do not already have specifications for fishing year 2023, rather than replacing them with the quotas proposed in this rule, which are based on the best available science. For multiple stocks, the fishery is operating under lower quotas than those proposed in Framework 65, and an extended delay could limit economic opportunities for the fishery, as well as lead to confusion and uncertainty. Providing timely access to these stocks is also a potential safely issue. A significant portion of fishing activity occurs in early summer, due to better weather, and for some smaller vessels, summer may be the only season in which they are able to participate in the fishery.

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

An Initial Regulatory Flexibility Analysis (IRFA) was prepared for this proposed rule, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603. The IRFA describes the economic impact that this proposed rule would have on small entities, including small businesses, and also determines ways to minimize these impacts. The IRFA includes this section of the preamble to this rule and analyses contained in Framework 63 and its accompanying EA/RIR/IRFA. A copy of the full analysis is available from the Council (see **ADDRESSES**). A summary of the IRFA follows.

Description of the Reasons Why Action by the Agency Is Being Considered and Statement of the Objectives of, and Legal Basis for, This Proposed Rule

This action proposes management measures, including annual catch limits, for the multispecies fishery in order to prevent overfishing, rebuild overfished groundfish stocks, and achieve optimum yield in the fishery. A complete description of the action, why it is being considered, and the legal basis for this action are contained in Framework 65, and elsewhere in the preamble to this proposed rule, and are not repeated here.

Description and Estimate of the Number of Small Entities to Which This Proposed Rule Would Apply

The proposed rule would impact the commercial and recreational groundfish, Atlantic sea scallop, small-mesh multispecies, Atlantic herring, and large-mesh non-groundfish fisheries. Individually permitted vessels may hold permits for several fisheries, harvesting species of fish that are regulated by several different FMPs, beyond those impacted by the proposed action. Furthermore, multiple-permitted vessels and/or permits may be owned by entities affiliated by stock ownership, common management, identity of interest, contractual relationships, or economic dependency. For the purposes

of the Regulatory Flexibility Act analysis, the ownership entities, not the individual vessels, are considered to be the regulated entities.

As of June 1, 2022, NMFS had issued 681 commercial limited-access groundfish permits associated with vessels (including those in confirmation of permit history (CPH)), 610 party/charter groundfish permits, 699 limited access and general category Atlantic sea scallop permits, 717 small-mesh multispecies permits, 73 Atlantic herring permits, and 758 large-mesh non-groundfish permits (limited access summer flounder and scup permits). Therefore, this action potentially regulates 3,538 permits. When accounting for overlaps between fisheries, this number falls to 2,027 permitted vessels. Each vessel may be individually owned or part of a larger corporate ownership structure and, for RFA purposes, it is the ownership entity that is ultimately regulated by the proposed action. Ownership entities are identified on June 1st of each year based on the list of all permit numbers, for the most recent complete calendar year, that have applied for any type of Greater Atlantic Federal fishing permit. The current ownership data set is based on calendar year 2021 permits and contains gross sales associated with those permits for calendar years 2019 through 2021.

For 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 (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 determination as to whether the entity is large or small is based on the average annual revenue for the three years from 2019 through 2021. The Small Business Administration (SBA) has established size standards for all other major industry sectors in the U.S., including for-hire fishing (NAICS code 487210). These entities are classified as small businesses if combined annual receipts are not in excess of $8.0 million for all its affiliated operations. As with commercial fishing businesses, the annual average of the three most recent years (2019–2021) is utilized in determining annual receipts for businesses primarily engaged in for-hire fishing.

Based on the ownership data, 1,506 distinct business entities hold at least one permit that the proposed action potentially regulates. All 1,506 business entities identified could be directly regulated by this proposed action. Of these 1,506 entities, 865 are commercial fishing entities, 274 are for-hire entities, and 367 did not have revenues (were inactive in 2021). Of the 865 commercial fishing entities, 854 are categorized as small entities and 11 are categorized as large entities, per the NMFS guidelines. Furthermore, 515 of these commercial fishing entities held limited access groundfish permits, with 512 of these entities being classified as small businesses and 3 of these entities being classified as large businesses. All 274 for-hire entities are categorized as small businesses.

Description of the Projected Reporting, Record-Keeping, and Other Compliance Requirements of This Proposed Rule

The proposed action does not contain any new collection-of-information requirements under the Paperwork Reduction Act (PRA).

Federal Rules Which May Duplicate, Overlap, or Conflict With This Proposed Rule

The proposed action does not duplicate, overlap, or conflict with any other Federal rules.

Description of Significant Alternatives to the Proposed Action Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact on Small Entities

The economic impacts of each proposed measure are discussed in more detail in sections 6.5 and 7.12 of the Framework 65 Environmental Assessment (see **ADDRESSES**) and are not repeated here. The Council considered several options within the proposed GOM cod rebuilding plan, including a $F_{rebuild}$ that are lower (50 percent of F_{MSY}) and higher (70 and 75 percent of F_{MSY}). The quotas that were set by Framework 63 remain in place for fishing years 2023–2024, and the proposed rebuilding strategy for GOM cod is expected to positively impact the groundfish fishery in the long-term through stock rebuilding. For the updated groundfish specifications, the Council also considered two lower ABC for GB cod, which would have greater negative economic impacts than the preferred alternative. There are no significant alternatives that would minimize the economic impacts. The proposed action is predicted to generate $74.2 million in gross revenues on the sector portion of the commercial groundfish trips, which is $41.7 million more than No Action, but $4.0 million less than fishing year 2021. Small entities engaged in common pool groundfish fishing may be negatively impacted by the proposed action as well. Likewise, small entities engaged in the recreational groundfish fishery are also likely to be negatively impacted. These negative impacts for both commercial and recreational groundfish entities are driven primarily by a substantial decline in the ACL for GOM haddock for fishing year 2023. While this decline is expected to result in short-term negative impacts, decreased GOM haddock catch in fishing year 2023 is expected to yield long-term positive impacts through stock rebuilding.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping, and reporting requirements.

Dated: May 24, 2023.

Samuel D. Rauch, III

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

For the reasons stated in the preamble, NMFS proposes to amend 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.11, revise paragraph (h)(3)(vii)(A) to read as follows:

§ 648.11 Monitoring coverage.

* * * * *

(h) * * *

(3) * * *

(vii) * * *

(A) A monitoring service provider must hold insurance specified at § 600.748(b) and (c) of this chapter.

* * * * *

■ 3. In § 648.86, revise paragraph (c) to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(c) *Atlantic halibut.* A vessel issued a NE multispecies permit under § 648.4(a)(1) may land or possess on board no more than one Atlantic halibut per trip, provided the vessel complies with other applicable provisions of this part, unless otherwise specified in § 648.90(a)(5)(i)(F).

* * * * *

■ 4. Amend § 648.87 by:

■ a. Revising paragraph (b)(1)(i)(A) and the first sentence of paragraph (c)(2)(i); and

■ b. Removing paragraphs (c)(2)(i)(A) and (B).

The revisions read as follows:

§ 648.87 Sector allocation.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(A) *Allocated stocks.* Each sector shall be allocated a TAC in the form of an ACE for each NE multispecies stock, with the exception of Atlantic halibut, ocean pout, windowpane flounder (both the northern and southern stocks), and Atlantic wolffish based upon the cumulative PSCs of vessels/permits participating in each sector during a particular fishing year, as described in paragraph (b)(1)(i)(E) of this section.

* * * * *

(c) * * *

(2) * * *

(i) *Regulations that may not be exempted for sector participants.* The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: Specific times and areas within the NE multispecies year-round closure areas; permitting restrictions (*e.g.,* vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (*e.g.,* roller gear restrictions, etc.); reporting requirements; and AMs specified in § 648.90(a)(5)(i)(D) through (H). * * *

* * * * *

■ 5. Amend § 648.90 by:

■ a. Removing and reserving paragraph (a)(2)(iv);

■ b. Revising paragraphs (a)(4)(iii)(A) and (B), (a)(4)(iii)(F), the introductory text of paragraph (a)(4)(iii)(H), paragraphs (a)(4)(iii)(H)(*1*)(*i*) and (a)(4)(iii)(H)(*2*), the second sentence of paragraph (a)(5)(i)(D), and paragraph (a)(5)(ii);

■ c. Removing and reserving paragraph (a)(5)(iv)(B); and

■ d. Removing paragraphs (a)(5)(iv)(C) and (D).

The revisions read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(4) * * *

(iii) * * *

(A) *Regulated species or ocean pout catch by vessels operating only in state waters.* The catch of regulated species or ocean pout that is expected to be harvested by vessels operating only in state waters that have not been issued a Federal NE multispecies permit and are not subject to the regulations specified in this part, as well as the recreational catch of regulated species or ocean pout that occurs in state waters, unless otherwise specified in paragraph (a)(4)(iii)(H)(*1*)(*i*) of this section, shall be deducted from the ABC/ACL of each regulated species or ocean pout stock pursuant to the process for specifying ABCs and ACLs, as described in this paragraph (a)(4).

(B) *Regulated species or ocean pout catch by other, non-specified fisheries.* Regulated species or ocean pout catch by other, non-specified fisheries, including, but not limited to, exempted fisheries that occur in Federal waters, fisheries harvesting exempted species specified in § 648.80(b)(3), and recreational fisheries that occur in Federal waters, unless otherwise specified in paragraph (a)(4)(iii)(H)(*1*)(*i*) of this section, shall be deducted from the ABC/ACL of each regulated species or ocean pout stock, pursuant to the process to specify ABCs and ACLs described in this paragraph (a)(4), unless otherwise specified in paragraphs (a)(4)(iii)(C) through (G) of this section. The catch of these non-specified sub-components of the ACL shall be monitored using data collected pursuant to this part. If catch from such fisheries exceeds the amount specified in this paragraph (a)(4)(iii)(B), AMs shall be developed to prevent the overall ACL for each stock from being exceeded, pursuant to the framework adjustment process specified in this section.

* * * * *

(F) *Southern windowpane flounder catch by exempted fisheries.* Southern windowpane flounder catch by other, non-specified fisheries, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3), shall be deducted from the ABC/ACL for southern windowpane flounder pursuant to the process to specify ABCs and ACLs, as described in this paragraph (a)(4). The specific value of the sub-components of the ABC/ACL for southern windowpane flounder distributed to these other fisheries shall be specified pursuant to the biennial adjustment process specified in paragraph (a)(2) of this section.

* * * * *

(H) *Regulated species or ocean pout catch by the NE multispecies commercial and recreational fisheries.* Unless otherwise specified in the ACL recommendations developed pursuant to paragraph (a)(4)(i) of this section, after all of the deductions and considerations specified in paragraphs (a)(4)(iii)(A) through (G) and (a)(4)(iii)(H)(*1*) of this section, the remaining ABC/ACL for each regulated species or ocean pout stock shall be allocated to the NE multispecies commercial fishery, pursuant to paragraph (a)(4)(iii)(H)(2) of this section.

* * * * *

(*1*) * * *

(i) Stocks allocated. Unless otherwise specified in this paragraph (a)(4)(iii)(H)(*1*), the ABCs/ACLs for GOM cod and GOM haddock set pursuant to paragraph (a)(4) of this section shall be divided between commercial and recreational components, based upon the average proportional catch of each component for each stock during fishing years 2001 through 2006.

* * * * *

(*2*) *Commercial allocation.* Unless otherwise specified in this paragraph (a)(4)(iii)(H)(*2*), the ABC/ACL for regulated species or ocean pout stocks available to the commercial NE multispecies fishery, after consideration of the recreational allocation pursuant to paragraph (a)(4)(iii)(H)(*1*) of this section, shall be divided between vessels operating under approved sector operations plans, as described at § 648.87(c), and vessels operating under the provisions of the common pool, as defined in this part, based upon the cumulative PSCs of vessels participating in sectors calculated pursuant to § 648.87(b)(1)(i)(E). The ABC/ACL of each regulated species or ocean pout stocks not allocated to sectors pursuant to § 648.87(b)(1)(i)(E) (*i.e.,* Atlantic halibut, ocean pout, windowpane flounder, and Atlantic wolffish) that is available to the commercial NE multispecies fishery shall be allocated entirely to the common pool, and catch from sector and common pool vessels shall be attributed to this allocation. Unless otherwise specified in paragraph (a)(5) of this section, regulated species or ocean pout catch by common pool and sector vessels shall be deducted from the sub-ACL/ACE allocated pursuant to this paragraph (a)(4)(iii)(H)(*2*) for the purposes of determining whether adjustments to common pool measures are necessary, pursuant to the common pool AMs specified in § 648.82(n), or whether sector ACE overages must be deducted, pursuant to § 648.87(b)(1)(iii).

* * * * *

(5) * * *

(i) * * *

(D) *AMs for both stocks of windowpane flounder, ocean pout,*

Atlantic halibut, and Atlantic wolffish. * * * If the overall ACL for any of these stocks is exceeded, NMFS shall implement the appropriate AM, as specified in paragraphs (a)(5)(i)(D) through (H) of this section, in a subsequent fishing year, consistent with the APA. * * *

* * * * *

(ii) *AMs due to excessive catch of regulated species or ocean pout by state and other, non-specified fisheries.* At the end of the NE multispecies fishing year, NMFS will evaluate whether the catch of any stock of regulated species or ocean pout by vessels operating only in state waters or in other, non-specified fisheries, as defined in paragraphs (a)(4)(iii)(A) and (B) of this section, exceeds the sub-component of the ACL for that stock.

(A) *AMs if the overall ACL for a regulated species or ocean pout stock is exceeded.* If the catch of any stock of regulated species or ocean pout by vessels operating only in state waters or in other, non-specified fisheries exceeds the sub-component of the ACL for that stock, and the overall ACL for that stock is exceeded, then the amount of the overage of the overall ACL for that stock attributed to catch from vessels operating only in state waters or in other, non-specified fisheries, as defined in paragraphs (a)(4)(iii)(A) and (B) of this section, shall be distributed among components of the NE multispecies fishery based upon each component's share of that stock's ACL available to the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(H) of this section. Each component's share of the ACL overage for a particular stock would be then added to the catch of that stock by each component of the NE multispecies fishery. If the resulting sum of catch of that stock for each component of the fishery exceeds that individual component's share of that stock's ACL specified pursuant to paragraph (a)(4)(iii)(H) of this section, then the AMs specified in paragraphs (a)(5)(i)(A) through (C) of this section shall take effect, as applicable, unless otherwise specified in paragraph (a)(5)(ii)(C) of this section.

(B) *AMs if the overall ACL for a regulated species or ocean pout stock is not exceeded.* If the catch of any stock of regulated species or ocean pout by vessels operating only in state waters or in other, non-specified fisheries, as defined in paragraphs (a)(4)(iii)(A) and (B) of this section, exceeds the sub-component of the ACL for that stock, but the overall ACL for that stock is not exceeded, even after consideration of the catch of that stock by other sub-components of the fishery, then the AMs specified in this paragraph (a)(5)(ii) shall not take effect.

(C) *AMs for GB cod due to excessive catch by non-allocated fisheries.* For any overages of the GB cod ACL in the 2022–2024 fishing years, the amount of overage of the overall ACL for GB cod attributed to catch from vessels operating only in state waters or in other, non-specified fisheries, as defined in paragraphs (a)(4)(iii)(A) and (B) of this section, would be reduced by any underage of the GB cod ACL in the fishing year following the overage, in order to determine the total amount that must be added to the catch by components of the NE multispecies fishery, as specified in paragraph (a)(5)(i)(A) of this section. If the full ACL of GB cod is caught or exceeded in the fishing year following an overage, no reduction to this amount would be made. For example, if in 2023 NMFS determines that 100 mt of GB cod catch by vessels operating only in state waters or in other, non-specified fisheries in fishing year 2022 has contributed to an ACL overage, NMFS would implement the AMs specified in paragraph (a)(5)(ii)(A) of this section at the beginning of fishing year 2024. If 2023 fishing year-end data showed that total catch of GB cod in fishing year 2023 was 25 mt below the 2023 ACL, NMFS would reduce the 100-mt overage amount by that 25-mt amount (down to 75 mt) in an in-season adjustment to the 2024 sub-ACLs, as specified in paragraph (a)(5)(i)(A) of this section.

* * * * *

[FR Doc. 2023–11494 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 104
Wednesday, May 31, 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

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by June 30, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Sanitation SOP's Pathogen Reduction/Hazard Analysis and Critical Control Point (HACCP).

OMB Control Number: 0583–0103.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome-, and properly labeled and packaged. FSIS has established requirements applicable to meat and poultry establishments designed to reduce the occurrence and numbers of pathogenic microorganisms on meat and poultry products, reduce the incidence of foodborne illness associated with the consumption of those products, and provide a new framework for modernization of the current system of meat and poultry inspection.

Need and Use of the Information: FSIS will collect information to ensure that (1) establishments have developed and maintained a standard operating plan for sanitation that is used by inspection personnel in performing monitoring regulations; (2) establishments have developed written procedures outlining specimen collection and handling for *E.coli* process control verification testing; (3) establishments developed written HAACP plans; (4) establishments will keep records for measurements during slaughter and processing, corrective action, verification check results, and related activities that contain the identity of the product, the product code or slaughter production lot, and the date the record was made; (5) establishments may have prerequisite programs that are designed to provide the basic environmental and operating conditions necessary for the production of safe, wholesome food; and (6) establishments maintain and are able to supply upon request the following information concerning the suppliers of source materials; the name, point of contact, and phone number for the establishment supplying the source materials for the lot of ground beef sampled; and the supplier lot numbers, production dates, and other information that would be useful to know about suppliers.

Description of Respondents: Business or other for-profit.

Number of Respondents: 6,087.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Other (daily).

Total Burden Hours: 7,045,283.

Food Safety and Inspection Service

Title: Procedures for the Notification of New Technology and Requests for Waivers.

OMB Control Number: 0583–0127.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). These statutes mandate that FSIS protect the public by ensuring that meat, poultry and egg products are safe, wholesome, unadulterated, and properly labeled and packaged. FSIS established flexible procedures to actively encourage the development and use of new technologies in meat and poultry establishments and egg products plants. These procedures facilitate notification to the Agency of any new technology that is intended for use in meat and poultry establishments and egg products plants so that the Agency can decide whether the new technology requires a pre-use review. A pre-use review often includes an in-plant trail.

Need and Use of the Information: FSIS will collect information to determine if a pre-use review is needed, FSIS will request that the firm submit a protocol for an in-plant trial of the new technology. The firm then must submit a protocol that is designed to collect relevant data to support the use of the new technology. To not collect this information would reduce the effectiveness of the meat, poultry, and egg products inspection program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 210.

Frequency of Responses: Recordkeeping; Reporting: on occasion.

Total Burden Hours: 12,800.

Food Safety and Inspection Service

Title: Nutrition Labeling of Major Cuts of Single-Ingredient Raw Meat or Poultry Products and Ground or Chopped Meat and Poultry Products.

OMB Control Number: 0583–0148.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*) These statutes mandate that FSIS protect the public by verifying that meat and, poultry products are safe, wholesome, and properly labeled and packaged. FSIS requires nutrition labeling of the major cuts of single-ingredients, raw meat and poultry products, unless an exemption applies. FSIS also requires nutrition labels on all ground or chopped meat and poultry products, with or without added seasonings, unless an exemption applies. Further, the nutrition labeling requirements for all ground or chopped meat and poultry products are consistent with the nutrition labeling requirements for multi-ingredient and heat processed products. (9 CFR 381.400(a), 9 CFR 317.300(a), 9 CFR 317.301(a), 9 CFR 381.401(a)).

Need and Use of the Information: FSIS requires nutrition labeling of major cuts of single-ingredient, raw meat and poultry products, all ground or chopped meat and poultry products to ensure that consumers will use this information to make better informed nutrition choices when purchasing these meat and poultry products.

Description of Respondents: Business or other for-profit.

Number of Respondents: 76,439.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 67,861.

Food Safety and Inspection Service

Title: Voluntary Destruction of Imported Meat, Poultry, and Egg Products.

OMB Control Number: 0583–0182.

Summary of Collection: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, and properly labeled and packaged. Imported meat, poultry, and egg products that do not comply with U.S. requirements are not allowed to enter U.S. commerce and are identified as ''U.S. Refused Entry'' product. Inspection Program Personnel (IPP) are required to verify that U.S. refused entry product is stored and segregated from other product at an official import inspection establishment until final disposition occurs, or permission to move the shipment is granted by a FSIS Office of Field Operations (OFO) District Office (DO).

Need and Use of the Information: FSIS IPP uses the information during the observation of the product destruction to verify that the product being destroyed is the same product that was refused entry and that the product is controlled by the import establishment until destruction is completed. The Importer/Broker/Agent completes FSIS Form 9840–4, Voluntary Destruction of Imported Meat (Including Siluriformes), Poultry, and Egg Product, for product that will be destroyed under FSIS supervision.

Description of Respondents: Business or other for-profit.

Number of Respondents: 151.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 17,818.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–11552 Filed 5–30–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket No. RBS–22–BUSINESS–0029]

Notice of Solicitation of Applications for the Rural Energy for America Program for Fiscal Years 2023 and 2024, Correction

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice, correction.

SUMMARY: The Rural Business-Cooperative Service (the Agency) published a Notice of Solicitation of Applications (NOSA) in the **Federal Register** on March 31, 2023, entitled Notice of Solicitation of Applications for the Rural Energy for America Program for Fiscal Years 2023 and 2024 to announce the availability of $1.055 billion in Inflation Reduction Act funds across six quarterly cycles to be obligated by September 30, 2024. The Notice also announced the types of projects that would qualify for a federal grant share not to exceed 50 percent of the project cost, a set-aside for underutilized renewable energy technologies (underutilized technologies), as well as scoring revisions to support Administration priorities. This correction notice is amending the definition of underutilized renewable energy technologies.

FOR FURTHER INFORMATION CONTACT: Jonathan Burns, Program Management Division, Rural Business-Cooperative Service, United States Department of Agriculture, 774–678–7238 or email *CPgrants@usda.gov.*

SUPPLEMENTARY INFORMATION:

Correction

In FR Doc. 2023–06376 of March 31, 2023 (88 FR 19239), on page 19240, in column 3, under Section A.3, the second paragraph that starts with ''For the purpose of this Notice,'' is being replaced with:

For the purpose of this Notice only, underutilized renewable energy technologies (underutilized technologies) are defined as those technologies which make up less than 20 percent of the total grant dollars obligated at the end of the fiscal year, two (2) fiscal years prior to the current year. No single technology may receive more than 50 percent of the total funding available in each fiscal year, excepting years in which all underutilized technology applications have been processed, and applications remain unfunded with funding still available in the set-aside.'' For example, FY 2021 award data will be utilized to determine which technologies are underutilized technologies for the FY 2023 competition.

Karama Neal,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2023–11435 Filed 5–30–23; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

Office of the Secretary

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; The Environmental Questionnaire and Checklist (EQC)

AGENCY: Office of Sustainable Energy and Environmental Programs, 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: Written comments must be submitted on or before July 31, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Kristen Thomas, Associate Director, Office of Sustainable Energy and Environmental Programs, and *PRAcomments@doc.gov.* Please reference OMB Control Number 0608–0028 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 Kristen Thomas, Associate Director, Office of Sustainable Energy and Environmental Programs, *kthomas@doc.gov* or (202) 482–1202.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection. The National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347) and the White House Council on Environmental Quality's (CEQ) Regulations for Implementing NEPA (40 CFR parts 1500–1508) require that Federal agencies complete an environmental analysis for all major Federal actions significantly affecting the environment. Those actions may include a Federal agency's decision to fund non-Federal projects under grants and cooperative agreements, including infrastructure projects. In order to determine NEPA compliance requirements for a project receiving Department of Commerce (DOC) bureau-level funding, DOC must assess information which can only be provided by the applicant for Federal financial assistance (grant).

The Environmental Questionnaire and Checklist (EQC) provides Federal financial assistance applicants and DOC staff with a tool to ensure that the necessary project and environmental information is obtained. The EQC was developed to collect data concerning potential environmental impacts that the applicant for Federal financial assistance possesses and to transmit that information to the Federal reviewer. The EQC allows for a more rapid review of projects and facilitate DOC's evaluation of the potential environmental impacts of a project and level of NEPA documentation required. DOC staff use the information provided in answers to the questionnaire to determine compliance requirements for NEPA and conduct subsequent NEPA analysis as needed. Information provided in the questionnaire may also be used for other regulatory review requirements associated with the proposed project, such as the National Historic Preservation Act.

II. Method of Collection

The primary method of collection will be the internet (electronically). Some supporting documents may be emailed or mailed.

II. Data

OMB Control Number: 0690–0028.

Form Number: CD–593.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Business or other for-profit organizations; individuals or households; not-for-profit institutions; State, local, or Tribal government; and Federal Government.

Estimated Number of Respondents: 1,000.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 3,000.

Estimated Total Annual Cost to Public: $1,200 in mailing costs ($6 × approximately 200 respondents who choose to mail rather than email attachments).

IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–11451 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–NW–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting-Hybrid

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet June 20, 2023, 9:00 a.m., Eastern Standard Time, 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 implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman
2. Opening remarks by the Bureau of Industry and Security
3. Presentations of Papers by the Public
4. Regulations Update
5. Automated Export System Update
6. Working Group Reports

Closed Session

7. 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). 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 June 13, 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 April 24, 2023, pursuant to 5 U.S.C. 1009(d) of the FACA, 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. 2023–11446 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–954]

Certain Magnesia Carbon Bricks From the People's Republic of China: 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 the 38 companies subject to this administrative review of the antidumping duty order on certain magnesia carbon bricks (bricks) from the People's Republic of China (China) are part of the China-wide entity because none filed a separate rate application (SRA) or a separate rate certification (SRC). The period of review (POR) is September 1, 2021, through August 31, 2022. We invite interested parties to comment on these preliminary results.

DATES: Applicable May 31, 2023.

FOR FURTHER INFORMATION CONTACT: 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) 482–5305.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on bricks from China [1] for the POR.[2] On November 3, 2022, in response to a timely request from the Magnesia Carbon Bricks Fair Trade Committee (the petitioner),[3] we initiated an administrative review of the *Order* with respect to 38 companies.[4]

On November 30, 2022, we placed on the record U.S. Customs and Border Protection (CBP) entry data under administrative protective order (APO) for all interested parties with APO access.[5] The deadline for interested parties to submit a no-shipment certification, SRA, or SRC was December 5, 2022.[6] No party submitted a no-shipment certification, SRA, or SRC.

Scope of the Order

The scope of the *Order* includes certain chemically bonded (resin or pitch), magnesia carbon bricks with a magnesia component of at least 70 percent magnesia (MgO) by weight, regardless of the source of raw materials for the MgO, with carbon levels ranging from trace amounts to 30 percent by weight, regardless of enhancements (for example, magnesia carbon bricks can be enhanced with coating, grinding, tar impregnation or coking, high temperature heat treatments, anti-slip treatments or metal casing) and regardless of whether or not antioxidants are present (for example, antioxidants can be added to the mix from trace amounts to 15 percent by weight as various metals, metal alloys, and metal carbides).

Certain magnesia carbon bricks that are subject to the *Order* are currently classifiable under subheadings 6902.10.1000, 6902.10.5000, 6815.91.0000, 6815.99.2000 and 6815.99.4000 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.213.

Preliminary Results of Review

The 38 companies subject to this review did not file no-shipment certifications, SRAs, or SRCs. Thus, Commerce preliminarily determines that these companies have not demonstrated their eligibility for separate rate status. As such, Commerce also preliminarily determines that the companies subject to review are part of the China-wide entity.

In addition, Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative review.[7] Accordingly, the NME entity will not be under review unless Commerce

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[1] *See Certain Magnesia Carbon Bricks from Mexico and the People's Republic of China: Antidumping Duty Orders,* 75 FR 57257 (September 20, 2010) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 87 FR 53719 (September 1, 2022).

[3] *See* Petitioner's Letter, ''Request for Administrative Review,'' dated September 30, 2022.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 66275 (November 3, 2022) (*Initiation Notice*); *see also* the appendix to this notice.

[5] *See* Memorandum, ''Placing Customs Data on the Record,'' dated November 30, 2022.

[6] *See Initiation Notice,* 87 FR 66275–76 (''If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (POR), it must notify Commerce within 30 days of publication of this notice in the **Federal Register**. . . . Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice.''). Thirty calendar days after the *Initiation Notice* published was Saturday, December 3, 2022. Commerce's practice dictates that, where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[7] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Non-Market Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963, 65970 (November 4, 2013).

specifically receives a request for, or self-initiates, a review of the NME entity. In this administrative review, no party requested a review of the China-wide entity and we have not self-initiated a review of the China-wide entity. Because no review of the China-wide entity is being conducted, the China-wide entity's entries are not subject to the review, and the rate applicable to the NME entity is not subject to change as a result of this review. The China-wide entity rate is 236.00 percent.[8]

Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments, filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), within 30 days after the date of publication of these preliminary results of review.[9] ACCESS is available to registered users at *https://access.trade.gov.* Rebuttal briefs, limited to issues raised in the case briefs, must be filed within seven days after the time limit for filing case briefs.[10] Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument a statement of the issue, a brief summary of the argument, and a table of authorities.[11] Note that Commerce has temporarily modified certain portions of its requirements for serving documents containing business proprietary information, until further notice.[12]

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of the date of publication of this notice.[13] 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 the respective case and rebuttal briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held.[14] Commerce intends to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, unless extended, pursuant to section 751(a)(3)(A) of the Act.

[8] *See Order,* 75 FR at 57258.

[9] *See* 19 CFR 351.309(c)(1)(ii).

[10] *See* 19 CFR 351.309(d)(1) and (2); *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) and (d); *see also* 19 CFR 351.303 (for general filing requirements).

[12] *See Temporary Rule,* 85 FR at 41363.

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 310(d).

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, and CBP will assess, antidumping duties on all appropriate entries covered by this review.[15] We intend to instruct CBP to liquidate entries containing subject merchandise exported by the companies under review that we determine in the final results to be part of the China-wide entity at the China-wide entity rate of 236.00 percent.[16]

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 this administrative review 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 review, as provided for by section 751(a)(2)(C) of the Act: (1) for previously-investigated or reviewed Chinese and non-Chinese exporters which are not under review in this segment of the proceeding but which have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (2) 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 the China-wide rate of 236.00 percent; and (3) 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 Chinese exporter(s) that supplied that non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

[15] *See* 19 CFR 351.212(b)(1).

[16] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during 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 countervailing 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, and 19 CFR 351.213(h) and 19 CFR 351.221(b)(4).

Dated: May 23, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

Companies Subject to This Administrative Review

1. Autong Industry Co., Ltd
2. Dandong Xinxing Carbon Co., Ltd
3. Fedmet Resources Corporation
4. Fengchi Imp. and Exp. Co., Ltd
5. Fengchi Imp. and Exp. Co., Ltd. of Haicheng City
6. Fengchi Mining Co., Ltd. of Haicheng City
7. Fengchi Refractories Co., of Haicheng City
8. FRC Global Inc
9. Haicheng Donghe Taidi Refractory Co., Ltd
10. Henan Xintuo Refractory Co., Ltd
11. Liaoning Fucheng Refractories
12. Liaoning Zhongmei High Temperature Material Co., Ltd
13. Liaoning Zhongmei Holding Co., Ltd
14. PRCO America Inc
15. Puyang Refractories Co., Ltd
16. Puyang Refractories Group Co., Ltd
17. Qingdao Wonjin Special Refractory Material Co., Ltd
18. RHI Refractories Liaoning Co., Ltd
19. Shandong Minye Refractory Fibre Co., Ltd
20. Shanxi Xinrong International Trade Co., Ltd
21. Shenglong Refractories Co., Ltd
22. SL Refractories LLC
23. Tangshan Strong Refractories Co., Ltd
24. The Economic Trading Group Of Haicheng Houying Corp. Ltd
25. Tianjin New Century Refractories Co., Ltd
26. Wonjin Refractory Co., Ltd
27. Xinyi New Century Refractories Co., Ltd
28. Yingkou Guangyang Refractories Co., Ltd
29. Yingkou Heping Samwha Minerals, Co., Ltd

30. Yingkou Heping Sanhua Materials Co., Ltd
31. Yingkou Hongyu Wonjin Refractory Material Co., Ltd
32. Yingkou Jiamei Refractories Co., Ltd
33. Yingkou Mei'ao Mining Product Co., Ltd
34. Zhengzhou Rongsheng Refractory Co., Ltd
35. Zibo Fubang Wonjin Refractory Technology Co., Ltd
36. Zibo Hengsen Refractory Co., Ltd
37. Zibo Hitech Material Co., Ltd
38. Zibo Jiuqiang Refractory Co., Ltd

[FR Doc. 2023–11472 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–147]

Paper File Folders From the People's Republic of China: Postponement of Final Determination in the Less-Than-Fair-Value Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is postponing the deadline for issuing the final determination in the less-than-fair-value investigation of paper file folders from the People's Republic of China (China) until September 29, 2023, and is extending the provisional measures from a four-month period to a six-month period.

DATES: Applicable May 31, 2023.

FOR FURTHER INFORMATION CONTACT: Zachariah Hall, AD/CVD Operations VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6261.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the notice of initiation of this investigation on November 8, 2022.[1] The period of investigation is April 1, 2022, through September 30, 2022. On May 17, 2023, Commerce preliminarily determined that paper file folders from China are being, or are likely to be, sold in the United States at less than fair value.[2]

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(b)(2) provide that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner.[3] Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On May 12, 2023, pursuant to 19 CFR 351.210(e), mandatory respondents CRE8 Direct (Ningbo) Co., Ltd. (CRE8 Direct) and Ningbo Guangbo Import & Export Co., Ltd. (Guangbo) requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[4] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce's final determination will be issued no later than 135 days after the date of publication of the *Preliminary Determination.*

Notification to Interested Parties

This notice is issued and published pursuant to section 735(a)(2) of the Act and 19 CFR 351.210(g).

Dated: May 24, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–11474 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Paper File Folders from the People's Republic of China, India, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 87 FR 67441 (November 8, 2022) (*Initiation Notice*).

[2] *See Paper File Folders from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value,* 88 FR 31485 (May 17, 2023) (*Preliminary Determination*).

[3] The petitioner is the Coalition of Domestic Folder Manufacturers. The members of the Coalition of Domestic Folder Manufacturers are: Smead Manufacturing Company, Inc.; and TOPS Products LLC.

[4] *See* CRE8 Direct and Guangbo's Letter, "Request to Extend Final Determination," dated May 12, 2023.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–869, A–570–150, A–428–851, A–421–816, A–580–915, A–583–870, A–489–848, A–412–827]

Tin Mill Products From Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable May 31, 2023.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun (Canada), Emily Halle (the People's Republic of China (China)), George McMahon (Germany), Brittany Bauer (the Netherlands), Fred Baker (the Republic of Korea (Korea)), Jacob Saude (Taiwan), Alice Maldonado (the Republic of Turkey (Turkey)), and Charles DeFilippo (the United Kingdom), AD/CVD Operations, Offices II, V, VI, and VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5760, (202) 482–0176, (202) 482–1167, (202) 482–3860, (202) 482–2924, (202) 482–0981, (202) 482–4682, and (202) 482–3979, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 7, 2023, the U.S. Department of Commerce (Commerce) initiated less-than-fair-value (LTFV) investigations of imports of tin mill products from Canada, China, Germany, the Netherlands, Korea, Taiwan, Turkey, and the United Kingdom.[1] Currently, the preliminary determinations are due no later than June 27, 2023.

[1] *See Tin Mill Products from Canada, the People's Republic of China, Germany, the Netherlands, the Republic of Korea, Taiwan, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations,* 88 FR 9481 (February 14, 2023).

Postponement of Preliminary Determinations

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in an LTFV investigation within 140 days after the date on which Commerce initiated the investigation. However, section 733(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 190 days after the date on which Commerce initiated the investigation if: (A) the petitioner makes a timely request for a postponement; or (B) Commerce concludes that the parties concerned are cooperating, that the investigation is extraordinarily complicated, and that additional time is necessary to make a preliminary determination. Under 19 CFR 351.205(e), the petitioner must submit a request for postponement 25 days or more before the scheduled date of the preliminary determination and must state the reasons for the request. Commerce will grant the request unless it finds compelling reasons to deny the request.

On May 18, 2023, the petitioners [2] submitted a timely request that Commerce postpone the preliminary determinations in the LTFV investigations of imports of tin mill products from Canada, China, Germany, the Netherlands, Korea, Taiwan, Turkey, and the United Kingdom. The petitioners stated that ''{p}ostponement is warranted so that Commerce can evaluate fully the initial questionnaire responses submitted by the mandatory respondents and solicit supplemental information as necessary,'' and the petitioners ''seek postponement of all the antidumping investigations in order to keep them on the same schedule and avoid the need to split the cases at the International Trade Commission.'' [3]

For the reasons stated above and because there are no compelling reasons to deny the request, in accordance with section 733(c)(1)(A) of the Act and 19 CFR 351.205(e), Commerce is postponing the deadline for the preliminary determinations by 50 days (*i.e.,* to 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations in the above-referenced investigations no later than August 16, 2023. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations of these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

[2] The petitioners are Cleveland-Cliffs Inc. and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[3] *See* Petitioners' Letter, ''Request for Postponement of the Preliminary Determinations,'' dated May 18, 2023.

Notification to Interested Parties

This notice is issued and published pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: May 24, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–11475 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) continues to determine that the mandatory respondents, Riverside Plywood Corporation (Riverside) and Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (Jiangsu Senmao), and 18 other producers and/or exporters of multilayered wood flooring (wood flooring) from the People's Republic of China (China), received countervailable subsidies during the period of review (POR) January 1, 2020, through December 31, 2020.

DATES: Applicable May 31, 2023.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or Jonathan Schueler, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5973 or (202) 482–9175, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of this administrative review in the **Federal Register** on December 22, 2022, and invited interested parties to comment.[1] On January 30, 2023, we received case briefs from the following interested parties: Riverside,[2] Jiangsu Senmao, Lumber Liquidators Services, LLC (including various Chinese exporters and producers) (Lumber Liquidators and Foreign Exporters/Producers), the Government of the People's Republic of China (GOC), and the American Manufacturers of Multilayered Wood Flooring (the petitioner).[3] Fine Furniture (Shanghai) Limited and Double F Limited (collectively, Fine Furniture); and Zhejiang Longsen Lumbering Co., Ltd., Huzhou Chenghang Wood Co., Ltd., Hunchun Xingjia Wooden Flooring Inc., Huzhou Fulinmen Imp. & Exp. Co., Ltd., Zhejiang Fuerjia Wooden Co., Ltd, and Dun Hua Sen Tai Wood Co., Ltd, (collectively, CTL Group) submitted letters in lieu of case briefs on January 30, 2023, concurring with the arguments of other respondent parties.[4] On February 13, 2023, we received rebuttal briefs from Riverside, Jiangsu Senmao, and the petitioner.[5] Fine Furniture and Lumber Liquidators and Foreign Exporters/Producers submitted letters in lieu of a rebuttal case brief on February 13, 2023, incorporating the rebuttal comments of other respondent parties.[6] On May 3, 2023, we held a public hearing to discuss the interested parties' comments.[7]

Scope of the Order

The product covered by the *Order* [8] is multilayered wood flooring from China.

[1] *See Multilayered Wood Flooring from the People's Republic of China: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review; 2020,* 87 FR 78644 (December 22, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] Cross-owned affiliates are Baroque Timber Industries (Baroque Timber), Suzhou Times Flooring Co., Ltd., and Zhongshan Lianjia Flooring Co., Ltd.

[3] *See* Petitioner's Letter, ''Case Brief,'' dated January 30, 2023; *see* also GOC's Letter, ''Case Brief,'' dated January 30, 2023; Riverside's Letter, ''Administrative Case Brief,'' dated January 30, 2023; Jiangsu Senmao's Letter, ''Case Brief,'' dated January 30, 2023; and Lumber Liquidators' Letter, ''Case Brief,'' dated January 30, 2023.

[4] *See* Fine Furniture's Letter, ''Letter in Lieu of Case Brief;'' dated January 30, 2023; *see also* CTL Group's Letter, ''Letter in Lieu of Case Brief,'' dated January 30, 2023.

[5] *See* Petitioner's Letter, ''Rebuttal Brief,'' dated February 13, 2023; *see also* Riverside's Letter, ''Rebuttal Brief,'' dated February 13, 2023; and Jiangsu Senmao's Letter, ''Rebuttal Brief,'' dated February 13, 2023.

[6] *See* Fine Furniture's Letter, ''Letter in Lieu of Rebuttal Brief,'' dated February 13, 2023; *see also* Lumber Liquidators and Foreign Exporters/Producers Letter, ''Letter in Lieu of Rebuttal Brief,'' dated February 13, 2023.

[7] *See* Memorandum, ''Scheduling of Public Hearing,'' dated April 17, 2023; *see also* Submission of Neal R. Gross and Co., Transcript of Public Hearing, filed May 10, 2023.

[8] *See Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty*

For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.[9]

Analysis of Comments Received

All issues raised in the parties' briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed is attached to this notice at Appendix I. 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.*

Changes Since the Preliminary Results

Based on our analysis of the case and rebuttal briefs and the evidence on the record, we made certain changes from the *Preliminary Results.* These changes are explained in the Issues and Decision Memorandum.

Methodology

Commerce is conducting this 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, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[10] The Issues and Decision Memorandum contains a full description of the methodology underlying Commerce's conclusions, including any determination that relied upon the use of adverse facts available pursuant to sections 776(a) and (b) of the Act.

Rate for Non-Selected Companies Under Review

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when 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 the all-others rate equal to the weighted average of the countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero or *de minimis* countervailable subsidy rates, and any rates determined entirely on the basis of facts available.

There are 18 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. For these non-selected companies, because the rates calculated for the participating mandatory respondents in this review, Riverside and Jiangsu Senmao, were above *de minimis* and not entirely based on facts available, we calculated a rate by weight-averaging the calculated subsidy rates of Riverside and Jiangsu Senmao using their publicly ranged sales data for exports of subject merchandise to the United States during the POR.[11]

This is the same methodology Commerce applied in the *Preliminary Results* for determining a rate for companies not selected for individual examination. However, due to changes in the calculations for Riverside and Jiangsu Senmao, we revised the non-selected rate accordingly. Consequently, for the 18 non-selected companies for which a review was requested and not rescinded, we are applying an *ad valorem* subsidy rate of 13.04 percent.

Final Results of Administrative Review

We determine the countervailable subsidy rates for the mandatory and non-selected respondents under review for the period of January 1, 2020, through December 31, 2020, are as follows:

Producer/exporter	Subsidy rate (percent)
Riverside Plywood Corporation and its Cross-Owned Affiliates[12]	17.06
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.	3.26
Non-Selected Companies Under Review[13]	13.04

Disclosure

Commerce intends to disclose the calculations and analysis performed for these final 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).

Assessment Rates

Pursuant to 19 CFR 351.212(b)(2), Commerce will determine, and CBP shall assess, countervailing duties on all appropriate entries of subject merchandise in accordance with the final results of this review, for the above-listed companies at the applicable *ad valorem* assessment rates listed. We intend to issue assessment instructions to CBP 35 days after the date of publication of these final results of review. 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 Instructions

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies 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. For all non-reviewed firms subject to the *Order,* we will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit requirements, effective upon publication of these final results, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information

Order, 76 FR 76693 (December 8, 2011) (*Order*); *see also Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 FR 5484 (February 3, 2012) (*Amended Order*); and *Multilayered Wood Flooring from the People's Republic of China: Final Clarification of the Scope of the Antidumping and Countervailing Duty Orders,* 82 FR 27799 (June 19, 2017).

[9] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the 2020 Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[10] *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.

[11] *See* Memorandum, ''Calculation of the Non-Selected Rate for the Final Results,'' dated concurrently with this notice.

[12] Cross-owned affiliates are Baroque Timber (Zhongshan) Industries, Suzhou Times Flooring Co., Ltd., and Zhongshan Lianjia Flooring Co., Ltd.

[13] *See* Appendix II.

disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 23, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Final Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Non-Selected Companies Under Review
V. Period of Review
VI. Subsidies Valuation Information
VII. Changes Since the Preliminary Results
VIII. Use of Facts Otherwise Available
IX. Analysis of Programs
X. Discussion of Comments
Comment 1: Whether to Apply Adverse Facts Available to the Export Buyer's Credit Program
Comment 2: Whether to Apply Adverse Facts Available Regarding the Countervailability of the Provision of Electricity for Less Than Adequate Remuneration
Comment 3: Whether to Apply Adverse Facts Available to Specificity Regarding the Countervailability of the Provision of Inputs for Less Than Adequate Remuneration
Comment 4: Whether Individually-Owned Suppliers Are Government Authorities
Comment 5: Whether Commerce Should Treat Pine Integrated Boards as Veneers
Comment 6: Whether Commerce Should Weight International Tropical Timber Organization Pricing Data Differently for the Wood Input Benchmarks
Comment 7: Whether to Include Certain Harmonized Schedule Subheadings in the Glue, Paint, and Plywood Benchmark Price Calculations
A. Wood Glue and Adhesives Benchmark: Whether to Include 3906.10
B. Paint, Primer, and Stain Benchmark: Whether to Exclude 3208.10; 3208.90; and 3209.90
C. Plywood Benchmark: Whether to Exclude All UN Comtrade Data and Use ITTO Prices for Specific Grades
Comment 8: Whether to Include UN Comtrade Data for China and ASEAN in the Input for Less Than Adequate Remuneration Benchmarks
Comment 9: Whether to Include Domestic ITTO Pricing Data in Tier Two World Market Benchmark Prices
Comment 10: Whether to Rely on Certain Ocean Freight Benchmark Data Used to Calculate the Ocean Freight Benchmarks
Comment 11: Whether to Use the Respondents' Inland Freight Costs for the Inland Freight Benchmark
Comment 12: Whether Commerce Correctly Calculated Baroque Timber's Backboard Veneer Benefit
Comment 13: Whether Commerce Made Ministerial Errors in the Subsidy Rate Calculations Pertaining to Various Provision of Inputs for Less Than Adequate Remuneration Programs
XI. Recommendation

Appendix II—Non-Selected Companies Under Review

1. Benxi Flooring Factory (General Partnership)
2. Dalian Kemian Wood Industry Co., Ltd.
3. Dalian Penghong Floor Products Co., Ltd.
4. Dalian Qianqiu Wooden Product Co., Ltd.
5. Dalian Shumaike Floor Manufacturing Co., Ltd.
6. Dun Hua Sen Tai Wood Co., Ltd.
7. Dunhua Shengda Wood Industry Co., Ltd.
8. Fine Furniture (Shanghai) Limited
9. Fusong Jinlong Wooden Group Co., Ltd.
10. Fusong Jinqiu Wooden Product Co., Ltd.
11. Fusong Qianqiu Wooden Product Co., Ltd.
12. Huzhou Jesonwood Co., Ltd
13. Jiangsu Guyu International Trading Co., Ltd.
14. Jiashan HuiJiaLe Decoration Material Co., Ltd.
15. Kingman Wood Industry Co., Ltd.
16. Metropolitan Hardwood Floors, Inc.
17. Samling Elegant Living Trading (Labuan) Ltd.
18. Zhejiang Fuerjia Wooden Co., Ltd.

[FR Doc. 2023–11473 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD027]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Groundfish Electronic Monitoring Policy Advisory and Technical Advisory Committees (GEMPAC/TAC) will hold an online meeting, which is open to the public.

DATES: The meeting will be held Friday, June 16, 2023, from 9 a.m. to 11 a.m., Pacific Time, or until business for the day is completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements, will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Brett Wiedoff, Staff Officer, Pacific Council; telephone: (503) 820–2424.

SUPPLEMENTARY INFORMATION: The primary purpose of this meeting is for the GEMPAC/TAC to review materials and prepare recommendations for the June 2023 Pacific Council meeting regarding potential changes to the Pacific Council's electronic monitoring program.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: May 25, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–11489 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD022]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 82 South Atlantic Gray Triggerfish Assessment Webinar 3.

SUMMARY: The SEDAR 82 assessment of the South Atlantic stock of gray triggerfish will consist of a data workshop, a series of assessment webinars, and a review workshop. A SEDAR 82 Assessment Webinar 3 is scheduled for June 21, 2023. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR 82 South Atlantic Gray Triggerfish Assessment Webinar 3 is scheduled for June 21, 2023, 1 p.m. until 4 p.m., Eastern. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Registration for the webinar is available by contacting the SEDAR coordinator via email at *Kathleen.Howington@safmc.net.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4371; email: *Kathleen.Howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and State and Federal agencies.

Items for discussion are as follows: Discuss any leftover data issues that were not cleared up during the data process, answer any questions that the analysts have, and introduce/discuss model development and model setup.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: May 25, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–11490 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Solicitation for Applications for Advisory Councils Established Pursuant to the National Marine Sanctuaries Act and Executive Order

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

ACTION: Notice of solicitation.

SUMMARY: Notice is hereby given that ONMS will solicit applications to fill non-governmental seats on its 17 established national marine sanctuary advisory councils and the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council (advisory councils), under the National Marine Sanctuaries Act and the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Executive Order, respectively. Note, the list of 18 established advisory councils in the Contact Information for Each Site section includes the advisory council established for the Proposed Lake Ontario National Marine Sanctuary and the Proposed Hudson Canyon National Marine Sanctuary. Vacant seats, including positions (*i.e.,* primary and alternate), for each of the advisory councils will be advertised differently at each site in accordance with the information provided in this notice. This notice contains web page links and contact information for each site, as well as additional resources on advisory council vacancies and the application process.

DATES: Please visit individual site web pages, or reach out to a site as identified in this notice's **SUPPLEMENTARY INFORMATION** section on Contact Information for Each Site, regarding the timing and advertisement of vacant seats, including positions (*i.e.,* primary or alternate), for each of the advisory councils. Applications will only be accepted in response to current, open vacancies and in accordance with the deadlines and instructions included on each site's website.

ADDRESSES: Vacancies and applications are specific to each site's advisory council. As such, questions about a specific council or vacancy, including questions about advisory council applications, should be directed to a site. Contact Information for Each Site is contained in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: For further information on a particular

advisory council or available seats, please contact the site as identified in this notice's **SUPPLEMENTARY INFORMATION** section on Contact Information for Each Site, below. For general inquiries related to this notice or ONMS advisory councils established pursuant to the National Marine Sanctuaries Act or Executive Order 13178, contact Sage Riddick, Office of National Marine Sanctuaries Protected Area Policy Division, *sage.riddick@noaa.gov,* or at 240–560–3365.

SUPPLEMENTARY INFORMATION: Section 315 of the National Marine Sanctuaries Act (NMSA) (16 U.S.C. 1445a) allows the Secretary of Commerce to establish advisory councils to advise and make recommendations regarding the designation and management of national marine sanctuaries. Executive Order 13178 similarly established a Coral Reef Ecosystem Reserve Council pursuant to the NMSA for the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve. In this **SUPPLEMENTARY INFORMATION** section, NOAA provides details regarding the Office of National Marine Sanctuaries, the role of advisory councils, and contact information for each site.

Office of National Marine Sanctuaries (ONMS)

ONMS serves as the trustee for a network of underwater parks encompassing more than 620,000 square miles of marine and Great Lakes waters from Washington State to the Florida Keys, and from Lake Huron to American Samoa. The network includes a system of 15 national marine sanctuaries and Papahānaumokuākea and Rose Atoll marine national monuments. National marine sanctuaries protect our nation's most vital coastal and marine natural and cultural resources, and through active research, management, and public engagement, sustain healthy environments that are the foundation for thriving communities and stable economies.

One of the many ways ONMS ensures public participation in the designation and management of national marine sanctuaries is through the formation of advisory councils. Advisory councils are community-based advisory groups established to provide advice and recommendations to ONMS on issues including management, science, service, and stewardship; and to serve as liaisons between their constituents in the community and the site. Pursuant to section 315(a) of the National Marine Sanctuaries Act, 16 U.S.C. 1445A(a), advisory councils are exempt from the requirements of the Federal Advisory Committee Act. Additional information on ONMS and its advisory councils can be found at *http://sanctuaries.noaa.gov.*

Advisory Council Membership

Under section 315 of the NMSA, advisory council members may be appointed from among: (1) Persons employed by federal or state agencies with expertise in management of natural resources; (2) members of relevant regional fishery management councils; and (3) representatives of local user groups, conservation and other public interest organizations, scientific organizations, educational organizations, or others interested in the protection and multiple use management of sanctuary resources. For the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council, section 5(f) of Executive Order 13178 (as amended by Executive Order 13196) specifically identifies member and representative categories.

The charter for each advisory council defines the number and type of seats and positions on the council; however, as a general matter, available seats could include: Conservation, education, research, fishing, whale watching, diving and other recreational activities, boating and shipping, tourism, harbors and ports, maritime business, agriculture, maritime heritage, and citizen-at-large.

For each of the advisory councils, applicants are chosen based upon their particular experience in relation to the seat for which they are applying; community and professional affiliations; views regarding the protection and management of marine or Great Lakes resources; and possibly the length of residence in the area affected by the site. Applicants chosen as members or alternates should expect to serve two- or three-year terms, pursuant to the charter of the specific national marine sanctuary advisory council or Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council. More information on advisory council membership and processes, and materials related to the purpose, policies, and operational requirements for advisory councils can be found in the charter for a particular advisory council (*http://sanctuaries.noaa.gov/management/ac/council_charters.html*) and the *National Marine Sanctuary Advisory Council Implementation Handbook* (*https://farallones.noaa.gov/manage/sac_handbook.html*).

Contact Information for Each Site

- Channel Islands National Marine Sanctuary Advisory Council: Channel Islands National Marine Sanctuary, University of California, Santa Barbara, Ocean Science Education Building 514, MC 6155, Santa Barbara, CA 93106; 805–893–6437; *https://channelislands.noaa.gov/sac/council_news.html.*
- Cordell Bank National Marine Sanctuary Advisory Council: Cordell Bank National Marine Sanctuary, P.O. Box 159, Olema, CA 94950; 415–464–5260; *http://cordellbank.noaa.gov/council/applicants.html.*
- Florida Keys National Marine Sanctuary Advisory Council: Florida Keys National Marine Sanctuary, 33 East Quay Road, Key West, FL 33040; 305–809–4700; *https://floridakeys.noaa.gov/sac/recruitment.html.*
- Flower Garden Banks National Marine Sanctuary Advisory Council: Flower Garden Banks National Marine Sanctuary, 4700 Avenue U, Building 216, Galveston, TX 77551; 409–621–5151; *http://flowergarden.noaa.gov/advisorycouncil/recruitment.html.*
- Gray's Reef National Marine Sanctuary Advisory Council: Gray's Reef National Marine Sanctuary, 10 Ocean Science Circle, Savannah, GA 31411; 912–598–2345; *http://graysreef.noaa.gov/management/sac/council_news.html.*
- Greater Farallones National Marine Sanctuary Advisory Council: Greater Farallones National Marine Sanctuary, 991 Marine Drive, The Presidio, San Francisco, CA 94129; 415–561–6622; *https://farallones.noaa.gov/manage/sac_recruitment.html.*
- Hawaiian Islands Humpback Whale National Marine Sanctuary Advisory Council: Hawaiian Islands Humpback Whale National Marine Sanctuary, NOAA Inouye Regional Center, NOS/ONMS/HIHWNMS, 1845 Wasp Boulevard, Building 176, Honolulu, HI 96818; 808–879–2818; *https://hawaiihumpbackwhale.noaa.gov/management/advisory/recruitment.html.*
- Mallows Bay—Potomac River National Marine Sanctuary Advisory Council: Mallows Bay—Potomac River National Marine Sanctuary, NOAA Chesapeake Bay Office, 200 Harry S. Truman Parkway, Room 460, Annapolis, MD 21401; (240) 460–1978; *https://sanctuaries.noaa.gov/mallows-potomac/involved/recruitment.html.*
- Monitor National Marine Sanctuary Advisory Council: Monitor National Marine Sanctuary, 100 Museum Drive, Newport News, VA 23606; 757–599–3122; *https://monitor.noaa.gov/advisory/news.html.*
- Monterey Bay National Marine Sanctuary Advisory Council: Monterey Bay National Marine Sanctuary, 99 Pacific Street, Building 455A, Monterey,

CA 93940; 831–647–4201; *http://montereybay.noaa.gov/sac/recruit.html.*

- National Marine Sanctuary of American Samoa Advisory Council: National Marine Sanctuary of American Samoa, Tauese P.F. Sunia Ocean Center, P.O. Box 4318, Pago Pago, American Samoa 96799; 684–633–6500; *https://americansamoa.noaa.gov/council/recruitment/.*
- Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve Advisory Council: NOAA Inouye Regional Center, NOS/ONMS/PMNM, 1845 Wasp Boulevard, Building 176, Honolulu, HI 96818; 808–725–5800; *http://www.papahanaumokuakea.gov/new-about/council/apply/.*
- Olympic Coast National Marine Sanctuary Advisory Council: Olympic Coast National Marine Sanctuary, 115 East Railroad Avenue, Suite 301, Port Angeles, WA 98362; 360–457–6622; *http://olympiccoast.noaa.gov/involved/sac/recruitment.html.*
- Proposed Lake Ontario Sanctuary Advisory Council; NOAA Office of National Marine Sanctuaries, 4840 South State Road, Ann Arbor, MI 48108; 734–741–2270; *https://sanctuaries.noaa.gov/lake-ontario/advisory/members.html.*
- Proposed Hudson Canyon Sanctuary Advisory Council; NOAA Office of National Marine Sanctuaries, 4840 South State Road, Ann Arbor, MI 48108; 734–741–2270; *https://sanctuaries.noaa.gov/hudson-canyon/involved/advisory-council.html.*
- Stellwagen Bank National Marine Sanctuary Advisory Council: Stellwagen Bank National Marine Sanctuary, 175 Edward Foster Road, Scituate, MA 02066; 781–545–8026; *http://stellwagen.noaa.gov/management/sac/recruitment.html.*
- Thunder Bay National Marine Sanctuary Advisory Council: Thunder Bay National Marine Sanctuary, 500 West Fletcher Street, Alpena, MI 49707; 989–356–8805; *https://thunderbay.noaa.gov/involved/recruitment.html.*
- Wisconsin Shipwreck Coast National Marine Sanctuary Advisory Council, University of Wisconsin Green-Bay, Sheboygan Campus, One University Drive, Sheboygan, WI 53081; 989–766–3359; *https://sanctuaries.noaa.gov/wisconsin/involved/.*

Privacy Act Statement

Authority. The collection of information concerning the solicitation for applications for sanctuary advisory councils is authorized under the National Marine Sanctuaries Act, 16 U.S.C. 1445a, and Executive Order 13178, and in accordance with the Privacy Act of 1974, as amended, (Privacy Act) 5 U.S.C. 552a.

Purposes. The collection of names, contact information, professional information, qualifications, and answers to the application questions is required in order for the Office of National Marine Sanctuaries to evaluate and appoint members to the sanctuary advisory councils. The information collected will be reviewed by NOAA employees, and may also be reviewed by current sanctuary advisory council members as part of the evaluation process.

Routine Uses. NOAA will use the application information for the purposes set forth above. The Privacy Act authorizes disclosure of the collected information for the following purposes: to NOAA staff for work-related purposes; for other purposes as set forth in the Privacy Act; and for routine uses published in one or more of the following Privacy Act System of Records Notices, as applicable: COMMERCE/DEPT–11, Candidates for Membership, Members, and Former Members of Department of Commerce Advisory Committees, available at *https://www.osec.doc.gov/opog/PrivacyAct/SORNs/dept-11.html;* COMMERCE/DEPT–18, Employees Personnel Files Not Covered by Notices of Other Agencies, available at *https://www.osec.doc.gov/opog/PrivacyAct/SORNs/DEPT-18.html;* and OPM/GOVT–1, General Personnel Records, available at *https://www.opm.gov/information-management/privacy-policy/sorn/opm-sorn-govt-1-general-personnel-records.pdf,* which cover certain records regarding Federal employees and may also cover records of individuals who are not Federal employees who, through their service on a sanctuary advisory council, may be considered as volunteers providing gratuitous services to the agency without compensation; and, for individuals who are also members of a Regional Fishery Management Council, COMMERCE/NOAA–13, Personnel, Payroll, Travel, and Attendance Records of the Regional Fishery Management Councils.

Effects of Not Providing Information. Providing the application information is voluntary; however, if the information is not provided, the individual will not be considered for appointment as a member of a sanctuary advisory council.

Consent. By submitting an application to the Office of National Marine Sanctuaries for appointment to a sanctuary advisory council, you are consenting to the use and disclosure of the information for the purposes and routine uses described above. However, if you prefer that your application be reviewed by NOAA employees only and not disclosed to current council members as part of the evaluation process, please contact the sanctuary advisory council coordinator to request internal review only, which will not result in any disadvantage or impact regarding your candidacy, or for any questions regarding this Privacy Act Statement.

Paperwork Reduction Act

ONMS has a valid Office of Management and Budget (OMB) control number (0648–0397) for the collection of public information related to the processing of ONMS national marine sanctuary advisory council applications across the National Marine Sanctuary System. Soliciting applications for sanctuary advisory councils fits within the estimated reporting burden under that control number. See *https://www.reginfo.gov/public/do/PRASearch* (Enter Control Number 0648–0397). Therefore, ONMS will not request an update to the reporting burden certified for OMB control number 0648–0397.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to: Office of National Marine Sanctuaries, 1305 East West Highway, N/NMS, Silver Spring, Maryland 20910.

Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), *44 U.S.C. 3501 et seq.,* unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. The OMB control number is #0648–0397.

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

John Armor,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2023–11559 Filed 5–30–23; 8:45 am]

BILLING CODE 3510–NK–P

CONSUMER FINANCIAL PROTECTION BUREAU

Statement on Enforcement and Supervisory Practices Relating to the Small Business Lending Rule Under the Equal Credit Opportunity Act and Regulation B

AGENCY: Consumer Financial Protection Bureau.

ACTION: Policy guidance.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is publishing a statutorily mandated small business lending rule concurrently with this Policy Guidance. The rule amends Regulation B to implement changes to the Equal Credit Opportunity Act (ECOA) made by section 1071 of the Consumer Financial Protection Act of 2010 (CFPA). This policy guidance informs covered financial institutions that the CFPB intends to focus its supervisory and enforcement activities in connection with the new rule in particular on ensuring that covered lenders do not discourage small business loan applicants from providing responsive data, including responses to lenders' ECOA-mandated demographic data requests.

DATES: This Policy Guidance is applicable August 29, 2023.

FOR FURTHER INFORMATION CONTACT: Vincent Herman, Senior Counsel, Office of Enforcement, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 2010, Congress passed the CFPA. Section 1071 of the CFPA [1] amended ECOA [2] to require that financial institutions collect and report certain data regarding applications for credit for small businesses. The CFPB has now implemented section 1071 by means of a new rule that requires covered lenders to collect, and annually report to the CFPB, certain information from small businesses applying for credit.[3]

Part II.A below outlines core regulatory requirements relating to the rule's prohibition against discouraging applicants from providing responsive information. Lenders covered by the rule violate ECOA if they fail to observe these requirements. Part II.B explains that the Bureau intends for its enforcement and supervisory work in connection with the new rule to focus on covered lenders' compliance with the rule's prohibition against discouraging applicants from providing responsive information.

II. Policy Guidance

A. Relevant Regulatory Requirements

Although the new rule provides a covered lender with considerable discretion in designing its data collection procedures, it requires that collection methods be designed not to have the effect of discouraging applicants from submitting responsive information.[4] The rule also requires that requests for data be prominent to applicants, that applicants can easily respond to such requests, that such requests initially be made prior to notifying an applicant of the lender's decision on the application, and that the time and manner of a lender's collection procedures otherwise serve to obtain responsive information.[5] In general, compliant lenders will seek to maximize the collection of responses from applicants and minimize missing or erroneous data.[6]

Covered lenders must also work to identify and respond to potential indicia of discouragement in their practices, policies, and procedures, including low response rates from applicants to lenders' requests.[7] In general, this includes promptly investigating any indicia of potential discouragement; taking prompt remedial action if discouragement or other improper conduct is identified; monitoring for low response rates and for significant irregularities in any particular response that may indicate steering, improper interference, or other potential discouragement or obstruction of applicants' preferred responses; monitoring response rates and responses by division, location, loan officer, or other factors to ensure that no discouragement or improper conduct is occurring in some parts of a financial institution, even if the financial institution maintains adequate response rates and responses overall; and providing adequate training to loan officers and other persons involved in collecting data from loan applicants.

B. Enforcement and Supervisory Action

The CFPB intends to use its enforcement and supervisory authorities to focus on covered lenders' compliance with these requirements relating to the rule's prohibition against discouraging applicants from submitting responsive information. The CFPB intends to pay particular attention to covered lenders' response rates for data requested from applicants.[8] As appropriate, the CFPB intends to consider how a lender's response rates compare to financial institutions of a similar size, type, geographic reach, or other relevant factors, because, as noted in the rule, low response rates may indicate discouragement or other failure by that lender to maintain proper collection procedures consistent with the rule.[9] Similarly, the CFPB intends to consider, among other things, irregularities in a particular response (for example, very high rates, relative to similar lenders, of an applicant response of ''I do not wish to provide this information'' or similar) because that may indicate steering, improper interference, or other potential discouragement or obstruction of applicants' preferred responses.

III. Regulatory Requirements

This Policy Guidance is a non-binding general statement of policy articulating considerations relevant to the CFPB's exercise of its supervisory and enforcement authority. It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The CFPB has determined that this Policy Guidance does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring Office of Management and Budget approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–07231 Filed 5–30–23; 8:45 am]

BILLING CODE 4810–AM–P

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[1] Public Law 111–203, tit. X, section 1071, 124 Stat. 1376, 2056 (2010), codified at ECOA section 704B, 15 U.S.C. 1691c–2. Section 1071's statutory purposes are to: (1) facilitate enforcement of fair lending laws; and (2) enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

[2] 15 U.S.C. 1691 *et seq.*

[3] The rule requires lenders to seek some data from the applicant, some data from the applicant or appropriate third-party sources at the lender's discretion, and some data internally. This Policy Statement pertains to the collection of data from applicants.

[4] 12 CFR 1002.107(c)(1) and (2)(iii); *see also generally* § 1002.107(c)(2).

[5] 12 CFR 1002.107(c)(1), (2)(i), (ii), and (iv).

[6] Comment 107(c)(2)–1.

[7] 12 CFR 1002.107(c)(3) and (4). Response rates may appropriately be measured as the percentage of covered applications for which the lender obtains some type of response to data requests submitted to applicants. For demographic data subject to the statutory right to refuse, this includes responses of ''I do not wish to provide this information'' or similar, or if an applicant responds that there are no principal owners.

[8] Response rates may be relevant across all applicant-provided data, though they are particularly relevant for the collection of the protected demographic data pursuant to § 1002.107(a)(18) and (19). These inquiries are particularly sensitive and responsive data are especially important for the purposes of the rule.

[9] 12 CFR 1002.107(c)(4).

DEPARTMENT OF EDUCATION

Applications for New Awards; Child Care Access Means Parents in School Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2023 for the Child Care Access Means Parents in School (CCAMPIS) Program, Assistance Listing Number 84.335A. This notice relates to the approved information collection under OMB control number 1840–0737.

DATES:

Applications Available: May 31, 2023.

Deadline for Transmittal of Applications: July 31, 2023.

Deadline for Intergovernmental Review: August 29, 2023.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT:
Harold Wells, U.S. Department of Education, 400 Maryland Avenue SW, 5th Floor, Washington, DC 20202–4260. Telephone: (202) 453–6131. Email: *Harold.Wells@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The CCAMPIS Program supports the participation of low-income parents in postsecondary education by providing campus-based child care services.

Priorities: This notice contains two absolute priorities, one competitive preference priority, and three invitational priorities. In accordance with 34 CFR 75.105(b)(2)(iv), the absolute priorities are from section 419N(d) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1070e(d). The competitive preference priority is from the Secretary's Supplemental Priorities and Definitions for Discretionary Grants Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

Note: Applicants must include in the one-page abstract submitted with the application a statement indicating whether the competitive preference priority is addressed. If the applicant has addressed the competitive preference priority, this information must also be listed on the CCAMPIS Program Profile form.

Absolute Priorities: For FY 2023, and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet both priorities.

These priorities are:

Absolute Priority 1: Projects that are designed to leverage significant local or institutional resources, including in-kind contributions, to support the activities assisted under section 419N of the HEA.

Absolute Priority 2: Projects that are designed to utilize a sliding fee scale for child care services provided under section 419N of the HEA in order to support a high number of low-income parents pursuing postsecondary education at the institution.

Competitive Preference Priority: For FY 2023, and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 5 points to an application, depending on how well the application meets this priority.

This priority is:

Strengthening Cross-Agency Coordination and Community Engagement to Advance Systemic Change (up to 5 points).

Projects that are designed to take a systemic evidence-based approach to improving outcomes for underserved students in coordinating efforts with Federal, State, or local agencies, or community-based organizations that support students, to address child care.

Background: The Department encourages applicants to coordinate with agencies and organizations to leverage funding available through Federal, State, or local governments, or community-based organizations, to support student parents in meeting early learning needs. Applicants could also propose to establish partnerships with other publicly funded child care centers, including Head Start providers, to help student parents on waiting lists access other child care centers with available space. For example, in recent months, partnerships have developed to encourage the establishment of Head Start Centers on community college campuses. Through these partnerships, community colleges will provide free on-campus space and the Head Start centers will provide free childcare to college students.[1]

Invitational Priorities: For FY 2023, and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

Invitational Priority 1: Supporting Students Who Are Single Parents.

Projects that propose to serve children of student-parents who are single parents. An applicant should describe in its application how it will use institutional funds, in addition to child care assistance provided by CCAMPIS funds, to provide resources that will enhance the educational, personal, and financial growth of students who are single parents.

Background: According to the Institute for Women's Policy Research (IWPR), there are nearly 2.1 million single mothers in college today, many of whom are women of color.[2] These mothers face nearly insurmountable odds against finishing their degrees, even as many of them are pursuing higher education in order to lift their families out of poverty. IWPR further notes that only 8 percent of single mothers who start college earn an associate or bachelor's degree within 6 years, compared with about half of women who are not mothers.

IWPR research also finds that supports such as free child care, financial assistance, and social skills training would allow more student parents to graduate. According to the IWPR, offering free child care to a single mother pursuing a bachelor's degree improves success rates for community college students. Free child care may

[1] Inside Higher Ed, "Community Colleges to Get More Head Start Centers." *https://www.insidehighered.com/quicktakes/2023/03/16/community-colleges-get-more-head-start-centers.*

[2] Institute for Women's Policy Research (IWPR) analysis of data from the U.S. Department of Education (September 2017), National Center for Education Statistics. National Postsecondary Student Aid Study and the Integrated Postsecondary Aid Survey (IPEDS). Retrieved from *https://iwpr.org/iwpr-issues/student-parent-success-initiative/single-mothers-in-college-growing-enrollment-financial-challenges-and-the-benefits-of-attainment/.*

allow many student parents to finish school more quickly, meaning they would require fewer years of support and likely spend more years earning higher wages. One recent study shows that students who utilized a campus child care center had triple the on-time graduation rate of student parents who did not use a center.[3]

Invitational Priority 2: Increasing the quality of campus-based child care for low-income student parents.

Applications from institutions that are working to improve the quality of campus-based child care provided to the children of low-income student parents, which include increases in compensation and providing support services for early childhood teachers, using Federal and non-Federal funding as appropriate.

Background: High-quality child care provides benefits to children, their parents, and the economy at large. Research indicates that children who attend high-quality early childhood education programs perform better in school, have higher educational attainment, have better health, and have higher individual and household earnings.[4] [5] These findings indicate that high-quality child care may produce positive intergenerational impacts by affording low-income parents the ability to participate in postsecondary education while setting up their children for future success.

Beyond the core safety and security requirements, systematic efforts to boost quality in early childhood education include the Head Start Program Performance Standards [6] and States' quality rating and improvement systems.[7] An important, measurable dimension of quality in early childhood settings is the nature of relationships and interactions between early childhood staff and children in the care setting. Evidence suggests that stable, attached child-caregiver relationships in the children's earliest years provide a critical foundation for their subsequent healthy development.[8] Research suggests that staff turnover in early childhood settings is associated with children's weaker language and social skill development,[9] and workers experiencing economic stress have a more difficult time fully engaging with children and offering a high-quality learning experience.[10] Evidence also indicates that improvements in compensation and working conditions can significantly reduce turnover and are associated with better care and improved child outcomes.[11] This priority is in keeping with President Biden's Executive Order on Increasing Access to High-Quality Care and Supporting Caregivers, signed April 18, 2023.[12]

Invitational Priority 3: Providing Wraparound Services for Low-Income Parents in Postsecondary Education.

Projects that propose to develop high-impact community engagement strategies and partner with community organizations in order to leverage institutional and community resources to provide wraparound services that address the comprehensive needs of low-income parents in postsecondary education, such as public benefits and additional financial aid to cover textbook costs, transportation costs, mental health services, faculty mentoring, tutoring, peer support groups, and emergency grants.

Background: Poverty reduces a student's opportunity to enter, persist, and complete higher education. Students from low-income backgrounds are more likely to delay enrollment, enroll in college part-time, or drop out.[13]

The novel coronavirus disease 2019 (COVID–19) pandemic caused many students to delay enrollment in college,[14] and colleges and universities struggle to address the financial needs of enrolled students. Financial aid supports such as Pell Grants provide important resources for under-resourced students to access college, but additional supports are needed to ensure students persist and complete their education. Studies in New York and Ohio, for example, show that comprehensive supports such as leadership opportunities, career development, and removal of key financial barriers designed to help community college students stay enrolled and graduate have doubled 3-year graduation rates for those students.[15]

Application Requirements: For FY 2023, and any subsequent year in which we make awards from the list of unfunded applications from this competition, applicants must meet the following application requirements from section 419N(c) of the HEA:

(a) An institution of higher education desiring a grant under this competition must submit an application that—

(1) Demonstrates that the institution is an eligible institution;

(2) Specifies the amount of funds requested;

(3) Demonstrates the need of low-income students (as defined in this notice) at the institution for campus-based child care services by including in the application—

(i) Information regarding student demographics;

(ii) An assessment of child care capacity on or near campus;

(iii) Information regarding the existence of waiting lists for existing child care;

(iv) Information regarding additional needs created by concentrations of poverty or by geographic isolation; and

(v) Other relevant data;

(4) Contains a description of the activities to be assisted, including whether the grant funds will support an existing child care program or a new child care program;

(5) Identifies the resources, including technical expertise and financial support, the institution will draw upon to support the child care program and the participation of low-income students in the program, such as accessing social services funding, using student activity fees to help pay the costs of child care, using resources obtained by meeting the needs of parents who are not low-income students, and accessing foundation, corporate, or other institutional support,

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[3] Stewart, P. ''Campus Child Care Critical in Raising Single Mothers' Graduation Rates.'' Diverse Issues in Higher Education (June 6, 2018). *https://diverseeducation.com/article/117704/.*

[4] U.S. Department of the Treasury. 2021. ''The economics of child care supply in the United States.'' *https://home.treasury.gov/system/files/136/TheEconomics-of-Childcare-Supply-09-14-final.pdf.*

[5] Barr, A., & Gibbs, C. R. (2022). Breaking the Cycle? Intergenerational Effects of an Antipoverty Program in Early Childhood. Journal of Political Economy, 130(12), 3253–3285.

[6] *https://eclkc.ohs.acf.hhs.gov/policy/45-cfr-chap-xiii.*

[7] *https://childcareta.acf.hhs.gov/sites/default/files/public/a_foundation_for_quality.pdf.*

[8] Thresholds in the association between quality of teacher-child interactions and preschool children's school readiness skills—ScienceDirect.

[9] Center- and Program-Level Factors Associated with Turnover in the Early Childhood Education Workforce.

[10] Chapter 20 Pre-School, Day Care, and After-School Care: Who's Minding the Kids?—ScienceDirect.

[11] *https://files.elfsightcdn.com/022b8cb9-839c-4bc2-992e-cefccb8e877e/6de6fd54-e921-4c88-a452-ad7cabccc362.pdf.*

[12] Executive Order on Increasing Access to High-Quality Care and Supporting Caregivers | The White House.

[13] ''Low-income students are dropping out of college this fall in alarming numbers,'' *The Washington Post* (Sept. 16, 2020), *https://www.washingtonpost.com/business/2020/09/16/college-enrollment-down/.*

[14] *https://www.cnbc.com/2021/04/16/college-enrollment-sank-due-to-thecovid-pandemic.html.*

[15] Manpower Demonstration Research Corporation, ''CUNY ASAP Doubles Graduation Rates in New York and Ohio.'' (Feb. 2021). Retrieved February 23, 2021. *https://www.mdrc.org/publication/cuny-asap-doubles-graduation-rates-new-york-city-and-ohio.*

and demonstrate that the use of the resources will not result in increases in student tuition;

(6) Contains an assurance that the institution will meet the child care needs of low-income students through the provision of services, or through a contract for the provision of services;

(7) Describes the extent to which the child care program will coordinate with the institution's early childhood education curriculum, to the extent the curriculum is available, to meet the needs of the students in the early childhood education program at the institution and the needs of the parents and children participating in the child care program assisted under the applicant's project;

(8) In the case of an institution seeking assistance for a new child care program—

(i) Provides a timeline, covering the period from receipt of the grant through the provision of the child care services, delineating the specific steps the institution will take to achieve the goal of providing low-income students with child care services;

(ii) Specifies any measures the institution will take to assist low-income students with child care during the period before the institution provides child care services; and

(iii) Includes a plan for identifying resources needed for the child care services, including space in which to provide child care services, and technical assistance, if necessary;

(9) Contains an assurance that any child care facility assisted under this section will meet the applicable State or local government licensing, certification, approval, or registration requirements; and

(10) Contains a plan for any child care facility assisted under this program to become accredited within 3 years of the date the institution first receives assistance under this program.

Definitions: The definitions of ''low-income student'' and ''early childhood education program'' are from sections 419N and 103 (20 U.S.C. 1003) of the HEA, respectively.

Early childhood education program means—

(1) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 *et seq.*), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(2) A State licensed or regulated child care program; or

(3) A program that—

(i) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(ii) Is—

(I) A State prekindergarten program;

(II) A program authorized under section 619 (20 U.S.C. 1419) or part C of the Individuals with Disabilities Education Act (20 U.S.C. 1431 *et seq.*); or

(III) A program operated by a local educational agency.

Low-income student means a student—

(1) Who is eligible to receive a Federal Pell Grant for the award year for which the determination is made; or

(2) Who would otherwise be eligible to receive a Federal Pell Grant for the award year for which the determination is made, except that the student fails to meet the requirements of—

(i) 20 U.S.C. 1070a(c)(1) because the student is enrolled in a graduate or first professional course of study; or

(ii) 20 U.S.C. 1091(a)(5) because the student is in the United States for a temporary purpose.

Program Authority: 20 U.S.C. 1070e.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) the Supplemental Priorities.

Note: Because there are no program-specific regulations for the CCAMPIS Program, applicants are encouraged to carefully read the authorizing statute: title IV, part A, subpart 7, section 419N of the HEA (20 U.S.C. 1070e).

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $13,600,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Estimated Range of Awards: $150,000 to $1,000,000.

Estimated Average Size of Awards: $500,000.

Maximum Award: The maximum annual amount an applicant may receive under this program for a 12-month budget period is $500,000 or the amount equivalent to the product of $100 multiplied by the institution's total number of Pell Grant recipients in FY 2022, whichever amount is greater. The Department encourages all applicants to consult the Department of HHS' Provider Cost of Quality Calculator while developing award requests. This tool can be found at *https://childcareta.acf.hhs.gov/pcqc.*

Estimated Number of Awards: 27.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education that awarded a total of $250,000 or more of Federal Pell Grant funds during FY 2022 to students enrolled at the institution.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This program is subject to Executive Order

12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program. Please note that, under 34 CFR 79.8(a), we have shortened the standard 60-day intergovernmental review period in order to make awards by the end of FY 2023.

3. *Funding Restrictions:* Funding restrictions are outlined in section 419N(b)(2)(B) of the HEA. We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative, which includes the budget narrative, to no more than 50 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins.
- Double-space all text in the application narrative, and single-space titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a 12-point font.
- Use an easily readable font such as Times New Roman, Courier, Courier New, or Arial.

The recommended 50-page limit does not apply to the Application for Federal Assistance cover sheet (SF 424); the Budget Information Summary form (ED Form 524); the CCAMPIS Program Profile form and the 1-page Project Abstract form; or the assurances and certifications. The recommended page limit also does not apply to a table of contents, which you should include in the application narrative. You must include your complete response to the selection criteria in the application narrative.

We recommend that any application addressing the invitational and competitive preference priorities include no more than three additional pages for each priority.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from section 419N of the HEA and 34 CFR 75.210 and are listed below.

We will award up to 100 points to an application under the selection criteria. An applicant that also chooses to address the competitive preference priority can earn up to 105 total points. The maximum number of points available for each criterion is indicated in parentheses.

(a) *Need for the project.* (up to 24 points)

In determining the need for the proposed project, the Secretary considers the extent to which the applicant demonstrates, in its application, the need for campus-based child care services for low-income students, by including the following (see section 419N(c)(3) of the HEA):

(i) Information regarding student demographics.

(ii) An assessment of child care capacity on or near campus, including information regarding the existence of waiting lists for existing child care.

(iii) Information regarding additional needs created by concentrations of poverty or by geographic isolation.

(iv) Other relevant data.

(b) *Quality of project design.* (up to 36 points)

In determining the quality of the design of the proposed project, the Secretary considers the following:

(i) The extent to which the applicant describes in its application the activities to be assisted, including whether the grant funds will support an existing child care program or a new child care program (see section 419N(c)(4) of the HEA).

(ii) The extent to which the services to be provided by the proposed project are focused on those with greatest needs (see 34 CFR 75.210(d)(3)(xi)).

Note: When describing how the project is focused on those with greatest needs, applicants are encouraged to include, in their assessment of focus on service of those with the greatest needs, the extent to which services are available during all hours that classes are in session, including evenings and weekends, to part-time students, and to students who need only emergency drop-in child care in the event that regularly scheduled child care is unexpectedly unavailable.

(iii) The likely impact of the services to be provided by the proposed project on the intended recipients of those services (see 34 CFR 75.210(d)(3)(iv)).

(iv) The extent to which the application includes an assurance that the institution will meet the child care needs of low-income students through the provision of services, or through a contract for the provision of services (see section 419N(c)(6) of the HEA).

(v) The extent to which the child care program will coordinate with the institution's early childhood education curriculum, to the extent the curriculum is available, to meet the needs of the students in the early childhood education program at the institution, and the needs of the parents and children participating in the child care program assisted under section 419N of the HEA (see section 419N(c)(7) of the HEA).

(vi) The extent to which the proposed project encourages parental involvement (see 34 CFR 75.210(c)(2)(xix)).

(vii) If the applicant is seeking assistance for a new child care program (see section 419N(c)(8) of the HEA)—

(1) The extent to which the applicant's timeline, covering the period from receipt of the grant through the provision of the child care services, delineates the specific steps the institution will take to achieve the goal of providing low-income students with child care services;

(2) The extent to which the applicant specifies any measures the institution will take to assist low-income students with child care during the period before the institution provides child care services; and

(3) The extent to which the application includes a plan for identifying resources needed for the child care services, including space in which to provide child care services and technical assistance if necessary.

Note: The maximum available points for this selection criterion will be divided equally, for applications that seek assistance to support existing programs, among factors (i)–(vi), and, for applications that seek assistance to support new programs, among factors (i)–(vii).

(c) *Quality of management plan.* (up to 21 points)

In determining the quality of the management plan for the proposed project, the Secretary considers the following:

(i) The extent to which the application identifies the resources, including technical expertise and financial support, the institution will draw upon to support the child care program and the participation of low-income students in the program, such as accessing social services funding, using student activity fees to help pay the costs of child care, using resources obtained by meeting the needs of parents who are not low-income students, and accessing foundation, corporate or other institutional support, and demonstrates that the use of the resources will not result in increases in student tuition (see section 419N(c)(5) of the HEA).

(ii) The qualifications, including relevant training and experience, of key project personnel (see 34 CFR 75.210(e)(3)(ii)).

(iii) The adequacy of the management plan to achieve the objectives of the

proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks (see 34 CFR 75.210(g)(2)(i)).

(d) *Quality of project evaluation.* (up to 12 points)

In determining the quality of the project evaluation, the Secretary considers the following:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project (see 34 CFR 75.210(h)(2)(i)).

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible (see 34 CFR 75.210(h)(2)(iv)).

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes (see 34 CFR 75.210(h)(2)(vi)).

(e) *Adequacy of resources.* (up to 7 points)

In determining the adequacy of resources for the proposed project, the Secretary considers the following:

(i) The extent to which the budget is adequate to support the proposed project (see 34 CFR 75.210(f)(2)(iii)).

(ii) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits (see 34 CFR 75.210(f)(2)(v)).

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For this competition, a panel of non-Federal reviewers will review each application in accordance with the selection criteria. The individual scores of the reviewers will be added and the sum divided by the number of reviewers to determine the peer review score received in the review process.

If there are insufficient funds for all applications with the same total scores, the Secretary will choose among the tied applications by selecting the institution with the largest number of Pell Grant recipients.

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we will notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant

deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* The success of the CCAMPIS Program will be measured by the postsecondary persistence and degree completion rates of the CCAMPIS Program participants. All CCAMPIS Program grantees will be required to submit an annual performance report documenting the persistence and degree attainment of their participants. Although students may choose to use child care services at different points in their college enrollment, the goal is to measure the outcomes of student-parents based on their completion of their program within 150 percent or 200 percent of the published program length. The cohort model of evaluation will track the level of utilization by a student-parent throughout their enrollment at the institution and will provide results based on the long-term academic success of the student-parent. The Department will aggregate the data provided in the annual performance reports from all grantees to determine the accomplishment level. The CCAMPIS reporting data collection is moving toward a semester-to-semester cohort model. This will not increase public reporting burden as CCAMPIS grantees are gathering and maintaining the data needed in completing and reviewing the collection of information currently.

6. *Continuation Awards:* In making a continuation grant under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Nasser H. Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2023–11469 Filed 5–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Activities for Underserved Populations

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2023 for Activities for Underserved Populations Program, Assistance Listing Number 84.315C, to make awards to minority entities and Indian Tribes to conduct research, training and technical assistance, and related activities to improve services under the Rehabilitation Act of 1973, as amended (Rehabilitation Act), especially services provided to underserved populations. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications available: May 31, 2023.

Deadline for transmittal of applications: July 21, 2023.

Date of pre-application meeting: On the date this notice is published in the **Federal Register**, the Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation specifically about Activities for Underserved Populations at *https://ncrtm.ed.gov/grant-info.* OSERS will conduct a pre-application conference call on June 6, 2023 at 2:00 p.m. Eastern Time specific to this competition to respond to questions. Information about the pre-application conference call will be available at *https://ncrtm.ed.gov/grant-info.* OSERS invites you to send questions to *315C@ed.gov* in advance of the pre-application conference call. A summary of questions and responses will be available at *https://ncrtm.ed.gov/grant-info* within six business days after the pre-application conference call.

Deadline for intergovernmental review: September 28, 2023.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: Kristen Rhinehart-Fernandez, U.S. Department of Education, 400 Maryland

Avenue SW, Room 5076, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–6103. Email: *315C@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: A purpose of the Activities for Underserved Populations program is to improve the quality, access, and delivery of services and the outcomes of services provided under the Rehabilitation Act, especially services provided to individuals with disabilities from underserved backgrounds, and to increase the capacity of minority entities and Indian Tribes to participate in activities funded under the Rehabilitation Act.

Priority: This priority is from the notice of final priority and definition (NFP) published elsewhere in this issue of the **Federal Register**.

Absolute Priority: For FY 2023, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

The priority is:

Improving the Delivery of Vocational Rehabilitation Services to, and the Employment Outcomes of, Individuals with Disabilities from Underserved Populations.

Under this priority, the Department provides funding for a cooperative agreement for a minority entity or an Indian Tribe to provide training and technical assistance to a minimum range of 5 to 15 State vocational rehabilitation (VR) agencies (Combined, General, or Agencies for the Blind) over a five-year period of performance so that the agencies are equipped to serve as role models for diversity, equity, inclusion, and accessibility in the workforce system by implementing policies, practices, and service delivery approaches that are designed to contribute to increasing competitive integrated employment outcomes for individuals with disabilities from underserved populations. Further, the grantee must contribute to VR research and pedagogical practices that promote access to approaches that are racially, ethnically, culturally, and linguistically inclusive.

During the first year of the project the grantee will focus on developing training and technical assistance material and gathering input and feedback from a diverse group of stakeholders including the Rehabilitation Services Administration (RSA), State VR agencies, and other relevant partners. During the period of performance, the grantee must enter into agreements with the State VR agencies receiving training and technical assistance. Each agreement must: specify the level of involvement from VR agency leadership and personnel and include an assurance that the VR agency is committed to sustainable systems change across the organization for improving delivery of services to underserved populations; explain how data will be collected and shared; identify training and technical assistance needs, intervention strategies, and implementation timelines; and describe how outcomes will be measured. The grantee must have a minimum of two agreements in place by the end of the first year of the grant.

Application Requirements

To be considered for funding under this priority, applicants must, at a minimum, propose a project that will conduct the following activities in a culturally appropriate manner. The Department encourages innovative approaches to meet this requirement. To meet this requirement, applicants must—

(a) Demonstrate, in the narrative section of the application under ''Significance of the Proposed Project,'' an understanding of the inequities and challenges experienced by individuals with disabilities from underserved populations determined eligible to receive VR services. To meet this requirement, applicants must—

(1) Present information and relevant data about the disparities that exist with respect to VR services and employment outcomes for underserved populations; and

(2) Describe how the project proposes to improve VR services for, and competitive integrated employment outcomes of, underserved populations.

(b) Demonstrate, in the narrative section of the application under ''Quality of Project Design,'' how the project will address inequities and challenges experienced by underserved populations determined eligible to receive VR services. To meet this requirement, applicants must—

(1) Demonstrate knowledge and experience working with individuals with disabilities from underserved populations;

(2) Incorporate into the project design current research and promising and evidence-based practices (EBPs),[1] research about adult learning principles and implementation science, and relevant findings, recommendations, and relevant strategies identified by the Targeted Communities project[2] to overcome barriers to competitive integrated employment and VR participation for individuals with disabilities from underserved populations;

(3) Detail how the project will collect and examine data, including from the RSA–911 and other relevant sources, from a minimum range of 5 to 15 State VR agencies regarding VR applicants, VR-eligible individuals, and VR participants by race/ethnicity by—

(i) Exploring patterns, changes, or shifts in demographics for individuals with disabilities from underserved populations;

(ii) Exploring data, by race/ethnicity, from each State VR agency regarding VR applicants to identify opportunities for increased outreach to and referral of individuals with disabilities from underserved populations to VR services;

(iii) Examining data, by race/ethnicity, from each State VR agency regarding selected VR services and competitive integrated employment outcomes at exit to identify inconsistencies or gaps in the provision of services;

(iv) Examining data from each State VR agency to identify reasons for successful and unsuccessful closures between VR program participants from underserved populations and VR program participants who are not from underserved populations; and

(v) Reviewing each State VR agency's service delivery model from eligibility determination to exit; and

(4) Present approaches for how the information and data described above will be used to inform strategies to improve the delivery of services to individuals with disabilities from underserved populations for each of the identified State VR agencies. For example, applicants may consider conducting a needs assessment and asset map for each of the identified State VR agencies to identify existing programs and services and businesses and philanthropic organizations in the community, as well as potential gaps

[1] For purposes of these requirements, ''evidence-based practices'' (EBPs) means, at a minimum, demonstrating a rationale (as defined in 34 CFR 77.1) based on high-quality research findings or positive evaluation that such activity, strategy, or intervention is likely to improve student outcomes or other relevant outcomes.

[2] Final Report from the Vocational Rehabilitation Technical Assistance Center for Targeted Communities (Project E3) (PR/Award #H264F150003) *https://ncrtm.ed.gov/library/detail/vocational-rehabilitation-technical-assistance-center-targeted-communities-project* and project website: *https://projecte3.com/.*

and opportunities for collaboration, to support individuals with disabilities from underserved populations in successfully obtaining competitive integrated employment. Applicants may also consider designing a long-term data collection tool and provide analytical support and training to the identified State VR agencies to identify additional data elements not captured in the RSA–911 or other case management systems to continually assess the quality of services and outcomes for individuals with disabilities from underserved populations and individuals with disabilities not from underserved populations.

(c) Demonstrate, in the narrative section of the application under ''Quality of Project Services,'' how the project will be designed so that policies, practices, and service delivery approaches will contribute to increased competitive integrated employment outcomes for individuals with disabilities from underserved populations. To meet this requirement, applicants must—

(1) Propose training and technical assistance activities that will be offered to the identified State VR agencies. Training and technical assistance activities will be further developed during the first year of the grant and described in the agreements with the identified State VR agencies based on needs and analysis of data. Training and technical assistance activities may include, but are not limited to, (i) assisting in State VR agency coordination and cross-agency partnerships with State and local agencies and community-based organizations, workforce programs, educational institutions, and other relevant local community agencies and organizations (*i.e.,* agencies and organizations that provide services and supports related to mental health, substance use, behavioral health, intellectual developmental disabilities, and other areas of need such as housing, food, transportation, and healthcare) to strengthen outreach and awareness about VR programs and services, build trust between State VR agency counselors and individuals with disabilities from underserved populations, and connect individuals with disabilities from underserved populations determined to be VR eligible with necessary supports to successfully obtain competitive integrated employment; (ii) reviewing policies, practices, and procedures from the identified State VR agencies and providing recommendations to help ensure they are culturally appropriate and implemented in an appropriate manner; (iii) developing strategies to strengthen diversity in the VR workforce (*e.g.,* reviewing hiring practices from the identified State VR agencies and identifying strategies that expand outreach to VR counselors from underserved populations and mentoring and coaching activities for new and existing VR counselors and paraprofessionals, human resource and professional development specialists, and VR management and leadership personnel from underserved populations); and (iv) any other activity that improves understanding, responsiveness, and delivery of services to, and competitive integrated employment outcomes for, individuals with disabilities from underserved populations;

(2) Detail how those activities will incorporate relevant strategies and promising and effective practices identified by the Targeted Communities Project and other EBPs or related sources to the extent possible;

(3) Explain how training and technical assistance activities will be of high quality and sufficient intensity and duration to achieve the intended outcomes of the project;

(4) Describe how remote learning [3] opportunities will be incorporated into the project. Remote learning opportunities should offer experiences that advance engagement and implementation (*e.g.,* synchronous and asynchronous professional learning, professional learning networks or communities, and coaching), which could also be incorporated into Rehabilitation Counseling programs, as well as other training and professional development activities designed for the VR workforce, as appropriate. The remote learning environment must be accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act;

(5) Describe their knowledge, skills, and experience to support the training and technical assistance activities described above;

(6) Describe how the project will contribute to VR research and pedagogical practices that promote access to approaches that are racially, ethnically, culturally, and linguistically inclusive. To meet this requirement, applicants must describe how they will—

(i) Disseminate to all State VR agencies, RSA-funded Rehabilitation Long-Term Training projects and technical assistance centers, Department-funded programs, and Federal partners, as applicable, training and technical assistance material, analysis of data collected, evidence-based and promising practices, and lessons learned;

(ii) Develop products, such as toolkits, guides, manuals, webinars, and communities of learning, for instructors, facilitators, State VR agency directors, and human resource and professional development specialists to facilitate the implementation of training and technical assistance material in curriculum and relevant training and development activities; and

(iii) Gather input and feedback from a diverse group of stakeholders and subject matter experts, including RSA, State VR agencies, and other relevant partners, throughout the project to inform the development and delivery of the material described above.

(d) In the narrative section of the application under ''Quality of the Project Evaluation,'' include an evaluation plan for the project. The evaluation plan must describe—

(1) Clear and measurable outcomes;

(2) Approaches for measuring the effectiveness of the intervention strategies identified in the agreements, including standards and targets for measuring knowledge, skills, and abilities of State VR agency personnel before and after completion of training activities. To address this requirement, applicants must provide an approach for determining—

(i) The most effective practices in improving the delivery of services to individuals with disabilities from underserved populations and the data that demonstrate the effectiveness of the practices; and

(ii) The most effective practices in creating a culture of systems change within the State VR agency and the data that demonstrate the effectiveness of the practices;

(3) Methodologies, including instruments, data collection methods, and analyses, that will be used to evaluate the project and how the methods of evaluation will produce quantitative and qualitative data to demonstrate whether the project activities achieved their intended outcomes;

(4) How the evaluation will be coordinated, implemented, and revised, as needed, during the project. The applicant must designate at least one individual with sufficient dedicated time, demonstrated experience in

[3] ''Remote learning'' means programming where at least part of the learning occurs away from the physical building in a manner that addresses a learner's educational needs. Remote learning may include online, hybrid/blended learning, or non-technology-based learning (*e.g.,* lab kits, project supplies, paper packets).

evaluation, and knowledge of the project to coordinate and conduct the evaluation. This may include, but is not limited to, making revisions to reflect any changes or clarifications, as needed, to the model and to the evaluation design and instrumentation with the logic model (*e.g.,* designing instruments and developing quantitative or qualitative data collections that permit collecting of progress data and assessing project outcomes);

(5) How evaluation results will be used to improve delivery of services to VR program participants from underserved populations from eligibility determination to exit. To address this requirement, applicants must provide an approach to gather input and feedback that includes the experiences of VR program participants from underserved populations. Applicants may consider voluntary focus groups, use of a unique identifier, or another approach that adheres to consumer confidentiality requirements in 34 CFR 361.38; and

(6) A process for gathering feedback from the identified State VR agencies for continuous improvement throughout years two, three, four, and five of the project.

(e) Demonstrate, in the narrative section of the application under ''Quality of the Management Plan,'' how applicants will ensure that—

(1) The project's intended outcomes, including the evaluation, will be achieved on time and within budget through—

(i) Clearly defined responsibilities of key project personnel, subawards, and contracts, as applicable;

(ii) Procedures to track and ensure completion of the action steps, timelines, and milestones established for key project activities, requirements, and deliverables;

(iii) Internal monitoring processes to ensure that the project is being implemented in accordance with the established application and management plan; and

(iv) Internal financial management controls to increase efficiency and cost-effectiveness, including by reducing waste or achieving better outcomes, and how the applicant will ensure accurate and timely obligations, drawdowns, and reporting of grant funds, as well as monitoring subawards as applicable, in accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR part 200 and the terms and conditions of the Federal award;

(2) The allocation of key project personnel, subawards, as applicable, and levels of effort of key personnel are appropriate and adequate to achieve the project's intended outcomes;

(3) The products and services are of high quality, relevance, and usefulness, in both content and delivery and are accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act, as applicable;

(4) The proposed project will benefit from a diversity of perspectives; and

(5) Projects will be awarded and operated in a manner consistent with nondiscrimination requirements contained in the Federal civil rights laws.

(f) Include the following:

(1) In Appendix A, personnel-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative;

(2) In Appendix A, a logic model [4] that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project;

(3) An assurance to maintain a high-quality website, with an easy-to-navigate design that is accessible to individuals with disabilities in accordance with section 504 of the Rehabilitation Act, as applicable; and

(4) An assurance that training and technical assistance materials such as outreach, training curricula, presentations, reports, outcomes, and other relevant information will be submitted to RSA's National Clearinghouse of Rehabilitation Training Materials (NCRTM) (*https://ncrtm.ed.gov/*) at least 90 days before the end of the final budget period.

Definition: The following definition is from the NFP.

Underserved populations means Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color.

Program Authority: 29 U.S.C. 718(b)(2)(B).

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84 and 86. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The NFP.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $910,490.

Note: This amount will be reduced by up to $9,000 in the first year of the award to support peer review for this competition.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Minority entities and Indian Tribes. As defined in section 21(b)(5)(B) of the Rehabilitation Act, ''minority entity'' means a historically Black college or university, a Hispanic-serving institution of higher education, an American Indian Tribal college or university, or another institution of higher education whose minority student enrollment is at least 50 percent. The definition of ''Indian Tribe'' in section 7(19)(B) of the Rehabilitation Act is ''any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act) and a tribal organization (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(l)).''

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on

[4] ''Logic model'' (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants to directly carry out project activities described in its application to the following types of entities: Indian Tribes, institutions of higher education, and public and private nonprofit organizations. The grantee may award subgrants to entities it has identified in an approved application. Under 34 CFR 75.708(e), a grantee may contract for supplies, equipment, and other services in accordance with 2 CFR 200.317–200.326, Procurement Standards.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/d/2022-26554,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 50 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots. Applicants are expected to make the contents of their application accessible for individuals with disabilities to the maximum extent possible. Tutorials and resources for making documents accessible are available for free on RSA's National Clearinghouse for Rehabilitation Training Materials at *https://ncrtm.ed.gov/accessibility-resources.*

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210, have a maximum score of 100 points, and are as follows:

(a) Significance. (10 points)

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The likelihood that the proposed project will result in system change or improvement; and

(ii) The potential contribution of the proposed project to increase knowledge or understanding of rehabilitation problems, issues, or effective strategies.

(b) Quality of the project design. (20 points)

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable;

(ii) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project;

(iii) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance;

(iv) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice;

(v) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population; and

(vi) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(c) Quality of project services. (25 points)

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services;

(ii) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services; and

(iii) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies.

(d) Quality of the project evaluation. (25 points)

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes (as defined in 34 CFR 77.1(c));

(ii) The extent to which the methods of evaluation will, if well implemented, produce promising evidence (as defined in 34 CFR 77.1(c)) about the project's effectiveness;

(iii) The extent to which the methods of evaluation include the use of objective performance measures that are

clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible;

(iv) The qualifications, including relevant training, experience, and independence, of the evaluator; and

(v) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

(e) Quality of the management plan. (20 points)

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestone for accomplishing project tasks;

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project; and

(iii) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This

does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may approve a data collection period for a grant for a period of up to 72 months after the end of the project period and provide funding, separate from this funding opportunity, for the data collection period for the sole purpose of collecting, analyzing, and reporting performance measurement data regarding the project.

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, we have established the following program performance measures:

Measure 1: Based on the State VR agencies that received training and technical assistance, the number and percentage of individuals with disabilities from underserved populations determined eligible to receive VR services compared to all individuals with disabilities that are not from underserved populations and determined eligible to receive VR services.

Measure 2: Based on the State VR agencies that received training and technical assistance, the number and percentage of individuals with disabilities from underserved populations that received VR services compared to all individuals with disabilities that are not from underserved populations that received VR services.

Measure 3: Based on the State VR agencies that received training and technical assistance, the number and percentage of individuals with disabilities from underserved populations employed at the time of exit compared to all individuals with disabilities that are not from underserved populations and employed at the time of exit.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register***,* in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–11600 Filed 5–30–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: Office of Infrastructure, U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995.

DATES: Comments regarding this proposed information collection must be received on or before July 31, 2023. If you anticipate difficulty in submitting comments within that period, contact the person listed in **ADDRESSES** as soon as possible.

ADDRESSES: Written comments may be sent to Ira Birnbaum, DOE/Infrastructure/FEMP, 1000 Independence Avenue SW, Washington, DC 20585 or by email at *Ira.Birnbaum@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Ira Birnbaum, DOE/Infrastructure/FEMP, 1000 Independence Avenue SW, Washington, DC 20585, *Ira.Birnbaum@hq.doe.gov,* (202) 287–1869.

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains: (1) *OMB No.:* New; (2) *Information Collection Request Title:* DOE Qualified List of Energy Service Companies; (3) *Type of Request:* New; (4) *Purpose:* The ESPC statute (42 U.S.C. 8287(b)(2)(A)–(B)) requires the Secretary of Energy to establish and maintain a list of firms qualified to perform energy efficiency and renewable energy

projects specifically using the energy savings performance contracts (ESPCs) project financing methodology. The forms subject to this Paperwork Reduction Act submission constitute the application and recertification statement for inclusion on the DOE Qualified List of Energy Service Companies (ESCOs). The ESCOs on the DOE Qualified List constitute the group of firms that are eligible for contract award under 10 CFR 436.32. ESCOs that would like to bid on ESPC contracts for the Federal government must apply to the DOE Qualified List of ESCOs and complete the annual recertification statement; (5) *Annual Estimated Number of Respondents:* 120; (6) *Annual Estimated Number of Total Responses:* 120; (7) *Annual Estimated Number of Burden Hours:* 492; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $59,220.

Statutory Authority: The ESPC statute (42 U.S.C. 8287(b)(2)(A)–(B)) requires the Secretary of Energy to establish and maintain a list of firms qualified to perform energy efficiency and renewable energy projects specifically using the energy savings performance contracts (ESPCs) project financing methodology.

Signing Authority: This document of the Department of Energy was signed on May 23, 2023, by Mary Sotos, Director, Federal Energy Management Program, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 25, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–11484 Filed 5–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice.

SUMMARY: The Department of Energy (DOE) submitted an information collection request for extension as required by the Paperwork Reduction Act of 1995. The information collection requests a three-year extension without changes to Form FE–746R, ''Natural Gas Imports and Exports,'' OMB Control Number 1901–0294. The information collection request supports DOE's Office of Fossil Energy & Carbon Management (FECM) in gathering critical information on the U.S. trade in natural gas, including liquefied natural gas (LNG). The data are used to monitor natural gas trade, assess the adequacy of U.S. energy resources to meet near and longer-term domestic demands, and support various market and regulatory analyses done by FECM.

DATES: Comments on this information collection must be received no later than June 30, 2023. 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: If you need additional information, contact Tu Tran, Office of Fossil Energy and Carbon Management, telephone (202) 235–5873, or by email at *Tu.tran@hq.doe.gov.* The forms and instructions are available on *https://www.energy.gov/fecm/guidelines-filing-monthly-reports.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1901–0294;

(2) *Information Collection Request Title:* ''Natural Gas Imports and Exports;''

(3) *Type of Request:* Three-year extension without changes;

(4) *Purpose:* The Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*) and the DOE Organization Act (42 U.S.C. 7101 *et seq.*) require EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. Additionally, FECM is authorized to regulate natural gas imports and exports, including LNG, under section 3 of the Natural Gas Act (15 U.S.C. 717b). In order to carry out its statutory responsibilities, FECM requires anyone seeking to import or export natural gas to file an application and provide basic information on the scope and nature of the proposed import/export activity. Additionally, once an importer or exporter receives an authorization from FECM, they are required to submit monthly reports of all import and/or export transactions.

Specifically, the Form FE–746R requires the reporting of the following information by every holder of a DOE import or export authorization: the name of importer/exporter; country of origin/destination; international point of entry/exit; name of supplier; volume; price; transporters; U.S. geographic market(s) served; and duration of supply contract on a monthly basis. This information is used by both EIA and FECM to assess the adequacy of energy resources to meet near and longer-term domestic demands, and by FECM in the management of its natural gas regulatory program.

Data collected on Form FE–746R are published in reports made available on DOE's website at *https://www.energy.gov/fecm/regulation,* and in EIA official statistics on U.S. natural gas supply and disposition. In addition, the data are used to monitor the North American natural gas trade, which, in turn, enables the Federal government to perform market and regulatory analyses; improve the capability of industry and the government to respond to any future energy-related supply problems; and keep the general public informed of international natural gas trade.

(5) *Annual Estimated Number of Respondents:* 241;

(6) *Annual Estimated Number of Total Responses:* 2,892;

(7) *Annual Estimated Number of Burden Hours:* 8,676;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* The cost of the burden hours is estimated to be $757,935. DOE estimates that respondents will have no additional costs associated with the surveys other than the burden hours and the maintenance of the information during the normal course of business.

Statutory Authority: 15 U.S.C. 772(b), 42 U.S.C. 7101 *et seq.,* 15 U.S.C. 717b.

Signed in Washington, DC, on May 24, 2023.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2023–11483 Filed 5–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA invites public comment on the proposed collection of information, EIA–914, *Monthly Crude Oil and Lease Condensate, and Natural Gas Production Report,* as required under the Paperwork Reduction Act of 1995. EIA is requesting a three-year extension with changes of Form EIA–914 *Monthly Crude Oil and Lease Condensate, and Natural Gas Production Report.* The survey collects monthly data on production and sales of natural gas, and crude oil and lease condensate. The data provide useful information on the nation's production and sales of crude oil and natural gas.

DATES: EIA must receive all comments on this proposed information collection no later than July 31, 2023. If you anticipate any difficulty in submitting comments within that period, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice as soon as possible.

ADDRESSES: Submit comments electronically to *Petroleum and Other Liquids Data* at *eiainfopetroleum@eia.gov* with 60-day Federal Register Notice: Form EIA–914 in the subject line, or mail comments to: Katie Lewis, U.S. Energy Information Administration, EI–23, 1000 Independence Avenue SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: If you need additional information, please contact: Katie Lewis, U.S. Energy Information Administration, at (202)586–5138, or by email at *katie.lewis@eia.gov.* The form and instructions are available on EIA's website at: *https://www.eia.gov/survey/#eia-914.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1905–0205;

(2) *Information Collection Request Title:* Monthly Crude Oil and Lease Condensate, and Natural Gas Production Report;

(3) *Type of Request:* Thee-year extension with changes; revision of the currently approved Form EIA–914.

(4) *Purpose:* Form EIA–914 *Monthly Crude Oil and Lease Condensate, and Natural Gas Production Report* collects monthly data on natural gas production, and crude oil and lease condensate production, and crude oil and lease condensate sales by API gravity category in 22 state/areas (Alabama, Arkansas, California (including State Offshore), Colorado, Federal Offshore Gulf of Mexico, Federal Offshore Pacific, Kansas, Louisiana (including State Offshore), Michigan, Mississippi (including State Offshore), Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas (including State Offshore), Utah, Virginia, West Virginia, Wyoming, and Other States (defined as all remaining states, except Alaska)). The data appear in the *Monthly Crude Oil and Lease Condensate, and Natural Gas Production Report* on EIA's website and in the EIA publications; *Monthly Energy Review, Petroleum Supply Annual* volumes, *Petroleum Supply Monthly, Natural Gas Annual,* and *Natural Gas Monthly.*

(4a) Changes to Information Collection: EIA proposes to make the following changes to Form EIA–914, Monthly Crude Oil and Lease Condensate, and Natural Gas Production Report:

- Section 4 of Form EIA–914, *Crude Oil and Lease Condensate Run Ticket Volumes (Sales) by API Gravity,* which collected density data for crude oil and lease condensate production for selected States would be discontinued and deleted from Form EIA–914.

(5) *Annual Estimated Number of Respondents:* 400.

(6) *Annual Estimated Number of Total Responses:* 4,800.

(7) *Annual Estimated Number of Burden Hours:* 14,400.

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $1,257,984 (14,400 burden hours times $87.36). EIA estimates that respondents will have no additional costs associated with the surveys other than the burden hours and that the information is maintained during the normal course of business.

Comments are invited on whether or not: (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; and (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology.

Statutory Authority: 15 U.S.C. 772(b) and 42 U.S.C. 7101 *et seq.*

Signed in Washington, DC, on May 24, 2023.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2023–11482 Filed 5–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Extension

AGENCY: U.S. Energy Information Administration (EIA), U.S. Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA submitted an information collection request for a three-year extension of the *Coal Markets Reporting System* as required by the Paperwork Reduction Act of 1995. The Coal Markets Reporting System (CMRS) consists of five surveys including, Form EIA–3 *Quarterly Survey of Non-Electric Sector Coal Data,* Form EIA–7A *Annual Survey of Coal Production and Preparation,* Form EIA–8A *Annual Survey of Coal Stocks and Coal Exports,* Form EIA–6 *Emergency Coal Supply Survey* (Standby), and Form EIA–20 *Emergency Weekly Coal Monitoring Survey for Coal Burning Power Producers* (Standby). The CMRS collects data on U.S. coal production, quality, consumption, receipts, stocks, and prices. EIA proposes to make changes to instructions to Forms EIA–3, EIA–7A, and EIA–8A and requests an extension to Forms EIA–6 and EIA–20 with no changes. The changes to Forms EIA–3, EIA–7A, and EIA–8A will reduce the burden of this collection while maintaining the utility and integrity of the data.

DATES: Comments on this information collection must be received no later than June 30, 2023. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Ms. Rosalyn Berry at (202) 586–1026, or by email at *Coal2023@eia.gov.* The forms are available online.

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1905–0167;

(2) *Information Collection Request Title:* Coal Markets Reporting System;

(3) *Type of Request:* Three-year extension with changes;

(4) *Purpose:* The Coal Markets Reporting System (CMRS) program collects, evaluates, assembles, analyzes, and disseminates information on coal production, sales, technology, reserves, and related economic and statistical information. This information is used to assess the adequacy of coal and other energy resources to meet near and longer-term domestic demands and to promote sound policymaking, efficient markets, and public understanding of energy and its interaction with the economy and the environment.

Form EIA–3 collects quarterly data on the use of coal at U.S. manufacturing plants, coal transformation/processing plants, coke plants, and commercial and institutional users of coal. Form EIA–7A collects coal production operations, characteristics of coalbeds mined, recoverable reserves, production capacity, coal sales and revenue, stocks held at mines, and the disposition of the coal mined. For coal preparation, information collected includes operations, locations, production capacity, disposition, and volume of coal prepared. Form EIA–8A collects data on coal stocks by state location, exported coal by origin state, and export revenue of coal sold during the reporting year.

Form EIA–6 *Emergency Coal Supply Survey* and Form EIA–20 *Emergency Weekly Coal Monitoring Survey for Coal Burning Power Producers* are standby surveys used during periods of coal supply and transportation disruptions. In the event of a supply or transportation disruption, these two standby surveys activate and operate weekly over a ten-week period. Once activated, Form EIA–6 collects weekly coal production and stocks data from U.S. coal mining companies. Data are aggregated and reported at the state level. During disruptive events, Form EIA–20 collects available coal-fired capacity, generation, consumption, and stocks from coal-fired electric power generators.

The CMRS also collects coal market data. The data elements include production, consumption, receipts, stocks, sales, and prices. Information pertaining to the quality of the coal is also collected, including heat content, ash content, sulfur content and contents of mercury. Aggregates of this collection are used to support analysis on the effects of public policy on the coal industry, economic modeling, forecasting, coal supply and demand studies, and in guiding research and development programs. The data are included in EIA publications, such as the *Monthly Energy Review, Quarterly Coal Report, Quarterly Coal Distribution Report, Annual Coal Report,* and *Annual Coal Distribution Report.*

EIA also uses the data in short-term and long-term forecast models such as the Short-Term Integrated Forecasting System (STIFS) and the National Energy Modeling System (NEMS) Coal Market Module. The forecast data also appear in the *Short-Term Energy Outlook* and the *Annual Energy Outlook* publications.

(4a) *Proposed Changes:* EIA will be requesting a three-year extension of approval for all its coal surveys with the following changes:

Form EIA–3: Quarterly Survey of Industrial, Commercial, & Institutional Coal Users

• Revise the instructions to indicate only active users of coal need report. Currently, respondents are required to report if they've consumed more than 1,000 short tons in the past year. Respondents who switch from coal to gas are still required to file the EIA–3 for up to almost a year after they stop consuming coal. The proposed change will make it easier for respondents who permanently stop consuming coal to be removed from the survey frame, thereby reducing the reporting burden of this collection.

Form EIA–7A: Annual Survey of Coal Production and Preparation

• Revise the instructions to indicate all coal mining companies that owned a mining operation which produced 50,000 or more short tons of coal during the reporting year must submit the Form EIA–7A, except for anthracite mines. The current threshold for anthracite mines of 10,000 short tons would remain the same. The proposed change in reporting threshold from 25,000 to 50,000 short tons will reduce the reporting burden of this collection while maintaining the utility and integrity of the data.

• Revise the instructions to remove the notes for Part 3 Question 10 advising respondents how to convert longitude and latitude, referencing an external document on EIA's website. These instructions are outdated and unnecessary.

Form EIA–8A: Annual Survey of Coal Stocks and Coal Exports

• Add an instruction to Part 2, Question 1 and Part 3 Question 1 to exclude stocks and exports already reported on the Form EIA–7A. Some respondents file both Forms EIA–7A and EIA–8A, especially companies with parent companies. The proposed change will avoid duplication of data collection, thereby reducing the reporting burden on Form EIA–8A respondents.

(5) *Annual Estimated Number of Respondents:* 833;

• Form EIA–3 will consist of 290 respondents;

• Form EIA–7A will consist of 480 respondents;

• Form EIA–8A will consist of 44 respondents;

• Form EIA–6 (standby) will consist of 10 respondents;

• Form EIA–20 (standby) will consist of 9 respondents;

(6) *Annual Estimated Number of Responses:* 1,830.

(7) *Annual Estimated Number of Burden Hours:* 3,149.

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* Additional costs to respondents are not anticipated beyond costs associated with response burden hours. The information is maintained in the normal course of business. The cost of the burden hours is estimated to be $275,097 (3,149 burden hours times $87.36 per hour). Other than the cost of burden hours, EIA estimates that there are no additional costs for generating, maintaining and providing the information.

Statutory Authority: 42 U.S.C. 7135, 15 U.S.C. 772(b), and 42 U.S.C. 7101 *et seq.*

Signed in Washington, DC, on May 24, 2023.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U. S. Energy Information Administration.

[FR Doc. 2023–11485 Filed 5–30–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23–74–000.
Applicants: Energy Harbor Corp.
Description: Energy Harbor Corp., et. al. submits Supplemental Submission and Request Not To Adjust Comment Period.
Filed Date: 5/15/23.
Accession Number: 20230515–5180.
Comment Date: 5 p.m. ET 6/16/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–1942–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: RS 172—IPC/PAC Kinport Construction Agreement to be effective 4/14/2023.
Filed Date: 5/23/23.
Accession Number: 20230523–5198.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: ER23–1943–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: RS 173—IPC/PAC Midpoint Construction Agreement to be effective 4/14/2023.
Filed Date: 5/23/23.
Accession Number: 20230523–5202.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: ER23–1944–000.
Applicants: Skylar Energy Resources LLC.
Description: Tariff Amendment: Cancellation entire tariff to be effective 5/24/2023.
Filed Date: 5/23/23.
Accession Number: 20230523–5216.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: ER23–1945–000.
Applicants: Skylar Power Marketing, LLC.
Description: Tariff Amendment: Cancellation entire tariff to be effective 5/24/2023.
Filed Date: 5/23/23.
Accession Number: 20230523–5217.
Comment Date: 5 p.m. ET 6/13/23.

Docket Numbers: ER23–1946–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: Certificate of Concurrence to Kinport Construction Agreement to be effective 4/14/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5000.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1947–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: Certificate of Concurrence to Midpoint Construction Agreement to be effective 4/14/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5001.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1948–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1518R26 Arkansas Electric Cooperative Corp NITSA NOA to be effective 8/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5009.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1949–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–05–24_Cancellation of Schedule 43J Teche Unit No. 3 SSR Cost Allocation to be effective 7/24/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5018.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1950–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–05–24_SA 4066 NIPSCO-Sedge Meadow Solar Park GIA (J1407) to be effective 5/25/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5034.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1951–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 5869; Queue No. AE2–126 (amend) to be effective 7/24/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5058.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1952–000.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii: Chilatchee 115B LGIA Filing to be effective 5/12/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5091.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1953–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–05–24_SA 3373 Entergy Arkansas-Newport Solar 2nd Rev GIA (J919 J1402) to be effective 5/16/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5100.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1954–000.
Applicants: EIP Investment, LLC.
Description: Initial rate filing: Exhibit C adding to be effective 5/24/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5136.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1955–000.
Applicants: Earthrise Lincoln Interconnection, LLC.
Description: Baseline eTariff Filing: Filing of SFA and Request for Associated Waivers and Blanket Authorization to be effective 12/31/9998.
Filed Date: 5/24/23.
Accession Number: 20230524–5167.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1956–000.
Applicants: Earthrise Tilton Interconnection, LLC.
Description: Baseline eTariff Filing: Filing of SFA and Request for Associated Waivers and Blanket Authorization to be effective 12/31/9998.
Filed Date: 5/24/23.
Accession Number: 20230524–5174.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1957–000.
Applicants: Earthrise Gibson City Interconnection, LLC.
Description: Baseline eTariff Filing: Filing of SFA and Request for Associated Waivers and Blanket Authorization to be effective 12/31/9998.
Filed Date: 5/24/23.
Accession Number: 20230524–5177.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1958–000.
Applicants: Earthrise Shelby County Interconnection, LLC.
Description: Baseline eTariff Filing: Filing of SFA and Request for Associated Waivers and Blanket Authorization to be effective 12/31/9998.
Filed Date: 5/24/23.
Accession Number: 20230524–5178.
Comment Date: 5 p.m. ET 6/14/23.

Docket Numbers: ER23–1959–000.
Applicants: Earthrise Crete Interconnection, LLC.
Description: Baseline eTariff Filing: Filing of SFA and Request for Associated Waivers and Blanket Authorization to be effective 12/31/9998.
Filed Date: 5/24/23.
Accession Number: 20230524–5179.
Comment Date: 5 p.m. ET 6/14/23.

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: May 24, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–11503 Filed 5–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1936–000]

Elektron Power 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 Elektron Power 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 June 13, 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: May 24, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–11501 Filed 5–30–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–1939–000]

Pike Solar LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Pike Solar LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is June 13, 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: May 24, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–11500 Filed 5–30–23; 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: RP23–778–000.
Applicants: Discovery Gas Transmission LLC
Description: § 4(d) Rate Filing: Discovery Gas Transmission LLC's Fuel, Lost and Unaccounted for Filing to be effective 7/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5006.
Comment Date: 5 p.m. ET 6/5/23.

Docket Numbers: RP23–779–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 5.24.23 Negotiated Rates—Freepoint Commodities LLC R–7250–49 to be effective 6/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5011.
Comment Date: 5 p.m. ET 6/5/23.

Docket Numbers: RP23–780–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 5.24.23 Negotiated Rates—Twin Eagle Resource Management, LLC R–7300–27 to be effective 6/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5014.
Comment Date: 5 p.m. ET 6/5/23.

Docket Numbers: RP23–781–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 5.24.23 Negotiated Rates—Mercuria Energy America, LLC H–7540–89 to be effective 6/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5015.
Comment Date: 5 p.m. ET 6/5/23.

Docket Numbers: RP23–782–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 5.24.23 Negotiated Rates—Mercuria Energy America, LLC R–7540–25 to be effective 6/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5017.
Comment Date: 5 p.m. ET 6/5/23.

Docket Numbers: RP23–783–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 5.24.23 Negotiated Rates—Emera Energy Services, Inc. R–2715–59 to be effective 6/1/2023.
Filed Date: 5/24/23.
Accession Number: 20230524–5019.
Comment Date: 5 p.m. ET 6/5/23.

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: RP23–655–000.
Applicants: Trailblazer Pipeline Company LLC.
Description: Refund Report: TPC 2023 Annual L&U Cash-Out Refund Report to be effective N/A.
Filed Date: 5/23/23.
Accession Number: 20230523–5178.
Comment Date: 5 p.m. ET 6/5/23.

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 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: May 24, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–11502 Filed 5–30–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2014–0128; FRL–5788–03–OAR]

Release of the Policy Assessment for the Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter—External Review Draft

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: On or about May 31, 2023, the Environmental Protection Agency (EPA) will make available for public comment the draft document, *Draft Policy Assessment for the Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter—External Review Draft* (PA). This draft document was prepared as a part of the current review of the Secondary National Ambient Air Quality Standards (NAAQS) for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter. When final, the PA serves to ''bridge the gap'' between the currently available scientific and technical information and the judgments required of the Administrator in determining whether to retain or revise the existing secondary NO_2, SO_2 and PM NAAQS. The secondary NAAQS for oxides of nitrogen, oxides of sulfur and particulate matter are set to protect the public welfare from known or anticipated effects of these pollutants in the ambient air.

DATES: Comments should be received on or before July 31, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2014–0128, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Air and Radiation Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this notice. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments, see the **SUPPLEMENTARY INFORMATION** section of this document. The draft document described here will be available on the EPA's website at *https://www.epa.gov/naaqs/nitrogen-dioxide-no2-and-sulfur-dioxide-so2-secondary-air-quality-standards.* The documents will be accessible under ''Policy Assessments'' for the current review.

FOR FURTHER INFORMATION CONTACT: Ginger Tennant, Office of Air Quality Planning and Standards, (Mail Code

C504–06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: 919–541–4072; or email: *tennant.ginger@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2014–0128, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. Information About the Documents

Two sections of the Clean Air Act (CAA or the Act) govern the establishment and revision of the NAAQS. Section 108 directs the Administrator to identify and list certain air pollutants and then issue ''air quality criteria'' for those pollutants. The air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air. . .'' (CAA section 108(a)(2)). Under section 109 of the Act, the EPA is then to establish primary (health-based) and secondary (welfare-based) NAAQS for each pollutant for which the EPA has issued air quality criteria. Section 109(d)(1) of the Act requires periodic review and, if appropriate, revision of existing air quality criteria. Revised air quality criteria are to reflect advances in scientific knowledge on the effects of the pollutant on public health and welfare. Under the same provision, the EPA is also to periodically review and, if appropriate, revise the NAAQS, based on the revised air quality criteria. The Act additionally requires appointment of an independent scientific review committee that is to periodically review the existing air quality criteria and NAAQS and to recommend any new standards and revisions of existing criteria and standards as may be appropriate (CAA section 109(d)(2)(A)-(B)). Since the early 1980s, the requirement for an independent scientific review committee has been fulfilled by the Clean Air Scientific Advisory Committee (CASAC).

In characterizing effects related to atmospheric deposition of oxides of nitrogen and oxides of sulfur and their transformation products, this review also recognizes the contribution of PM through deposition to eutrophication-related effects, acidification-related effects, and other such welfare effects, as well to the direct and other indirect effects on vegetation, soils, and biota. Addressing the pollutants together enables us to take a comprehensive look at the nature and interactions of the pollutants, which is important for ensuring that all scientific information relevant to ecological effects is thoroughly evaluated. This approach also addresses the CASAC's comments on the draft Integrated Review Plan (IRP) for this review, as well as the CASAC's comments on the draft IRP for the PM NAAQS review. In particular, the CASAC expressed concern that PM deposition-related effects were not adequately covered in the PM review; and they also encouraged the EPA to include all reduced nitrogen compounds, including ammonia and ammonium, to properly evaluate ecological impacts from nitrogen deposition in the secondary standards review for oxides of nitrogen and oxides of sulfur (Diez Roux and Fernandez, 2016; Diez Roux, 2016). Additional welfare effects associated with PM, such as visibility impairment, climate effects and materials damage, and the health effects of PM (including particulate transformation products of oxides of nitrogen and oxides of sulfur) are considered as part of the separate review of the NAAQS for PM.

In March 2017, EPA released the first external review draft of the *Integrated Science Assessment (ISA) for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter Ecological Criteria,* which was then discussed at a CASAC meeting May 24–25, 2017. Comments from the CASAC (Diez Roux, 2017) and the public were considered in preparing the second external review draft (June 2018), which was then discussed at a CASAC meeting September 5–6, 2018, and April 27, 2020. CASAC provided a final letter on the second draft ISA in May 2020 (Cox, 2020), and in October 2020, EPA released the final ISA for NO_X, SO_X, and PM ecological criteria (U.S. EPA, 2020).

This draft PA serves to ''bridge the gap'' between the scientific and technical information in the 2020 ISA and any air quality, exposure, and risk analyses available in this review, and the judgments required of the Administrator in determining whether to retain or revise the existing secondary ambient air quality standards for NO_2, SO_2 and PM. The draft PA document will be available on or about May 31, 2023, on EPA's website at *https://www.epa.gov/naaqs/nitrogen-dioxide-no2-and-sulfur-dioxide-so2-secondary-air-quality-standards.* The EPA is soliciting advice and recommendations from the CASAC by means of a review of this draft document in an upcoming public meeting of the CASAC. Information about this public meeting, including the dates and location, was published as a separate notice in the **Federal Register** on March 23, 2023 (88 FR 17572). Following the CASAC meeting, the EPA will consider comments received from the CASAC and the public in preparing the final PA.

The Draft PA will be available primarily via the internet at: *https://www.epa.gov/naaqs/nitrogen-dioxide-no2-and-sulfur-dioxide-so2-secondary-air-quality-standards.* The document will be accessible under ''Policy Assessments'' from the current review. The draft document briefly described above does not represent and should not be construed to represent any final EPA policy, viewpoint, or determination.

Erika Sasser,

Director, Health and Environmental Impacts Division.

[FR Doc. 2023–11391 Filed 5–30–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2023–0284; FRL–10996–01–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with the Clean Air Act, as amended (CAA or the Act), the Environmental Protection Agency (EPA or the Agency) is providing notice of a proposed consent decree in *California Communities Against Toxics, et al.* v. *Regan,* No. 1:22-cv-03724 (D.D.C.). On December 14, 2022, Plaintiffs California Communities Against Toxics, Clean Power Lake County, Rio Grande International Study Center, Sierra Club, and Union of Concerned Scientists filed a complaint in the United States District Court for the District of Columbia alleging that EPA has failed to perform its nondiscretionary duty to ''review, and revise as necessary'' the National Emission Standards for Hazardous Air Pollutants: Ethylene oxide Emissions Standards for Sterilization Facilities, at least every 8 years. The proposed consent decree would establish a deadline for EPA to sign a final rule for this action.

DATES: Written comments on the proposed consent decree must be received by *June 30, 2023.*

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0284, online at *https://www.regulations.gov* (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Additional Information about Commenting on the Proposed Consent Decree'' heading under the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Amy Huang Branning, Air and Radiation Law Office, Office of General Counsel, U.S. Environmental Protection Agency; telephone (202) 564–1744; email address *branning.amy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining a Copy of the Proposed Consent Decree

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2023–0284) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

The electronic version of the public docket for this action contains a copy of the proposed consent decree and is available through *https://www.regulations.gov.* You may use *https://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

II. Additional Information About the Proposed Consent Decree

On December 14, 2022, Plaintiffs California Communities Against Toxics, Clean Power Lake County, Rio Grande International Study Center, Sierra Club, and Union of Concerned Scientists (collectively ''Plaintiffs'') filed a complaint in the United States District Court for the District of Columbia alleging that EPA has failed to perform its nondiscretionary duty under CAA section 112(d)(6) to ''review, and revise as necessary'' the National Emission Standards for Hazardous Air Pollutants (''NESHAP''): Ethylene oxide Emissions Standards for Sterilization Facilities, 40 CFR part 60, subpart O (''Sterilization Facilities NESHAP''), at least every 8 years. EPA promulgated the Sterilization Facilities NESHAP in 1994. 59 FR 62585 (December 6, 1994). In 2006, EPA conducted a risk assessment of this source category pursuant to CAA section 112(f)(2) and a technology review of its NESHAP pursuant to section 112(d)(6), neither of which resulted in revisions to the Sterilization Facilities NESHAP. 71 FR 17712 (April 7, 2006). EPA has not completed a section 112(d)(6) review of this NESHAP since then. EPA recently published a proposed rule that includes revisions to the Sterilization Facilities NESHAP pursuant to CAA section 112(d)(6) of the Act. 88 FR 22790 (April 13, 2023). The proposed consent decree, if finalized, would require that EPA sign a final rule on its review and ''necessary revisions'' of the Sterilization Facility NESHAP pursuant to section 112(d)(6) by March 1, 2024.

In accordance with section 113(g) of the CAA, for a period of thirty (30) days following the date of publication of this document, the Agency will accept written comments relating to the proposed consent decree. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

III. Additional Information About Commenting on the Proposed Consent Decree

Submit your comments, identified by Docket ID No. EPA–HQ–OGC–2023–0284, via *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document. Note that written comments containing CBI and submitted by mail may be delayed and deliveries or couriers will be received by scheduled appointment only.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties

and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *https://www.regulations.gov* website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

Gautam Srinivasan,

Associate General Counsel.

[FR Doc. 2023–11493 Filed 5–30–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0407; FRL—11005–01–OAR]

Agency Information Collection Activities; Proposed Information Collection Request; Comment Request; EPA's ENERGY STAR Program in the Commercial and Industrial Sectors (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''EPA's ENERGY STAR Program in the Commercial and Industrial Sectors'' (EPA ICR Number 1772.09, OMB Control Number 2060–0347) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through January 21, 2024. This notice allows for 60 days for public comments.

DATES: Comments must be submitted on or before July 31, 2023.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2006–0407, to EPA online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Cynthia Veit Maia, Climate Protection Partnerships Division, (5230A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–9494; fax number: 202–343–2204; email address: *veitmaia.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through January 31, 2024. 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.

This notice allows 60 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate forms of information technology. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: EPA created ENERGY STAR as a voluntary program to help businesses and individuals protect the environment through superior energy efficiency. The program focuses on reducing utility-generated emissions by reducing the demand for energy. In 1991, EPA launched the Green Lights Program to encourage corporations, State and local governments, colleges and universities, and other organizations to adopt energy-efficient lighting as a profitable means of preventing pollution and improving lighting quality. Since then, EPA has rolled Green Lights into ENERGY STAR and expanded ENERGY STAR to encompass organization-wide energy performance improvement, such as building technology upgrades, product purchasing initiatives, and employee training. At the same time, EPA has streamlined the reporting requirements of ENERGY STAR and focused on providing incentives for improvements (*e.g.,* ENERGY STAR awards program). EPA also makes tools and other resources available over the Web to help the public overcome the barriers to evaluating their energy performance and investing in profitable improvements.

To join ENERGY STAR, organizations are asked to complete a Partnership Application that establishes their commitment to energy efficiency. Partners agree to undertake efforts such as measuring, tracking, and benchmarking their organization's energy performance by using tools such as those offered by ENERGY STAR; developing and implementing a plan to improve energy performance in their facilities and operations by adopting a strategy provided by ENERGY STAR; and educating staff and the public about their Partnership with ENERGY STAR, and highlighting achievements with the ENERGY STAR, where available.

Partners also may be asked to periodically submit information to EPA as needed to assist in program implementation.

Partnership in ENERGY STAR is voluntary and can be terminated by Partners or EPA at any time. EPA does not expect organizations to join the program unless they expect participation to be cost effective and otherwise beneficial for them.

In addition, Partners and other interested parties can seek recognition and help EPA promote energy-efficient technologies by evaluating the efficiency of their buildings using EPA's on-line tools (*e.g.,* Portfolio Manager) and applying for recognition. EPA does

not expect any information collected under ENERGY STAR to be Confidential Business Information (CBI).

Form Numbers: 5900–19, 5900–195, 5900–197, 5900–198, 5900–22, 5900–262, 5900–263, 5900–264, 5900–265, 5900–382, 5900–383, 5900–387, 5900–436, 5900–437, 5900–441, 5900–441a, 5900–442, 5900–443, 5900–444, 5900–445, 5900–89.

Respondents/affected entities: Participants in EPA's ENERGY STAR Program in the commercial and industrial sectors.

Respondent's obligation to respond: Voluntary.

Estimated number of respondents: 37,021 (total).

Frequency of response: One-time, annually, or on occasion.

Total estimated burden: 210,306 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $14,859,991 (per year), which includes $5,034,450 annualized capital or operation & maintenance costs.

Changes in the Estimates: The burden estimates presented in this notice are from the last approval. EPA is currently evaluating and updating these estimates as part of the ICR renewal process. EPA will discuss its updated estimates, as well as changes from the last approval, in the next **Federal Register** notice to be issued for this renewal.

Jean Lupinacci,

Director, Climate Protection Partnerships Division.

[FR Doc. 2023–11443 Filed 5–30–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0703; FR ID 143029]

Information Collections Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it can further reduce the information collection burden for small business concerns with fewer than 25 employees.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before June 30, 2023.

ADDRESSES: Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–0703.

Title: Determining Costs of Regulated Cable Equipment and Installation, FCC Form 1205.

Form Number: FCC Form 1205.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 2,650 respondents; 4,650 responses.

Estimated Time per Response: 4–12 hours.

Frequency of Response: Recordkeeping requirement, Annual reporting requirement, Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 301(j) of the Telecommunications Act of 1996 and 623(a)(7) of the Communications Act of 1934, as amended.

Total Annual Burden: 35,800 hours.

Total Annual Cost: $1,800,000.

Needs and Uses: Information derived from FCC Form 1205 filings is used to facilitate the review of equipment and installation rates. This information is then reviewed by each cable system's respective local franchising authority. Section 76.923 records are kept by cable operators in order to demonstrate that charges for the sale and lease of equipment for installation have been developed in accordance with the Commission's rules.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–11492 Filed 5–30–23; 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 June 29, 2023.

A. Federal Reserve Bank of Minneapolis (Stephanie Weber, Assistant Vice President)

90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291. Comments can also be sent electronically to *MA@mpls.frb.org:*

1. *Heritage Bancshares Group Inc. Employee Stock Ownership Plan and Trust, Spicer, Minnesota;* to acquire up to 41.12 percent of the voting shares of Heritage Bancshares Group, Inc., and thereby indirectly acquire voting shares of Heritage Bank, N.A., both of Spicer, Minnesota.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–11440 Filed 5–30–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–MA–2023–06; Docket No. 2023–0006; Sequence No. 01]

Federal Travel Regulation (FTR); Agency Reporting Requirements

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Notice of GSA Bulletin FTR 23–06, travel reporting information profile (trip) reporting requirements.

SUMMARY: GSA Bulletin FTR 23–06 announces updates to the reporting requirements for annual travel and transportation information, commonly called the TRIP report.

DATES: *Applicable:* May 31, 2023.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact LaMan Dantzler J.D., Office of Government-wide Policy, Office of Asset and Transportation Management, at *travelpolicy@gsa.gov,* or 202–615–5399. Please cite Notice of GSA Bulletin FTR 23–06.

SUPPLEMENTARY INFORMATION: 5 United States Code 5707(c), as implemented in Federal Travel Regulation (FTR) Part 300–70, directs agencies (as defined in FTR § 301–1.1) to report specific information on payments for temporary duty travel and employee relocation no later than November 30 of each year to the General Services Administration (GSA). The head of the agency is responsible for ensuring the reported information is complete and accurate, to include information from all components of the agency, before submitting it to GSA (FTR 300–70.3; 300–70.4).

Executive Order 14057, ''Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability'' and its implementing instructions direct GSA to establish tracking and provide annual reporting of agency-specific and Government-wide Scope 3 greenhouse gas (GHG) carbon emissions for employee travel.

The E-Gov Travel Service (ETS) and the Department of Defense's Defense Travel System (DTS) and MyTravel solutions capture mileage information required to compute a carbon footprint for commercial airline and privately owned vehicle travel, but GSA cannot extract this mileage data directly from other agencies' travel solutions. To consolidate travel-related information into a single repository while enabling necessary GHG calculations, GSA is adding mileage components to the information agencies must submit in the TRIP report.

GSA Bulletin FTR 23–06 can be viewed in its entirety at *https://www.gsa.gov/ftrbulletins.*

Saul A. Japson,

Principal Deputy Associate Administrator, Office of Government-wide Policy.

[FR Doc. 2023–11436 Filed 5–30–23; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meeting

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) announces a Special Emphasis Panel (SEP) meeting on ''Supporting the Management of Substance Use Disorders in Primary Care and other Ambulatory Settings (R18)''. This SEP meeting will be closed to the public.

DATES: July 13, 2023.

ADDRESSES: Agency for Healthcare Research and Quality (Video Assisted Review), 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: Jenny Griffith, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, Agency for Healthcare Research and Quality, (AHRQ), 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 427–1557.

SUPPLEMENTARY INFORMATION: A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by AHRQ, and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

The SEP meeting referenced above will be closed to the public in accordance with the provisions set forth in 5 U.S.C. 1009(d), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(6). Grant applications for ''Supporting the Management of Substance Use Disorders in Primary Care and other Ambulatory Settings (R18)'' are to be reviewed and discussed at this meeting. 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.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: May 24, 2023.

Marquita Cullom,

Associate Director.

[FR Doc. 2023–11498 Filed 5–30–23; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Refugee Cash and Medical Assistance Federal Financial Report ORR–2 Supplemental Data Collection (OMB #: 0970–0510)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families' (ACF) Office of Refugee Resettlement (ORR) plans to submit a generic information collection (GenIC) request under the following umbrella generic: Generic Clearance for Financial Reports used for ACF Mandatory Grant Programs (0970–0510). This request is to include instructions for ORR Refugee Cash and Medical Assistance (CMA) grant recipients to provide supplemental financial information when submitting the already required ORR–2 Financial Report, which is approved under Office of Management and Budget (OMB) number 0970–0407.

DATES: *Comments due within 14 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above and below.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ACF programs require detailed financial information from their grantees that allows ACF to monitor various specialized cost categories within each program to closely manage program activities and to have sufficient financial information to enable periodic thorough and detailed audits. The Generic Clearance for Financial Reports used for ACF Mandatory Grant Programs allows ACF programs to efficiently develop and receive approval for financial reports that are tailored to specific funding recipients and the associated needs of the program. For more information about the umbrella generic, see: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202303-0970-002.*

This specific GenIC request applies to all ORR Refugee Cash and Medical Assistance grantees awarded traditional base funding as well as funding received under the Afghanistan Supplemental Appropriations Act, 2022 (ASA), and the Ukraine Supplemental Appropriations Act, 2022, and other appropriations as communicated. All grantees must complete reporting in accordance with statute. Currently, grantees use the ORR–2 (OMB #: 0970–0407) to report federal expenditures by program categories such as refugee cash assistance and refugee medical assistance. The ORR–2 requests grantees to report on the various program categories totaling expenditures, unliquidated obligations, and unobligated balances. ORR is proposing to request that grantees break out unobligated balances reported on the final ORR–2 financial report by funding source (base, ASA, Ukraine) and financial account number as referenced on the Notice of Award as a Word or Excel attachment to upload (with the ORR–2 report) in the Online Line Data Collection via the designated link. This final report is due September 30th. The proposed supplemental instructions will provide guidance and assist grantees with submitting the additional detail about Federal expenditure data reported on the ORR–2. The analysis of this data would further support adherence to program requirements.

Respondents: States, State Agency Grantee Designees.

ANNUAL BURDEN ESTIMATES

Title of information collection	Number of respondents	Annual frequency of responses	Hourly burden per response	Annual hourly burden
RSS SF–425 Supplemental Data Collection	66	1	1.67	110

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 14 days of this publication.

Authority: Section 412(c)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1522(c)(1)(A)).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–11479 Filed 5–30–23; 8:45 am]

BILLING CODE 4184–89–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for Office of Management and Budget (OMB) Review; Monitoring and Compliance for ORR Care Provider Facilities (OMB #: 0970–0564)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is inviting public comments on the proposed collection. The request consists of several forms that allow the ORR Unaccompanied Children (UC) Program to enhance monitoring efforts at care provider facilities that are not licensed by the State, as well as continue standard monitoring activities that ensure its care provider facilities are in compliance with Federal and State laws and regulations, licensing and accreditation standards, ORR policies and procedures, and child welfare standards. This notice is specific to forms that were recently approved through emergency approval for 180 days and additional proposed forms.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description

Current Proposed Revisions

Quarterly Unlicensed Facility Site Visits

- Unlicensed Facility Unaccompanied Child Case File Checklist (Form M–8A–UF)
  - Admission Documents
    - *Inventory of Property and Cash:* Corrected timeframe to align with policy. The inventory log should be completed ''within 2 hours of admission'' not 24 hours.
    - *Clothing and Supplies:* Added language to clarify what is covered under this item.
  - Orientation Documents—Added new item checking for compliance with ORR's access to reproductive health care policy (also known as the *Garza* policy).
  - Legal Information
    - *Acknowledgement of Receiving Legal Resource Guide:* Changed ''within 24 hours'' to ''within 24 hours of admission'' to clarify the policy requirement.
    - *EOIR Docs:* Corrected name Executive Office for Immigration Review (''Review'' was missing)
  - Medical Documents
    - *Authorization for Medical, Dental, and Mental Health Care:* Changed ''within 24 hours'' to ''within 24 hours of admission'' to clarify the policy requirement.
    - *Documentation of Initial Medical Exam:* Added ''within 48 hours of admission'' to clarify policy requirement. Updated form expiration dates referenced. Added reminder that completion of the exam form is mandatory.
    - *Dental Exam Form:* Updated form expiration dates referenced. Added reminder that completion of the form is mandatory.
    - *Supplemental TB Screening Form:* Updated form expiration dates referenced. Added reminder that completion of the form is mandatory.
    - *Prescriptions:* Changed ''log'' to ''record/log'' for clarity.
    - Split Medical and Mental Health Records into two separate line items and added language to clarify the policy requirements.
  - Assessments
    - *Unaccompanied Child Case Review:* In first bullet point, clarified that it's the *initial* case review that is continuously updated until 30 calendar days after admission. In second bullet point, changed ''Every 30 calendars days . . .'' to ''Subsequently every 30 calendar days . . .'' for clarity.
    - *Sponsor Assessment:* Updated form expiration dates referenced. Changed ''Within 5 days'' to ''Must be initiated within 5 days'' for clarity.
    - *Individual Service Plan:* Changed ''Within 5 days'' to ''Initial must be done within 5 days'' for clarity.
  - Case Management—Recreation/Leisure: Changed ''log'' to ''plan/log'' for clarity. Removed ''Effective 3/20/20—avoid community outing due to COVID–19'' since this is no longer applicable.
  - Clinical Services—Added ''Disclosure Notice'' to reflect new policy requirement.
  - Discharge
    - *Removed ''CDC Covid–19 Fact Sheet and Symptoms Sheet (Effective:* 3/13/20)''—the revised sponsor letter has replaced that fact sheet.
    - Added ''Post-18 Plan (if applicable)'' to align with policy and procedures.
    - *Family Reunification Packet:* Updated form expiration dates referenced.
  - Post-Discharge—Health Follow-Up Call: Updated effective dates for related guidance and added language clarify requirements.
- Unlicensed Facility Staff Secure Addendum to Case File Checklist (Form M–8D–UF)—Made minor edits for more precise language and changed formatting to bullet point lists for several items.
- Unlicensed Facility Personnel File Checklist (Form M–10A–UF)
  - Removed Training Directive per ORR Management section because it is no longer a requirement. This requirement was related to a specific webinar series on the topic of trauma-informed care. It was removed because it is duplicative of the requirements in the cooperative agreement that require training on strength-based behavior management and trauma-informed care approaches.
  - Annual Trainings—Removed ''Hover for additional comments'' and corresponding comment that read ''How does the employee confirm comprehension of a training? *i.e.,* quiz/test score or signature confirming comprehension'' because respondents reported the comments were unhelpful.
  - Trainings Every Two Years per Cooperative Agreement—
    - *Medication Management:* Added ''must also receive medication administration training''
    - Removed ''Hover for additional comments'' and corresponding comment that read ''How does the employee confirm comprehension of a training? *i.e.,* quiz/test score or signature confirming comprehension'' because respondents reported the comments were unhelpful.
    - Rephrased ''Strength-based behavior management . . .'' to ''Strength-based behavior management and trauma-informed care approaches'' to reflect current cooperative agreement requirements.

Reinstated the following forms as the number of respondents has increased to more than nine respondents.

- Unlicensed Facility LTFC Monitoring Notes (Form M–6C–UF)
- Unlicensed Facility LTFC UC Case File Checklist (Form M–8B–UF)
- Unlicensed Facility Staff Secure Addendum to Case File Checklist (Form M–8D–UF)
- Unlicensed Facility Foster Home Onsite Monitoring Checklist (M–9B–UF)

Quarterly Influx Care Facility Site Visits

Added the below-listed alternate version of a form that was previously

approved by OMB but was removed from the information collection due to the number of respondents. Differences between the previously approve version and the alternate version are noted below.

- Influx Care Facility (ICF) Monitoring Notes (Form M–6E)
  - ○ Instructs monitors to review the facility's contract and statement of work (as opposed to the grant application and cooperative agreement) to reflect the funding method used for ICFs.
  - ○ Removes the following sections that are specific to grants.
    - ▪ Fiscal year budget
    - ▪ Key positions approved by the Project Officer
  - ○ Instructs monitors to review Serious Incident Reports (SIRs) from the past three months (as opposed to six months for shelters). This revision does not represent a reduction in SIR review, rather it reflects the ongoing SIR review process that occurs for ICFs. Monitors are performing site visits within the first three months of an ICR opening, which means that there would only be three months' worth of SIRs available during the initial site visit. Thereafter, three months will cover review of all SIRs since the last site visit. For example, if an ICF opened at the start of January, the initial site visit would occur by the end of March and SIRs generated from January through March would be reviewed. The next site visit would then occur at the end of June and during that visit SIRs generated April through June would be review. There would be no need to review six months' worth of SIRs at that time because the SIRs generated January through March would have already been reviewed. This pattern of quarterly reviews would continue while the ICF is operational.
  - ○ Reworded questions under the staffing plan section to be more specific to contracts.
  - ○ Added instruction for monitors to ensure that the facility is following their supervision plan (as reported in the ICF Site Visit Guide) for any staff whose relevant background checks are still pending. All staff must pass a public records criminal background check before hire. Staff with direct access to children must also pass an FBI fingerprint check and child abuse and neglect check (CA/N). However, staff may be hired provisionally before FBI or CA/N check results are received if at all times prior to receipt of results the staff member is within the sight and under the supervision of a staff member whose background checks are complete.
  - ○ Removed questions on State licensing.
  - ○ Removed section on mosquito control inspections. These inspections were originally established to address concerns with the Zika virus and are no longer performed.

Added the below-listed alternate versions of forms already approved under this information collection. Differences between the already approved versions and the alternate versions are as noted below.

- ICF Monitoring Site Visit Guide (Form M–7G)—Revisions were made to develop a more in-depth guide to reflect the size and complexity of influx sites. ORR plans to pilot this revised guide at ICFs and later decide on whether some or all of these revisions should be made to site visit guides for other levels of care. ORR will seek OMB approval for any future revision to other versions of the site visit guide.
  - ○ Reorganized and grouped questions under different sections, as well as rewording questions and instructions for clarity.
  - ○ Added text boxes and tables to make clear where the ICF should enter information.
  - ○ Added areas for the ICF to provide a brief overview of their site operations and list of subcontractors and their respective scopes of work.
  - ○ Expanded the list of facility points of contact requested.
  - ○ Added areas for the ICF to share any innovative and/or best practices implemented at the site and for the ICF to describe know deficiencies and/or areas for improvement.
  - ○ Added a table in the stakeholders section to prompt the ICF to provide more detail information about the frequency and type of collaboration as well as areas in need of improvement.
  - ○ Expanded section on personnel to include questions about personnel evaluation practices, whistleblower policies, and significant staffing changes, vacancies, deficiencies, and/or barriers to personnel capacity.
  - ○ In addition to providing copies of internal procedures, ICFs are asked to document information about the personnel responsible for internal reviews, protocols for responding to noncompliance, and how the ICF protects child privacy and confidentiality.
  - ○ Expands the question asking for the program's video monitoring policies and procedures to include all perimeter and internal security mechanisms.
  - ○ In addition to providing copies of emergency and evacuation plans, programs are asked to describe related procedures and provide information on emergency drills and after-action reviews.
  - ○ Added area for programs to describe their safety inspection practices and related drills, as well as an area to note concerns/deficiencies related to safety and security.
  - ○ Added questions on the program's procedures for staffing cases, case status updates, and how case managers coordinate with other discipline (*e.g.,* clinical).
  - ○ Split the question asking for the programs discharge procedures into several questions that prompt the program to specifically provide information about their procedures for transfers, age redetermination cases, and managing age outs.
  - ○ Added question that requests the program's procedures on facilitating visits among children in care.
  - ○ Added question asking the program to note any complex or especially vulnerable cases that required specialized service coordination.
  - ○ Added question asking the program to note any concerns/deficiencies related to case management.
  - ○ Added new section on child supervision that asks for program's procedures on supervision plans and direct care staffing ratios, determining room/bed assignments, accurately monitoring the location of the child, and behavior management.
  - ○ Expanded the section that asks for a description of ancillary services to include recreational/leisure, religious, languages access, and phone call, visitation, and mail services (in addition to education and transportation).
  - ○ In addition to requesting copies of nutritional services procedures, adds a section for programs to describe these services. This includes food storage and safety protocols, how child dietary needs are meet, how cultural and religious preferences are meet, and any concerns/deficiencies.
  - ○ Expands the medical services section to add questions asking the program to describe their medical intakes procedures, onsite medical services, medication administration protocols, medical records system, the process for referring a child for offsite medical services, and vaccination procurement and administration protocols.
  - ○ Expands the mental health services section to add questions asking the program to describe their mental health intake procedures and onsite mental health services.
  - ○ In addition to requesting copies of prevention of sexual abuse procedures and related materials, asks the program to describe several specific aspects of their procedures.

○ Breaks the general question asking the program to describe their SIR procedures into several more specific questions on who the responsible parties are for submitting reports, follow-up/addendums, and notification/coordination with external entities.

○ Adds a new question asking the program how long it took to complete the form.

○ Updates the type of background check documentation requested to align with background check requirements specific to influx care facilities.

• ICF Personnel File Checklist (Form M–10E)

○ Pre-Service Trainings—Removed ''State licensed required trainings'' because ICF are not State-licensed.

○ Removed Training Directive per ORR Management section because it is no longer a requirement. This requirement was related to a specific webinar series on the topic of trauma-informed care. It was removed because it is duplicative of a new item added to the annual trainings section that monitors for training on strength-based behavior management and trauma-informed care approaches.

○ Annual Trainings—Added ''Strengths-based behavior management approaches and trauma-informed care approaches, such as using conflict resolution, problem solving skills, using rewards and consequences, de-escalation techniques and helping children and youth learn accountability and self-control.''

○ Removed Trainings Every Two Years per Cooperative Agreement section because ICFs are funded through contracts and not grants.

Prevention of Sexual Abuse (PSA) Audits

ORR is seeking approval to add eight new instruments that will allow ORR to audit its care provider programs for compliance with the IFR on Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children (45 CFR Subpart L). These instruments are currently in use without OMB approval; this request will allow ORR to comply with the Paperwork Reduction Act requirements. The proposed new instruments are:

• Preaudit Questionnaire and Audit Documentation Requested Checklist (Form M–17A)

• Instructions for Site Visit and Facility Tour (Form M–17B)

• Interview Guide: Random Sample of Staff Interview (Form M–17C)

• Interview Guide: Program Director (Form M–17D)

• Interview Guide: Prevention of Sexual Abuse (PSA) Compliance Manager (Form M–17E)

• Interview Guide: Specialized Staff (Form M–17F)

• Interview Guide: Unaccompanied Child (Form M–17G)

• PSA Audit Corrective Action Report (Form M–17H)

Revisions to Existing Forms

The below noted revisions were made to existing forms in this collection to better align with ORR policies and procedures and strengthen monitoring protocols.

• FFS Compliance and Safety Site Visit Report (Form M–3A)

○ Converted the original Excel version into a web-based format.

○ Removed the following items that are best practices but not explicitly required in ORR policy/procedures:

▪ Client's rights are posted in language unaccompanied child understands

▪ Daily schedule is posted in language unaccompanied child understands

○ Added the following fields

▪ ORR Region

▪ Please note the number of children in the group being interviewed

▪ Please note the estimate age range of the group of children you interviewed

○ Renamed field ''FFS Name'' to ''ORR Representative Name''

○ Consolidated separate questions regarding compliance with staffing ratios into two questions (''Is the program compliant with all ORR staffing ratios?'' and ''Are there staffing concerns?'') and added field ''If Yes, please confirm you elevated this to the Project Officer for resolution or to address UC capacity.''

• PSA Unaccompanied Child Incident Review (Form M–5A)—Corrected typo in the *When did the incident occur?* field dropdown options, changing ''pm'' to ''am.''

• PSA Adult Incident Review (Form M–5B)—Corrected typo in the *When did the incident occur?* field dropdown options, changing ''pm'' to ''am.''

• Site Visit Guide (Form M–7A)

○ Under Child Protection—Added requirement for program to provide link to mandatory reporting laws/rules and specify who is classified as a mandatory reported in the State in which the program is located.

○ Under Background Checks—Clarified that information on foster parents is also required.

○ Removed reference to mosquito control inspections. These inspections were originally established to address concerns with the Zika virus and are no longer performed.

○ Added *Personnel and Volunteer List* as a supplemental tool to use with this instrument. This list directly corresponds to the information requested in the Background Checks section of the guide.

• Foster Care Site Visit Guide (Form M–7C)

○ Retitled form ''Foster Care Site Visit Guide.'' The former title was ''Long Term Foster Care Site Visit Guide.''

○ Under Program Management—Added requirement to describe internal policies and procedures related to referral and placement.

○ Under Child Protection—Rephrased question 3 from ''Describe the State's licensing child maltreatment reporting requirements. (Provide state link to licensing requirements for reporting requirements.)'' to ''Describe the State's child maltreatment reporting requirements. (Provide a link to the state's mandatory reporting laws/rules. Also, include who classifies as a mandatory reporter in your state.)''

○ Under Facility, Foster Homes, and Food Services

▪ Retitled ''Facility, Foster Homes, and Food Services section to ''Foster Homes.''

▪ Moved the two questions unrelated to foster homes into their own section titled ''Facility and Food Services'' and added additional instructions to clarify what programs are expected to include in their description of the facility space.

○ Under Case Management—Clarified what programs must provide related to their procedures on post-18 planning.

○ Under Background Checks—Reordered and rephrased some of the questions.

○ Under Health Services—Added examples of communicable diseases.

○ Under Problems Encountered—Removed requirement to provide list of commonly used partnerships and services.

○ In the list of requested materials

▪ Added educational curriculum and weekly class schedule

▪ Reformatted the item requesting various policies and procedures into a bullet point list

○ Added a note clarifying that ORR will request foster parent documentation for foster homes that are visited during the site visit.

• Personnel File Checklist (Form M–10A)

○ Removed Training Directive per ORR Management section because it is no longer a requirement. This requirement was related to a specific webinar series on the topic of trauma-informed care. It was removed because it is duplicative of the requirements in the cooperative agreement that require

training on strength-based behavior management and trauma-informed care approaches.

◦ Annual Trainings—Removed ''Hover for additional comments'' and corresponding comment that read ''How does the employee confirm comprehension of a training? *i.e.* quiz/test score or signature confirming comprehension'' because respondents reported the comments were unhelpful.

◦ Trainings Every Two Years per Cooperative Agreement—

▪ Medication Management: Added ''must also receive medication administration training''

▪ Removed ''Hover for additional comments'' and corresponding comment that read ''How does the employee confirm comprehension of a training? *i.e.* quiz/test score or signature confirming comprehension'' because respondents reported the comments were unhelpful.

▪ Rephrased ''Strength-based behavior management . . .'' to ''Strength-based behavior management and trauma-informed care approaches'' to reflect current cooperative agreement requirements.

• Foster Parent Checklist (Form M–10D)

◦ Under General Documentation—Added requirement for monitors to check for completed foster home study assessments/inspections.

◦ General Documentation

▪ Foster Home License: Added ''(Effective: 2022; please reference the program-specific Cooperative Agreement)'' to clarify requirements in the current cooperative agreement.

▪ Added new item ''Completed Foster Home Study Assessments/Inspections (Effective: 2022; please reference the program-specific Cooperative Agreement)'' to align with requirements in the current cooperative agreement.

▪ Added new item ''Foster Parent Agreement (signed; Effective: 2022; please reference the program-specific Cooperative Agreement)'' to align with requirements in the current cooperative agreement.

◦ Pre-Service Trainings—ORR Standards to Prevent, Detect, and Respond to SA and SH involving unaccompanied children: Removed ''New employees must complete training before hire.'' to align with current guidance that allows hire (but no interaction with children) before training.

• Foster Parent Questionnaire (Form M–11O)

◦ Added instructions on the first page.

◦ Reordered some questions.

◦ Clarified that when asking the foster parent what information they received on the child, that ORR is asking about information on the child's individual services needs and provided examples (education, health, dietary, religious, etc.).

◦ Added example of independent living to question asking what types of activities the child participates in.

• Unaccompanied Child Questionnaire—Ages 6–12 Years Old (Form M–12As)—Updated Spanish translation to match currently-approved English version.

• Unaccompanied Child Questionnaire—Ages 13 and Older (Form M–12Bs)—Updated Spanish translation to match currently-approved English version.

ORR is requesting that the following instruments be removed from this information collection:

• Remote Monitoring Site Visit Guide (Form M–7B)—Remove from information collection. This instrument was created for use during the height of the COVID–19 pandemic. Monitors have resumed in-person site visits and the instrument is no longer needed.

• Long Term Foster Care Remote Site Visit Guide (Form M–7D)—Remove from information collection. This instrument was created for use during the height of the COVID–19 pandemic. Monitors have resumed in-person site visits and the instrument is no longer needed.

Voluntary Agency Site Visit Guide (Form M–7F)—Remove from information collection. This instrument is completed by less than 10 respondents and therefore not subject to PRA.

Revisions Approved Under Emergency Approval

Added Interpreter Questionnaire (Form M–11P), which is currently approved under OMB #0970–0558, to this information collection.

Quarterly Unlicensed Facility Site Visits

Added the following forms that were previously approved by OMB but were removed from the information collection due to the number of respondents. Differences between the previously approved versions and the current versions that will be used by contractor monitors are as noted below.

• Monitoring Notes (Form M–6A–UF)

◦ Directions added to top of form.

• UC Case File Checklist (Form M–8A–UF)

◦ Added a Read Me tab with directions.

◦ Added a summary tab that auto-sums data from other tabs.

◦ Revised the formatting of the UC Services tab.

• On Site Monitoring Checklist (M–9A–UF)

◦ Removed section on mosquito control. These inspections were originally established to address concerns with the Zika virus and are no longer performed.

◦ Under Documents that Should be Posted—Removed reference to two discontinued items.

◦ Under Other—Removed reference to mosquito repellant.

◦ Under Logs/Schedules—Removed reference to the discontinued UC Temperature Tracker.

Added the below-listed alternate versions of forms already approved under this information collection. Differences between the already approved versions and the alternate versions are as noted below. Unlicensed programs will continue to receive comprehensive biennial monitoring visits pursuant to UC Policy Guide section 5.5.1 during which the full original versions of these forms will be used. Quarterly monitoring visits will mainly focus on health and safety. To align with that purpose and help streamline forms that will be administered more often than their full version counterparts, adjustments made to the alternate versions removed some items related to program management. Other adjustments were made for clarity or to align with current ORR policy and procedures. Quarterly monitoring visits will continue to monitor the same areas related to child welfare practices and provision of services as biennial monitoring visits.

• Site Visit Guide (Form M–7A–UF)

◦ Under Child Protection—Added requirement for program to provide link to mandatory reporting laws/rules and specify who is classified as a mandatory reported in the State in which the program is located.

◦ Under Background Checks—Clarified that information on foster parents is also required.

◦ Removed reference to mosquito control inspections. These inspections were originally established to address concerns with the Zika virus and are no longer performed.

• Personnel File Checklist (Form M–10A–UF)

◦ Under General Documentation—Removed job description; employment application; personal and professional references; educational records; professional licensure; and I–9 documents.

• Program Director Questionnaire (Form M–11A–UF)

◦ Removed question on what changes the program director envisions for the program in the next year.

○ Modified the question on how the program incorporates input from others to assess the program to only ask about how input from minors and staff is used. Previously, the question asked how input from minors, staff, program partners, legal services providers, and sponsor is used.

• Clinician Questionnaire (Form M–11C–UF)

○ Removed question on what system the clinician uses to document clinical sessions.

○ Removed question asking clinician to describe their relationship with their supervisor.

• Case Manager Questionnaire (Form M–11E–UF)

○ Removed question asking case manager to describe their relationship with their supervisor.

• Education Staff Questionnaire (Form M–11G–UF)

○ No modifications made.

• Medical Coordinator Questionnaire (Form M–11I–UF)

○ Removed question asking medical coordinator to describe their relationship with their supervisor.

• Youth Care Worker Questionnaire (Form M–11J–UF)

○ Removed question on access to UC Portal.

○ Removed question on how often staff meetings are held.

○ Removed question asking youth care worker to describe their relationship with their supervisor.

• Prevention of Sexual Abuse Compliance Manager Staff Questionnaire (Form M–11K–UF)

○ No modifications made.

• Interpreter Questionnaire (Form M–11P–UF)

○ No modifications made.

• UC Questionnaire—Ages 6–12 Years Old (Forms M–12A–UF and M–12As–UF)

○ Under Communication with Family—Added question on how often and how long the child speaks with their family.

○ Removed placeholder sections on meetings with case management and clinical staff, which are not asked of children ages 6–12.

• UC Questionnaire—Ages 13 and Older (Forms M–12B–UF and M–12Bs–UF)

○ Under Admission/Orientation—Removed question asking what the child remembers about documents signed/received during the first couple days.

○ Under Communication with Family—Added question on how often and how long the child speaks with their family. Removed question on sending/receiving mail and email.

• UC Questionnaire—Ages 5 and Under (Form M–12E–UF and M–12Es–UF)

○ No modifications made.

• Legal Service Provider Questionnaire (Form M–13C–UF)

○ Reworded questions on ability to perform Know Your Rights and legal screenings.

○ Removed question on with which program staff members legal service providers regularly interact.

○ Removed questions method used to inform legal service providers of incidents affecting the child's legal case.

• Case Coordinator Questionnaire (Form M–13E–UF)

○ No modifications made.

For information about all currently approved forms under this OMB number, see: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202108-0970-016.*

Respondents: ORR grantee and contractor staff; foster parents; and UC.

Annual Burden Estimates:

Note: These burden estimates include burden related to the revisions described above *and* currently approved forms for which we are not proposing any changes.

ESTIMATED BURDEN HOURS FOR RESPONDENTS

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Corrective Action Report (Form M–1)	262	0.4	5.00	524.00
FFS Compliance and Safety Site Visit Report (Form M–3A)	262	12.0	1.00	3,144.00
Out-of-Network Site Visit Report (Form M–3B)	24	5.0	1.00	120.00
Checklist for a Child-Friendly Environment (Form M–4)	262	12.0	0.25	786.00
Incident Reviews (Forms M–5A to M–5B)	262	0.3	1.50	117.90
Site Visit Guide (Forms M–7A)	114	1.0	13.00	1,482.00
LTFC Site Visit Guide (Forms M–7C)	18	1.0	6.00	108.00
Home Study and Post-Release Services Site Visit Guide (Form M–7E)	30	1.0	6.00	180.00
ICF Monitoring Site Visit Guide (Form M–7G)	3	1	15.00	45.00
Unlicensed Facility Site Visit Guide (Form M–7A–UF)	56	4.0	1.00	224.00
Unlicensed Facility UC Case File Checklist (Form M–8A–UF)	56	20.0	1.00	1,120.00
Unlicensed Facility LTFC UC Case File Checklist (Form M–8B–UF)	1	20	1.00	20.00
Unlicensed Facility Staff Secure Addendum Case File Checklist (Form M–8B–UF)	2	20	1.00	40.00
Program Staff Questionnaires (Forms M–11A to M–11K)	917	1.0	1.00	917.00
Secure Detention Officer Questionnaire (Form M–11L)	1	1.0	1.00	1.00
Long Term Foster Care Home Finder Questionnaire (Form M–11M)	18	1.0	1.00	18.00
Long Term Foster Care Independent Living Life Skills Staff Questionnaire (Form M–11N)	18	1.0	1.00	18.00
Long Term Foster Care Foster Parent Questionnaire (Form M–11O)	35	1.0	0.75	26.25
Interpreter Questionnaire (Form M–11P)	115	2.0	0.50	115.00
Unlicensed Facility Program Staff Questionnaires (Forms M–11A–UF to M–11K–UF)	56	32.0	1.00	1,792.00
Unlicensed Facility Interpreter Questionnaire (Form M–11P–UF)	56	4.0	0.50	112.00
UC Questionnaires (Forms M–12A to M–12B & M–12E)	563	1.0	0.50	281.50
Long Term Foster Care Client Questionnaire (Form M–12C)	88	1.0	0.50	44.00
Secure Client Questionnaire (Form M–12D)	5	1.0	0.50	2.50
Unlicensed Facility UC Questionnaires (Forms M–12A–UF to M–12B–UF & M–12E–UF)	1,120	1.0	0.50	560.00
Home Study and Post-Release Services Director Questionnaire (Form M–13A)	30	1.0	1.00	30.00

ESTIMATED BURDEN HOURS FOR RESPONDENTS—Continued

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Home Study and Post-Release Services Caseworker Questionnaire (Form M–13B)	90	1.0	1.00	90.00
Legal Service Provider Questionnaire (Form M–13C)	114	1.0	1.00	114.00
Long Term Foster Care Legal Service Provider Questionnaire (Form M–13D)	18	1.0	0.75	13.50
Case Coordinator Questionnaire (Form M–13E)	131	1.0	1.00	131.00
Unlicensed Facility Legal Service Provider Questionnaire (Form M–13C–UF)	224	1.0	0.75	168.00
Unlicensed Facility Case Coordinator Questionnaire (Form M–13E–UF)	224	1.0	1.00	224.00
Preaudit Questionnaire and Audit Documentation Requested Checklist (Form M–17A)	78	1.0	4.00	312.00
Instructions for Site Visit and Facility Tour (Form M–17B)	78	1.0	2.00	156.00
Interview Guide: Random Sample of Staff Interview (Form M–17C)	312	1.0	1.00	312.00
Interview Guide: Program Director (Form M–17D)	78	1.0	1.00	78.00
Interview Guide: PSA Compliance Manager (Form M–17E)	78	1.0	1.00	78.00
Interview Guide: Specialized Staff (Form M–17F)	156	1.0	1.00	156.00
Interview Guide: Unaccompanied Child (Form M–17G)	780	1.0	0.50	390.00
PSA Audit Corrective Action Report (Form M–17H)	78	1.0	1.00	78.00
Estimated Annual Burden Hours Total				14,184.65

ESTIMATED BURDEN HOURS FOR CONTRACTOR INTERIM FINAL RULE AUDITORS

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Preaudit Questionnaire and Audit Documentation Requested Checklist (Form M–17A)	8	48.0	3.00	1,152.00
Instructions for Site Visit and Facility Tour (Form M–17B)	8	48.0	1.00	384.00
Interview Guide: Random Sample of Staff Interview (Form M–17C)	8	48.0	1.00	384.00
Interview Guide: Program Director (Form M–17D)	8	48.0	1.00	384.00
Interview Guide: PSA Compliance Manager (Form M–17E)	8	48.0	1.00	384.00
Interview Guide: Specialized Staff (Form M–17F)	8	48.0	1.00	384.00
Interview Guide: Unaccompanied Child (Form M–17G)	8	48.0	0.50	192.00
PSA Audit Corrective Action Report (Form M–17H)	8	48.0	2.00	768.00
Estimated Annual Burden Hours Total				4,032.00

ESTIMATED BURDEN HOURS FOR CONTRACTOR MONITORS—UNLICENSED FACILITIES

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Unlicensed Facility Monitoring Notes (Form M–6A–UF)	18	12.0	12.00	2,592.00
Unlicensed Facility LTFC Monitoring Notes (Form M–6C–UF)	18	0.2	12.00	43.20
ICF Monitoring Notes (Form M–6E–UF)	18	0.7	12.00	151.20
Unlicensed Facility Site Visit Guide (Form M–7A–UF)	18	12.0	29.00	6,264.00
ICF Monitoring Site Visit Guide (Form M–7G)	18	0.7	29.00	365.40
Unlicensed Facility UC Case File Checklist (Form M–8A–UF)	18	62.0	6.00	6,696.00
Unlicensed Facility LTFC UC Case File Checklist (Form M–8B–UF)	18	1.0	6.00	108.00
Unlicensed Facility Staff Secure Addendum to Case File Checklist (Form M–8D–UF)	18	2.0	6.00	216.00
Unlicensed Facility On-Site Monitoring Checklist (Form M–9A–UF)	18	12.0	4.00	864.00
Unlicensed Facility Foster Home Onsite Monitoring Checklist (Form M–9B–UF)	18	0.4	4.00	28.80
Unlicensed Facility Personnel File Checklist (Form M–10A–UF)	18	50.0	1.00	900.00
ICF Personnel File Checklist (Form M–10E)	18	3	1.00	54.00
Unlicensed Facility Program Staff Questionnaires (Forms M–11A–UF to M–11K–UF)	18	100.0	1.00	1,800.00
Unlicensed Facility Interpreter Questionnaire (Form M–11P–UF)	18	12.0	0.50	108.00
Unlicensed Facility UC Questionnaires (Forms M–12A–UF to M–12B–UF & M–12E–UF)	18	62.0	0.50	558.00
Unlicensed Facility Legal Service Provider Questionnaire (Form M–13C–UF)	18	12.0	0.75	162.00

ESTIMATED BURDEN HOURS FOR CONTRACTOR MONITORS—UNLICENSED FACILITIES—Continued

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Unlicensed Facility Case Coordinator Questionnaire (Form M–13E–UF)	18	12.0	1.00	216.00
Estimated Annual Burden Hours Total				21,126.60

ESTIMATED BURDEN HOURS FOR CONTRACTOR MONITORS—PREVIOUSLY APPROVED FOR LICENSED FACILITIES

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Corrective Action Report (Form M–1)	4	25.0	22.00	2,200.00
Site Visit Guide (Forms M–7A)	4	7.0	29.00	812.00
LTFC Site Guide (Forms M–7C)	4	1.0	21.00	84.00
Home Study and Post-Release Services Site Visit Guide (Form M–7E)	4	2.0	21.00	168.00
Personnel File Checklist (Form M–10A)	4	31.0	1.00	124.00
Supplement to Personnel File Checklist (Form M–10B)	4	54.0	1.00	216.00
Home Study and Post-Release Services Personnel File Checklist (Form M–10C)	4	6.0	1.00	24.00
Long Term Foster Care Foster Parent Checklist (Form M–10D)	4	2.0	0.50	4.00
Program Staff Questionnaires (Forms M–11A to M–11K)	4	54.0	1.00	216.00
Secure Detention Officer Questionnaire (Form M–11L)	4	0.1	1.00	0.40
Long Term Foster Care Home Finder Questionnaire (Form M–11M)	4	1.0	1.00	4.00
Long Term Foster Care Independent Living Life Skills Staff Questionnaire (Form M–11N)	4	1.0	1.00	4.00
Long Term Foster Care Foster Parent Questionnaire (Form M–11O)	4	2.0	0.75	6.00
UC Questionnaires (Forms M–12A to M–12B & M–12E)	4	33.0	0.50	66.00
Long Term Foster Care Client Questionnaire (Form M–12C)	4	5.0	0.50	10.00
Secure Client Questionnaire (Form M–12D)	4	0.4	0.50	0.80
Home Study and Post-Release Services Director Questionnaire (Form M–13A)	4	2.0	0.50	4.00
Home Study and Post-Release Services Caseworker Questionnaire (Form M–13B)	4	6.0	1.00	24.00
Legal Service Provider Questionnaire (Form M–13C)	4	7.0	1.00	28.00
Long Term Foster Care Legal Service Provider Questionnaire (Form M–13D)	4	1.0	0.75	3.00
Case Coordinator Questionnaire (Form M–13E)	4	8.0	1.00	32.00
Monitoring Visit (Form M–14)	4	8.0	0.50	16.00
Monitoring Schedule (Form M–15)	4	0.3	0.30	0.36
Estimated Annual Burden Hours Total				4,046.56

Authority: 6 U.S.C. 279; 8 U.S.C. 1232; *Flores* v. *Reno* Settlement Agreement, No. CV85–4544–RJK (C.D. Cal. 1996); 45 CFR part 411.

Mary B. Jones,

ACF/OPRE Certifying Officer.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, Maryland 20857; (301) 443–6593, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with the United States Court of Federal Claims and to serve a copy of the petition to the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to

HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the Table) set forth at 42 CFR 100.3. This Table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the Table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on April 1, 2023, through April 30, 2023. This list provides the name of the petitioner, city, and state of vaccination (if unknown then the city and state of the person or attorney filing the claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the Table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the United States Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Health Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, Maryland 20857. The Court's caption (*Petitioner's Name* v. *Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the Program.

Carole Johnson,

Administrator.

List of Petitions Filed

1. Rosemary Zummak, Boston, Massachusetts, Court of Federal Claims No: 23–0462V
2. John Staub on behalf of J.S., Blackwood, New Jersey, Court of Federal Claims No: 23–0463V
3. Tonya Appel, Moline, Illinois, Court of Federal Claims No: 23–0465V
4. Karen Hoffken, Washington, District of Columbia, Court of Federal Claims No: 23–0470V
5. Yvette Douglas, Phoenix, Arizona, Court of Federal Claims No: 23–0472V
6. Sarah Whitman Blank, Brookline, Massachusetts, Court of Federal Claims No: 23–0473V
7. Veronica Groom, Bowie, Maryland, Court of Federal Claims No: 23–0474V
8. Madison Aguilera, Shorewood, Illinois, Court of Federal Claims No: 23–0476V
9. Armando Cirello, Weatherford, Texas, Court of Federal Claims No: 23–0478V
10. Linda Finch, Ft. Carson, Colorado, Court of Federal Claims No: 23–0480V
11. Lolita Brache, Hermiston, Oregon, Court of Federal Claims No: 23–0481V
12. Michelle Calderon, Pilot Mountain, North Carolina, Court of Federal Claims No: 23–0482V
13. Richard Capps, Asheville, North Carolina, Court of Federal Claims No: 23–0484V
14. Jeremy Hershberger, Buckeye, Arizona, Court of Federal Claims No: 23–0485V
15. Debra Farmer, St. Clair Shores, Michigan, Court of Federal Claims No: 23–0486V
16. Mary Demyan on behalf of J.D., Cheyenne, Wyoming, Court of Federal Claims No: 23–0488V
17. Paul Granet, Scranton, Pennsylvania, Court of Federal Claims No: 23–0491V
18. Michele Sites, Luray, Virginia, Court of Federal Claims No: 23–0492V
19. Kaja Marshall, Broomfield, Colorado, Court of Federal Claims No: 23–0493V
20. Lauren Johnson, Phoenix, Arizona, Court of Federal Claims No: 23–0494V
21. Veronica Kramb, Amherst, Ohio, Court of Federal Claims No: 23–0495V
22. Yvonne McClay, San Pablo, California, Court of Federal Claims No: 23–0496V
23. Muriel Lyons, Brunswick, Maine, Court of Federal Claims No: 23–0497V
24. Beverly Bowles, Bertrand, Missouri, Court of Federal Claims No: 23–0498V
25. Ann Desena, Pembroke Pines, Florida, Court of Federal Claims No: 23–0500V
26. Hollinger James, East Norriton, Pennsylvania, Court of Federal Claims No: 23–0501V
27. Michael C. Henderson, Boscobel, Wisconsin, Court of Federal Claims No: 23–0502V
28. Abera Mengistu, Silver Spring, Maryland, Court of Federal Claims No: 23–0503V
29. Christie Schwager, Michigan City, Indiana, Court of Federal Claims No: 23–0504V
30. Dai Chen, Wayland, Massachusetts, Court of Federal Claims No: 23–0507V
31. Angela Murphy, York, Pennsylvania, Court of Federal Claims No: 23–0508V
32. James Kennedy, Massapequa, New York, Court of Federal Claims No: 23–0511V
33. Charles Upperman, Chambersburg, Pennsylvania, Court of Federal Claims No: 23–0512V
34. Samantha Kennedy, Massapequa, New York, Court of Federal Claims No: 23–0513V
35. Nick Skinner, Norman, Oklahoma, Court of Federal Claims No: 23–0516V
36. Mai Luong, Reston, Virginia, Court of Federal Claims No: 23–0517V
37. Gerald Ross, McDonough, Georgia, Court of Federal Claims No: 23–0518V

38. Jacquelyn Jackson, Geneva, Illinois, Court of Federal Claims No: 23–0522V
39. David Webb, Indianapolis, Indiana, Court of Federal Claims No: 23–0526V
40. Joseph Parayil, West Chester, Ohio, Court of Federal Claims No: 23–0527V
41. Sally A. Cevasco, Rumford, Rhode Island, Court of Federal Claims No: 23–0530V
42. Roxanne S. Cross, Howell, Michigan, Court of Federal Claims No: 23–0531V
43. Deloris Alford-Robinson, Cayce, South Carolina, Court of Federal Claims No: 23–0532V
44. Jessica Daneshrad, Los Angeles, California, Court of Federal Claims No: 23–0533V
45. Lori Capozzoli, Lincoln, Rhode Island, Court of Federal Claims No: 23–0534V
46. Casandra Rivera, Boston, Massachusetts, Court of Federal Claims No: 23–0535V
47. Daniel L. Wakefield, Boscobel, Wisconsin, Court of Federal Claims No: 23–0536V
48. Christine Maupin on behalf of B.M., Palm Coast, Florida, Court of Federal Claims No: 23–0537V
49. Svetlana Loshak, Wilmington, Massachusetts, Court of Federal Claims No: 23–0541V
50. Diane Broide, Vancouver, Washington, Court of Federal Claims No: 23–0544V
51. Marvin R. Barber, Atlanta, Georgia, Court of Federal Claims No: 23–0546V
52. Patricia Cressman, Allentown, Pennsylvania, Court of Federal Claims No: 23–0552V
53. Ronald Croddick, Old Bridge, New Jersey, Court of Federal Claims No: 23–0558V
54. Amber Hampton, Indianola, Iowa, Court of Federal Claims No: 23–0559V
55. Laucetta Edwards, Farmington Hills, Massachusetts, Court of Federal Claims No: 23–0561V
56. Bobbie Henderson, West Memphis, Arizona, Court of Federal Claims No: 23–0562V
57. Geraldine Keel-Mann, Columbus, Ohio, Court of Federal Claims No: 23–0564V
58. Patricia Weigelt, New Ulm, Minnesota, Court of Federal Claims No: 23–0576V
59. Dong Wan Kim, Closter, New Jersey, Court of Federal Claims No: 23–0578V
60. Cheyenne Andres, Ashwaubenon, Wisconsin, Court of Federal Claims No: 23–0579V
61. Heather Clark, Phoenix, Arizona, Court of Federal Claims No: 23–0582V
62. Marya Nemeh, Edgewater, New Jersey, Court of Federal Claims No: 23–0584V
63. Paul Kriss, Belmont, North Carolina, Court of Federal Claims No: 23–0585V
64. Christopher Derr, Austin, Texas, Court of Federal Claims No: 23–0586V
65. Ceta Jagers-Reine, LaPlace, Louisiana, Court of Federal Claims No: 23–0587V
66. Glendina Hammond-Martin, Columbus, Georgia, Court of Federal Claims No: 23–0588V
67. Phaedra McLaughlin, Phoenix, Arizona, Court of Federal Claims No: 23–0590V
68. Stacy Rodriguez, Spring Hill, Florida, Court of Federal Claims No: 23–0591V
69. Jennel L. Palermo, Rochester, New York, Court of Federal Claims No: 23–0592V
70. Don Little, Boston, Massachusetts, Court of Federal Claims No: 23–0593V
71. Connie Widell, Moline, Illinois, Court of Federal Claims No: 23–0594V
72. Barry Atlas, Sewell, New Jersey, Court of Federal Claims No: 23–0595V
73. Tamara Tutt on behalf of L.T., Morrilton, Arkansas, Court of Federal Claims No: 23–0596V
74. Margarita Zabala, Granada Hills, California, Court of Federal Claims No: 23–0597V
75. Christopher Hoy, Schenectady, New York, Court of Federal Claims No: 23–0598V
76. Willow Wren, Phoenix, Arizona, Court of Federal Claims No: 23–0599V
77. Jody Gorran, Vista, California, Court of Federal Claims No: 23–0603V
78. Allison Hine, Lititz, Pennsylvania, Court of Federal Claims No: 23–0606V
79. Thomas Gorski, Seattle, Washington, Court of Federal Claims No: 23–0607V
80. Shardae Cage, Cleveland, Ohio, Court of Federal Claims No: 23–0613V
81. Marie Librizzi, State College, Pennsylvania, Court of Federal Claims No: 23–0615V
82. Dienel Buckner, St. Louis, Missouri, Court of Federal Claims No: 23–0617V

[FR Doc. 2023–11480 Filed 5–30–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Ryan White HIV/AIDS Program: Expenditures Forms, OMB No. 0915–xxxx—New

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than June 30, 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 Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–3983.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Ryan White HIV/AIDS Program: Expenditures Forms, OMB No. 0915–xxxx—New.

Abstract: HRSA administers the Ryan White HIV/AIDS Program (RWHAP) authorized under Title XXVI of the Public Health Service Act. The RWHAP Allocations and Expenditures Reports (A&E Reports) allow HRSA to monitor and track the use of grant funds for compliance with program and grants policies, and requirements as outlined in the legislation.

A&E Reports: Recipients funded under RWHAP Parts A, B, C, and D are

required to report financial data to HRSA at the beginning (Allocations Report) and at the end (Expenditures Report) of their grant budget period. The A&E Reports request information recipients already collect, including the use of RWHAP grant funds for core medical and support services; and on various program components, such as administration, planning and evaluation, and clinical quality management. RWHAP Parts A and B recipients funded under the Ending the HIV Epidemic in the U.S. (EHE) initiative are also required to report allocations and expenditures of the grant budget period in the EHE A&E Reports. This allows HRSA to track and report progress toward meeting the EHE goals.

The reports are similar in content; however, in the first report, recipients document the allocation of their RWHAP or EHE grant award at the beginning of their grant budget period. In the second report, recipients document actual expenditures of their RWHAP or EHE grant award (including any carryover dollars) at the end of their grant budget period.

HRSA is proposing the following updates to the RWHAP Expenditure Reports.

RWHAP Part A Expenditures Report:

- Revising row and column headers and other language for clarity and alignment with RWHAP requirements;
- Combining the columns for RWHAP Part A Formula and Supplemental Expenditure amounts and updating the title;
- Moving the Prior Fiscal Year (FY) Carryover column row after the Current FY column and updating the title;
- Moving the RWHAP Part A Minority AIDS Initiative (MAI) Award Amount row after the RWHAP Part A Supplemental Award Amount row;
- Re-ordering the MAI rows in the ''RWHAP Part A and MAI Service Category Expenditures'' table as follows: 3. RWHAP Part A Supplemental Award, 4. RWHAP Part A MAI Award Amount, 5. RWHAP Part A MAI Carryover Amount;
- Updating calculations and language in the Legislative Requirements Checklist; and
- Adding a requirement for Financial Officer/Designee to certify subrecipient aggregated administrative expenditures.

RWHAP Part B Expenditures Report:

- Revising rows and column headers and other language for clarity and alignment with RWHAP requirements;
- Adding the following rows to Table 1: 4b. RWHAP Part B HIV Care Consortia Planning & Evaluation and 4c. RWHAP Part B HIV Care Consortia Clinical Quality Management (CQM);
- Blacking out selected cells in the following rows, columns, or tables:
  - 5. Total (including carryover) Percent column:
  - (4a–4c) RWHAP Part B HIV Care Consortia Admin, Planning & Evaluation (P&E), and CQM
  - (6) RWHAP Part B CQM
  - (7) RWHAP Part B Recipient P&E Activities
  - (8) Recipient Administration
  - (9) Column Totals
  - (10) Total RWHAP Part B Expenditures (excluding carryover);
- 2. RWHAP Part B Health Insurance Premium & Cost Sharing Assistance and 3. RWHAP Part B Home and Community-based Health Services' amounts and percent:
  - (1) Base Award
  - (2) AIDS Drug Assistance Program (ADAP) Earmark + ADAP Supplemental
  - (3) Emerging Communities Award
  - (4) Total Prior FY Carryover
  - (5) Total (Including Carryover);
- 4b. RWHAP Part B HIV Care Consortia P&E and 4c. RWHAP Part B HIV Care Consortia CQM:
  - (1) Base Award: Prior FY Carryover
  - (2) ADAP Earmark + ADAP Supplemental: Prior FY Carryover, Current FY and Percent
  - (3) Emerging Communities Award: Prior FY Carryover
  - (4) Total Prior FY Carryover: Amount and Percent;
- MAI Expenditure by Program Component:
  - (3) CQM: Prior FY Carryover amount & percent
  - (4) Recipient Planning & Evaluation Activities: Prior FY Carryover amount & percent
  - (5) Recipient Administration: Prior FY Carryover amount & percent
  - (6) Total MAI Expenditures; and percent
- Adding a new row: (10) Total RWHAP Part B Expenditures (excluding carryover);
- Displaying previously blacked out cells in the following two rows under the Expenditures Categories table:
- d. Health Insurance Premium and Cost Sharing Assistance for Low-Income Individuals and e. Home and Community-Based Health Services
  - (2) Direct Services
  - (3) Emerging Communities
  - (4) Prior FY Carryover;
- Updating calculations and language in the Legislative Requirements Checklist;
- Removing Consortia Administration and Emerging Communities Administration from the Legislative Requirement from Legislative Requirement;
- Removing the following services under the Legislative Requirements Checklist's Core Medical Services:
  - Health Insurance Premium & Cost Sharing Assistance
  - Home and Community-based Health Services
- Adding requirement for a Financial Officer/Designee to certify subrecipient aggregated administrative expenditures; and
- Adding a row for the recipient to certify that administrative expenses for the RWHAP Part B does not exceed allowable cap.

RWHAP Part C Expenditures Report:

- There are no proposed changes to the RWHAP Part C Expenditures Report.

RWHAP Part D Expenditures Report:

- There are no proposed changes to the RWHAP Part D Expenditures Report.

EHE Expenditures Reports:

- There are no proposed changes to the EHE Expenditures Reports.

A 60-day notice published in the **Federal Register**, 88 FR pp. 14626–27 (March 9, 2023). There was one comment received. There are no changes made to the information collection since the comment received is outside the scope of this information request.

Need and Proposed Use of the Information: Accurate allocation, expenditure, and service contract records of the recipients receiving RWHAP and EHE funding are critical to the implementation of the RWHAP legislation and EHE initiative appropriation language and thus are necessary for HRSA to fulfill its monitoring and oversight responsibilities.

Likely Respondents: RWHAP Part A, Part B, Part C, Part D, and EHE recipients.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the

information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Part A Expenditures Report	52	1	52	4	208
Part B Expenditures Report	54	1	54	6	324
Part C Expenditures Report	346	1	346	4	1,384
Part D Expenditures Report	116	1	116	4	464
EHE Expenditures Report	47	1	47	4	188
Total	615		615		2,568

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–11565 Filed 5–30–23; 8:45 am]

BILLING CODE 4165–15–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 the Substance Abuse and Mental Health Services Administration (SAMHSA) is supporting a supplement (in scope of the parent award) for the grant recipient funded in FY 2020 under the Homeless and Housing Resource Center (HHRC) Notice of Funding Opportunity (NOFO) SM–20–009. The recipient may receive up to $498,500 in supplemental funds. The recipient has a project end date of August 30, 2024. The supplemental funding will be used to address substance use and/or mental disorders associated with service access and delivery and systems needs related to unsheltered and rural homelessness.

FOR FURTHER INFORMATION CONTACT: Michelle E. Daly, M.S.W., Lead Public Health Advisor, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857, telephone 240–276–2789; email: *Michelle.Daly@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: FY 2020 Homeless and Housing Resource Center (HHRC) Grant SM–20–009.

Assistance Listing Number: 93.243.

Authority: Section 520 of the Public Health Services Act as amended.

Justification: Eligibility for this supplemental funding is limited to Policy Research, Inc., which was funded in FY 2020 under the Homeless and Housing Resource Center (HHRC—SM–20–009) grant program. The recipient has special expertise in providing training and technical assistance to support federal, state, and local efforts on strategic planning, capacity development, financing, and delivering substance use and/or mental disorders evidence-based practices to improve systems coordination.

This is not a formal request for application. Assistance will only be provided to the HHRC grant recipient funded in FY 2020 based on the receipt of a satisfactory application and associated budget that is approved by a review group.

Dated: May 24, 2023.

Ann Ferrero,

Public Health Analyst.

[FR Doc. 2023–11461 Filed 5–30–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4676–DR; Docket ID FEMA–2023–0001]

Illinois; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Illinois (FEMA–4676–DR), dated October 14, 2022, and related determinations.

DATES: This change occurred on March 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Waddy Gonzalez, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Darryl L. Dragoo as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals

and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11515 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4646–DR; Docket ID FEMA–2023–0001]

Alaska; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alaska (FEMA–4646–DR), dated March 14, 2022, and related determinations.

DATES: This change occurred on April 5, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lance E. Davis, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Yolanda J. Jackson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11507 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4693–DR; Docket ID FEMA–2023–0001]

New Hampshire; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New Hampshire (FEMA–4693–DR), dated March 15, 2023, and related determinations.

DATES: The declaration was issued March 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 15, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of New Hampshire resulting from a severe storm and flooding during the period of December 22 to December 25, 2022, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of New Hampshire.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, William F. Roy, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of New Hampshire have been designated as adversely affected by this major disaster:

Belknap, Carroll, Coos, and Grafton Counties for Public Assistance.

All areas within the State of New Hampshire are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11519 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4648–DR; Docket ID FEMA–2023–0001]

Alaska; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alaska (FEMA–4648–DR), dated March 24, 2022, and related determinations.

DATES: This change occurred on April 5, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lance E. Davis, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Yolanda J. Jackson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11508 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4673–DR; Docket ID FEMA–2023–0001]

Florida; Amendment No. 14 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–4673–DR), dated September 29, 2022, and related determinations.

DATES: This change occurred on April 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Thomas J. McCool as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11514 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4584–DR; Docket ID FEMA–2023–0001]

Washington; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Washington (FEMA–4584–DR), dated February 4, 2021, and related determinations.

DATES: This change occurred on March 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew P. Meyer, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of David R. Gervino as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11505 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4705–DR; Docket ID FEMA–2023–0001]

Texas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Texas (FEMA–4705–DR), dated April 21, 2023, and related determinations.

DATES: The declaration was issued April 21, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 21, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Texas resulting from a severe winter storm during the period of January 30 to February 2, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Texas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Gerard M. Stolar, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Texas have been designated as adversely affected by this major disaster:

Bastrop, Blanco, Burleson, Burnet, Hays, Henderson, Kendall, Lee, Leon, Milam, Robertson, Travis, and Williamson Counties for Public Assistance.

All areas within the State of Texas are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11538 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4697–DR; Docket ID FEMA–2023–0001]

Mississippi; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA–4697–DR), dated March 26, 2023, and related determinations.

DATES: The declaration was issued March 26, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 26, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in the State of Mississippi resulting from severe storms, straight-line winds, and tornadoes during the period of March 24 to March 25, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Mississippi.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible cost.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John F. Boyle, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Mississippi have been designated as adversely affected by this major disaster:

Carroll, Humphreys, Monroe, and Sharkey Counties for Individual Assistance.

Carroll, Humphreys, Monroe, and Sharkey Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of Mississippi are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11523 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0013; OMB No. 1660–0022]

Agency Information Collection Activities: Proposed Collection, Comment Request; Community Rating System—Application Letter & Quick Check; Community Annual Recertification; Environmental & Historic Preservation Certification; NFIP Repetitive Loss Update Form

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of renewal and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on an extension, without change, of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the application for the National Flood Insurance Program's (NFIP's) Community Rating System (CRS) program. This program allows communities to become eligible for discounts on the cost of flood insurance when the communities undertake activities to mitigate anticipated damage due to flooding. The application materials verify and document the community mitigation activities performed and provides FEMA with the information necessary to determine what flood insurance premium discounts are appropriate for participating communities.

DATES: Comments must be submitted on or before July 31, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *www.regulations.gov* under Docket ID FEMA–2023–0013. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used to submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bill Lesser, Program Specialist, Federal Insurance and Mitigation Administration, (202) 646–2807, *FEMA-CRS@fema.dhs.gov.* You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The National Flood Insurance Reform Act (NFIRA) of 1994 (Pub. L. 103–325, Sec. 541) requires that a community rating system be established. This ratings system is a voluntary program for communities, and it would provide a method by which flood mitigation activities engaged in by these communities could be measured. The effect of this mitigation activity would reduce the exposure of the communities to damage resulting from flooding and in turn reduce the losses incurred as a result of this flooding. To encourage participation, discounts on flood insurance are offered within communities that successfully complete qualified mitigation actions, and the community ratings system provides the ability to measure these actions and to recertify the communities in successive years.

Collection of Information

Title: Community Rating System (CRS) Program—Application Letter and CRS Quick Check, Community Annual Recertification, Environmental and Historic Preservation Certifications, and NFIP Repetitive Loss Update Form.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1600–0022.

FEMA Forms: FEMA Form FF–206–FY–23–100 (formerly 086–0–35), Community Rating System Application Letter and Quick Check; FEMA Form FF–206–FY–23–101 (formerly 086–0–35A), Community Annual Recertifications, FEMA Form FF–206–FY–23–102 (formerly 086–0–35B), Environmental and Historic Preservation Certifications, and FEMA Form FF–206–FY–23–103 (formerly 086–0–35C), NFIP Repetitive Loss Update Form.

Abstract: The Community Rating System (CRS) Application Letter & Quick Check, the CRS certification forms, and accompanying guidance are used by communities that participate in the National Flood Insurance Program's (NFIP) CRS program. The CRS is a voluntary program where flood insurance costs are reduced in communities that implement practices, such as building codes and public awareness activities, that are considered to reduce the risks of flooding and promote the purchase of flood insurance.

Affected Public: State, Local, or Tribal government.

Estimated Number of Respondents: 2,170.

Estimated Number of Responses: 4,170.

Estimated Total Annual Burden Hours: 52,292.

Estimated Total Annual Respondent Cost: $4,173,947.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $12,992,290.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–11499 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–47–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4650–DR; Docket ID FEMA–2023–0001]

Washington; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Washington (FEMA–4650–DR), dated March 29, 2022, and related determinations.

DATES: This change occurred on March 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew P. Meyer, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of David R. Gervino as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11509 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4685–DR; Docket ID FEMA–2023–0001]

Georgia; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Georgia (FEMA–4685–DR), dated January 16, 2023, and related determinations.

DATES: This change occurred on May 3, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Judy Kruger, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Manny J. Toro as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11518 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4706–DR; Docket ID FEMA–2023–0001]

Oklahoma; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–4706–DR), dated April 24, 2023, and related determinations.

DATES: The declaration was issued April 24, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 24, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in the State of Oklahoma resulting from severe storms, straight-line winds, and tornadoes during the period of April 19 to April 20, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Oklahoma.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible cost.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Adam D. Burpee, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Oklahoma have been designated as adversely affected by this major disaster:

McClain and Pottawatomie Counties for Individual Assistance.

McClain and Pottawatomie Counties for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program.

All areas within the State of Oklahoma are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11540 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4680–DR; Docket ID FEMA–2023–0001]

Florida; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–4680–DR), dated December 13, 2022, and related determinations.

DATES: This change occurred on April 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Thomas J. McCool as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11516 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4661–DR; Docket ID FEMA–2023–0001]

Alaska; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alaska (FEMA–4661–DR), dated July 26, 2022, and related determinations.

DATES: This change occurred on April 5, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lance E. Davis, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Yolanda J. Jackson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11511 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4699–DR; Docket ID FEMA–2023–0001]

California; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4699–DR), dated April 3, 2023, and related determinations.

DATES: This amendment was issued April 14, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 3, 2023.

San Bernardino for Individual Assistance.

Alpine, Fresno, Kings, Merced, Sierra, and Trinity Counties for Public Assistance.

Kern, Mariposa, San Benito, and Tuolumne Counties for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11530 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4667–DR; Docket ID FEMA–2023–0001]

Alaska; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alaska (FEMA–4667–DR), dated August 26, 2022, and related determinations.

DATES: This change occurred on April 5, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lance E. Davis, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Yolanda J. Jackson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11512 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4672–DR; Docket ID FEMA–2023–0001]

Alaska; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alaska (FEMA–4672–DR), dated September 23, 2022, and related determinations.

DATES: This change occurred on April 5, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lance E. Davis, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Yolanda J. Jackson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11513 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4696–DR; Docket ID FEMA–2023–0001]

Maine; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Maine (FEMA–4696–DR), dated March 22, 2023, and related determinations.

DATES: The declaration was issued March 22, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 22, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Maine resulting from a severe storm and flooding during the period of December 23 to December 24, 2022, is of sufficient severity and magnitude to warrant a major disaster declaration under

the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Maine.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, William F. Roy, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Maine have been designated as adversely affected by this major disaster:

Franklin, Knox, Oxford, Somerset, Waldo, and York Counties for Public Assistance.

All areas within the State of Maine are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11522 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4539–DR; Docket ID FEMA–2023–0001]

Washington; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Washington (FEMA–4539–DR), dated April 23, 2020, and related determinations.

DATES: This change occurred on March 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew P. Meyer, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of David R. Gervino as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11504 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4652–DR; Docket ID FEMA–2023–0001]

New Mexico; Amendment No. 13 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Mexico (FEMA–4652–DR), dated May 4, 2022, and related determinations.

DATES: This change occurred on April 10, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Jose M. Gil-Montanez, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gerard M. Stolar as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11510 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4635–DR; Docket ID FEMA–2023–0001]

Washington; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Washington (FEMA–4635–DR), dated January 5, 2022, and related determinations.

DATES: This change occurred on March 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew P. Meyer, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of David R. Gervino as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11506 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4698–DR; Docket ID FEMA–2023–0001]

Arkansas; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–4698–DR), dated April 2, 2023, and related determinations.

DATES: This amendment was issued April 8, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 8, 2023, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), in a letter to Deanne Criswell, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in certain areas of the State of Arkansas resulting from severe storms and tornadoes on March 31, 2023, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act'').

Therefore, I amend my declaration of April 2, 2023, to authorize Federal funds for debris removal and emergency protective measures, including direct Federal assistance at 100 percent of the total eligible costs for a continuous 30-day period of the State's choosing within the first 120 days of the incident period.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11528 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4702–DR; Docket ID FEMA–2023–0001]

Kentucky; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Commonwealth of Kentucky (FEMA–4702–DR), dated April 10, 2023, and related determinations.

DATES: The declaration was issued April 10, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 10, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the Commonwealth of Kentucky resulting from severe storms, straight-line winds, tornadoes, flooding, landslides, and mudslides during the period of March 3 to March 4, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the Commonwealth of Kentucky.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the

Commonwealth. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Myra M. Shird, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the Commonwealth of Kentucky have been designated as adversely affected by this major disaster:

Adair, Allen, Anderson, Barren, Bourbon, Breckenridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Casey, Christian, Clark, Clay, Crittenden, Cumberland, Daviess, Edmonson, Estill, Floyd, Franklin, Gallatin, Garrard, Grant, Graves, Grayson, Green, Hancock, Hardin, Harrison, Hart, Henry, Hopkins, Hickman, Jackson, Jessamine, Johnson, LaRue, Laurel, Lee, Lincoln, Livingston, Logan, Lyon, Madison, Marion, Marshall, Martin, McCracken, McLean, Meade, Menifee, Metcalfe, Monroe, Muhlenberg, Nelson, Nicholas, Ohio, Owen, Owsley, Powell, Robertson, Rockcastle, Simpson, Spencer, Taylor, Todd, Trigg, Trimble, Union, Warren, Washington, Webster, Whitley, and Wolfe Counties for Public Assistance.

All areas within the Commonwealth of Kentucky are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11534 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4699–DR; Docket ID FEMA–2023–0001]

California; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4699–DR), dated April 3, 2023, and related determinations.

DATES: This amendment was issued May 2, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 3, 2023.

Madera, Mendocino, and Mono Counties for Individual Assistance.

Amador, Butte, Del Norte, Glenn, Inyo, Madera, Modoc, and San Francisco Counties for Public Assistance.

Santa Cruz County for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11531 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4698–DR; Docket ID FEMA–2023–0001]

Arkansas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–4698–DR), dated April 2, 2023, and related determinations.

DATES: This amendment was issued April 13, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 2, 2023.

Cross, Lonoke, and Pulaski Counties for permanent work [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11527 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4699–DR; Docket ID FEMA–2023–0001]

California; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of California (FEMA–4699–DR), dated April 3, 2023, and related determinations.

DATES: The declaration was issued April 3, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 3, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of California resulting from severe winter storms, straight-line winds, flooding, landslides, and mudslides beginning on February 21, 2023, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of California.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew F. Grant, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of California have been designated as adversely affected by this major disaster:

Kern, Mariposa, Monterey, San Benito, Santa Cruz, Tulare, and Tuolumne Counties for Individual Assistance.

Calaveras, Los Angeles, Monterey, and Tulare Counties for Public Assistance.

All areas within the State of California are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11529 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4701–DR; Docket ID FEMA–2023–0001]

Tennessee; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Tennessee (FEMA–4701–DR), dated April 7, 2023, and related determinations.

DATES: The declaration was issued April 7, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 7, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in the State of Tennessee resulting from severe storms, straight-line winds, and tornadoes during the period of March 31 to April 1, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Tennessee.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible cost.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew D. Friend, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Tennessee have been designated as adversely affected by this major disaster:

Cannon, Hardeman, Hardin, Haywood, Lewis, Macon, McNairy, Rutherford, Tipton, and Wayne Counties for Individual Assistance.

Cannon, Hardeman, Hardin, Haywood, Lewis, Macon, McNairy, Rutherford, Tipton, and Wayne Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of Tennessee are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance— Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11533 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4697–DR; Docket ID FEMA–2023–0001]

Mississippi; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4697–DR), dated March 26, 2023, and related determinations.

DATES: This amendment was issued April 19, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Mississippi is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of March 26, 2023.

Washington County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance— Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11525 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4698–DR; Docket ID FEMA–2023–0001]

Arkansas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Arkansas (FEMA–4698–DR), dated April 2, 2023, and related determinations.

DATES: The declaration was issued April 2, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 2, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Arkansas resulting from severe storms and tornadoes on March 31, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Arkansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance, under the Public Assistance program in the designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Roland W. Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Arkansas have been designated as adversely affected by this major disaster:

Cross, Lonoke, and Pulaski Counties for Individual Assistance.

Cross, Lonoke, and Pulaski Counties for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All areas within the State of Arkansas are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance— Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals

and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11526 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4704–DR; Docket ID FEMA–2023–0001]

Indiana; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Indiana (FEMA–4704–DR), dated April 15, 2023, and related determinations.

DATES: This amendment was issued April 24, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Indiana is hereby amended to include the Hazard Mitigation Grant Program for those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 15, 2023.

All areas within the State of Indiana are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11537 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4704–DR; Docket ID FEMA–2023–0001]

Indiana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Indiana (FEMA–4704–DR), dated April 15, 2023, and related determinations.

DATES: The declaration was issued April 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 15, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Indiana resulting from severe storms, straight-line winds, and tornadoes during the period of March 31 to April 1, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Indiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brian F. Schiller, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Indiana have been designated as adversely affected by this major disaster:

Allen, Benton, Clinton, Grant, Howard, Johnson, Lake, Monroe, Morgan, Owen, Sullivan, and White Counties for Individual Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11536 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4700–DR; Docket ID FEMA–2023–0001]

Arkansas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Arkansas

(FEMA–4700–DR), dated April 4, 2023, and related determinations.

DATES: The declaration was issued April 4, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 4, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Arkansas resulting from a severe winter storm during the period of January 30 to February 2, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Arkansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Roland W. Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Arkansas have been designated as adversely affected by this major disaster:

Bradley, Calhoun, Cleveland, Dallas, Desha, Drew, Grant, Jefferson, Lincoln, Nevada, Ouachita, Searcy, and Stone Counties for Public Assistance.

All areas within the State of Arkansas are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11532 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4707–DR; Docket ID FEMA–2023–0001]

Hoopa Valley Tribe; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Hoopa Valley Tribe (FEMA–4707–DR), dated April 25, 2023, and related determinations.

DATES: The declaration was issued April 25, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 25, 2023 the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage to the lands associated with the Hoopa Valley Tribe resulting from severe winter storms and mudslides during the period of February 14 to March 5, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists for the Hoopa Valley Tribe.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance and Hazard Mitigation for the Hoopa Valley Tribe. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Benigno Bern Ruiz, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas have been designated as adversely affected by this major disaster:

The Hoopa Valley Tribe for Public Assistance.

The Hoopa Valley Tribe is eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11542 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4709–DR; Docket ID FEMA–2023–0001]

Florida; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major

disaster for the State of Florida (FEMA–4709–DR), dated April 27, 2023, and related determinations.

DATES: The declaration was issued April 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 27, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Florida resulting from severe storms, tornadoes, and flooding during the period of April 12 to April 14, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Florida.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brett H. Howard, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Florida have been designated as adversely affected by this major disaster:

Broward County for Individual Assistance.
Broward County for Public Assistance.

All areas within the State of Florida are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11544 Filed 5–30–23; 8:45 am]
BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4706–DR; Docket ID FEMA–2023–0001]

Oklahoma; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Oklahoma (FEMA–4706–DR), dated April 24, 2023, and related determinations.

DATES: This amendment was issued May 8, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Oklahoma is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 24, 2023.

Cleveland County for Individual Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11541 Filed 5–30–23; 8:45 am]
BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4708–DR; Docket ID FEMA–2023–0001]

Nevada; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Nevada (FEMA–4708–DR), dated April 27, 2023, and related determinations.

DATES: The declaration was issued April 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 27, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Nevada resulting from severe winter storms, flooding, landslides, and mudslides during the period of March 8 to March 19, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Nevada.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Maona N. Ngwira, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Nevada have been designated as adversely affected by this major disaster:

Douglas, Eureka, Lincoln, Lyon, Mineral, and Storey Counties for Public Assistance.

All areas within the State of Nevada are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11543 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4697–DR; Docket ID FEMA–2023–0001]

Mississippi; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4697–DR), dated March 26, 2023, and related determinations.

DATES: This amendment was issued March 31, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 31, 2023, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), in a letter to Deanne Criswell, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in certain areas of the State of Mississippi resulting from severe storms, straight-line winds, and tornadoes during the period of March 24 to March 25, 2023, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act'').

Therefore, I amend my declaration of March 26, 2023, to authorize Federal funds for debris removal and emergency protective measures at 100 percent of the total eligible costs for a continuous 30-day period of the State's choosing within the first 120 days of the incident period.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11524 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4695–DR; Docket ID FEMA–2023–0001]

Vermont; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Vermont (FEMA–4695–DR), dated March 20, 2023, and related determinations.

DATES: The declaration was issued March 20, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 20, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Vermont resulting from a severe storm and flooding during the period of December 22 to December 24, 2022, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Vermont.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, William F. Roy, of FEMA is appointed to act as the Federal

Coordinating Officer for this major disaster.

The following areas of the State of Vermont have been designated as adversely affected by this major disaster:

Chittenden, Essex, Franklin, Grand Isle, Lamoille, Orange, Orleans, and Washington Counties for Public Assistance.

All areas within the State of Vermont are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11521 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4682–DR; Docket ID FEMA–2023–0001]

Washington; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Washington (FEMA–4682–DR), dated January 12, 2023, and related determinations.

DATES: This change occurred on March 27, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew P. Meyer, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of David R. Gervino as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11517 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4705–DR; Docket ID FEMA–2023–0001]

Texas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–4705–DR), dated April 21, 2023, and related determinations.

DATES: This amendment was issued May 8, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 21, 2023.

Anderson, Falls, Gillespie, Hopkins, Kerr, Kimble, Limestone, and Red River Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11539 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4694–DR; Docket ID FEMA–2023–0001]

New York; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New York (FEMA–4694–DR), dated March 15, 2023, and related determinations.

DATES: The declaration was issued March 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 15, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of New York resulting from a severe winter storm and snowstorm during the period of December 23 to December 28, 2022, is of sufficient severity and magnitude to warrant a major disaster

declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of New York.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance limited to Funeral Assistance under Other Needs Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. You are further authorized to provide snow assistance under the Public Assistance program for a limited period of time during or proximate to the incident period. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lai Sun Yee, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of New York have been designated as adversely affected by this major disaster:

Erie and Niagara Counties for Funeral Assistance under Other Needs Assistance.

Erie, Genesee, Niagara, St. Lawrence, and Suffolk Counties for Public Assistance.

Erie and Niagara Counties for snow assistance under the Public Assistance program for any continuous 48-hour period during or proximate to the incident period.

All areas within the State of New York are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance— Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11520 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4703–DR; Docket ID FEMA–2023–0001]

Navajo Nation; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Navajo Nation (FEMA–4703–DR), dated April 11, 2023, and related determinations.

DATES: The declaration was issued April 11, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 11, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage to the lands associated with the Navajo Nation resulting from severe winter storms and flooding during the period of January 14 to January 17, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists for the Navajo Nation.

In order to provide federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance and Hazard Mitigation for the Navajo Nation. Consistent with the requirement that federal assistance be supplemental, any federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Benigno B. Ruiz, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas have been designated as adversely affected by this major disaster:

Navajo Nation for Public Assistance.

The Navajo Nation is eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance— Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–11535 Filed 5–30–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2023–0022; FXIA16710900000–234–FF09A30000]

Marine Mammal Protection Act; Receipt of Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit application; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on an application to conduct certain activities with marine mammals for which the Service has jurisdiction under the Marine Mammal Protection Act (MMPA). With some exceptions, the MMPA prohibits activities with marine mammals unless Federal authorization is issued that allows such activities. The MMPA also

requires that we invite public comment before issuing permits for any activity that is otherwise prohibited with respect to any marine mammal.

DATES: We must receive comments by June 30, 2023.

ADDRESSES:

Obtaining Documents: The application, application supporting materials, and any comments and other materials that we receive will be available for public inspection at *https://www.regulations.gov* in Docket No. FWS–HQ–IA–2023–0022.

Submitting Comments: You may submit comments by one of the following methods:

- *Internet: https://www.regulations.gov.* Search for and submit comments on Docket No. FWS–HQ–IA–2023–0022.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2023–0022; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, by phone at 703–358–2185 or via email at *DMAFR@fws.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

A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on this application. Before issuing any requested permit, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email, or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

B. May I review comments submitted by others?

You may view and comment on others' public comments at *https://www.regulations.gov* unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

C. Who will see my comments?

If you submit a comment at *https://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 104(c) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the MMPA prohibits certain activities with marine mammals unless Federal authorization is issued that allows such activities. Service regulations regarding permits for any activity otherwise prohibited by the MMPA with respect to any foreign or native marine mammal species are available in title 50 of the Code of Federal Regulations in part 18.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of this marine mammal application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

III. Permit Application

We invite comments on the following application.

Applicant: U.S. Fish and Wildlife Service, Alaska Marine Mammals Management Office, Anchorage, AK; Permit No. 041309

The applicant requests a renewal and amendment of their permit to capture, re-capture, release, collect carcasses of, import or export parts of, hold, anesthetize, flipper tag, PIT tag, collect samples of, transport, use radio transmitter for location of, use time-depth recorders for study of, use LX2 and TDR transmitters for study of, conduct benthic surveys of using CTD and underwater cameras, deploy passive acoustic monitors for study of, and conduct ensonification studies of up to 200 northern sea otters (*Enhydra lutris kenyoni*) annually, for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching *https://www.regulations.gov* for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to *https://www.regulations.gov* and search for ''12345A''.

V. Authority

We issue this notice under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and its implementing regulations.

Brenda Tapia,

Supervisory Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2023–11448 Filed 5–30–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/A0A501010.999900; OMB Control Number 1076–0122]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Data Elements for Bureau-Funded Schools

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Indian Education (BIE) are proposing to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before June 30, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection request (ICR) should be sent within 30 days of publication of this notice to the Office of Information and Regulatory Affairs (OIRA) through *https://www.reginfo.gov/public/do/PRA/icrPublicCommentRequest?ref_nbr=202301-1076-001* or by visiting *https://www.reginfo.gov/public/do/PRAMain* and selecting ''Currently under Review—Open for Public Comments'' and then scrolling down to the ''Department of the Interior.''

FOR FURTHER INFORMATION CONTACT: Steven Mullen, Information Collection Clearance Officer, by email at *comments@bia.gov* or telephone at (202) 924–2650. 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. You may also view the ICR at *https://www.reginfo.gov/public/Forward?SearchTarget=PRA&textfield=1076-0122.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on March 2, 2023 (88 FR 13145). BIE received one comment.

Comment: Commentor opposes the BIE proposal for a referral intake form to facilitate virtual counseling and crisis services and believes the new form would place undue burden on schools, especially those without a counselor on staff.

Agency Response to Comment: BIE wholeheartedly appreciates schools are limited in both capacity and resources. To clarify, BIE's program seeks to connect schools to federally-funded virtual counseling and crisis services. The proposed action would not create a regulatory requirement for schools to provide counseling services; and it would not require Tribal schools/organizations to have a counselor on staff. BIE's Behavioral Health and Wellness Program (BHWP) is an optional resource for students and staff at all Bureau-funded programs, departments, and institutions—including Bureau operated schools, Tribally controlled schools, post-secondary institutions, and Tribal colleges and universities. The purpose of the referral intake form is to collect information necessary to facilitate virtual counseling and crisis services.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

OMB Control Number 1076–0122

Abstract: The Secretary of the Interior, through the Bureau of Indian Education (BIE), is required by the Snyder Act (25 U.S.C. 13), Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 5301), Education Amendments of 1978 (25 U.S.C. 2001), Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (20 U.S.C. 6301 *et seq.*), and Every Student Succeeds Act (20 U.S.C. 6301) to provide educational services to federally recognized Indians and Alaska Natives. In addition, 25 CFR 43, Maintenance and Control of Student Records in Bureau Schools, contain regulations governing the maintenance, control, and accessibility of student records.

BIE's Student Enrollment Application is utilized by schools operated or funded by BIE. The information is collected by school registrars to determine the student's eligibility for enrollment in a bureau-operated school, and if eligible, is shared with appropriate school officials to identify the student's base and supplemental educational and/or residential program needs. The information is compiled into a national database by the Bureau of Indian Education to facilitate budget requests and the allocation of congressionally appropriated funds.

BIE's Behavioral Health and Wellness Program (BHWP) is focused on providing indigenous focused, evidence-based, and trauma-informed behavioral health and wellness services/resources for students and staff at all Bureau-funded programs, departments, and institutions including Bureau operated schools, Tribally controlled schools, post-secondary institutions, and Tribal colleges and universities.

Proposed Revisions

BIE proposes a referral intake form to facilitate federally-funded virtual counseling and crisis services. All data collected for the BHWP will only be utilized for establishing the appropriate level of care, assessing client safety, ensuring services are individualized to meet the client's specific needs, and providing clients with external referrals,

as needed. The BHWP counseling and crisis services are optional—BIE regulations do not require a school to participate in the BHWP.

Title of Collection: Data Elements for Bureau-Funded Schools.

OMB Control Number: 1076–0122.

Form Number: None.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Individuals, Contract and Grant schools, and Bureau-funded schools.

Total Estimated Number of Annual Respondents: 49,000 per year, on average.

Total Estimated Number of Annual Responses: 49,000 per year, on average.

Estimated Completion Time per Response: 15 to 30 minutes.

Total Estimated Number of Annual Burden Hours: 12,500 hours.

Frequency of Collection: Occasionally, required to obtain a benefit.

Total Estimated Annual Nonhour Burden Cost: $0.

Authority

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.*).

Steven Mullen,

Information Collection Clearance Officer, Office of Regulatory Affairs and Collaborative Action—Indian Affairs.

[FR Doc. 2023–11569 Filed 5–30–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/ A0A501010.999900]

Receipt of Documented Petition for Federal Acknowledgment as an American Indian Tribe

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Department of the Interior (Department) gives notice that the group known as the Butte Tribe of Bayou Bourbeaux has filed a documented petition for Federal acknowledgment as an American Indian Tribe with the Assistant Secretary—Indian Affairs. The Department seeks comment and evidence from the public on the petition.

DATES: Comments and evidence must be postmarked by September 28, 2023.

ADDRESSES: Copies of the narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under 25 CFR 83.21(b)), and other information are available at OFA's website: *www.bia.gov/as-ia/ofa.* Submit any comments or evidence to: Department of the Interior, Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, Mail Stop 4071 MIB, 1849 C Street NW, Washington, DC 20240, or by email to: *lee.fleming@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. R. Lee Fleming, OFA Director, Office of the Assistant Secretary—Indian Affairs, Department of the Interior, telephone: (202) 513–7650.

SUPPLEMENTARY INFORMATION: On July 31, 2015, the Department's revisions to 25 CFR part 83 became final and effective (80 FR 37861). A key goal of the revisions was to improve transparency through increased notice of petitions and providing improved public access to petitions. Today the Department informs the public that a complete documented petition has been submitted under the current regulations, that portions of that petition are publicly available on the website identified above for easy access, and that we are seeking public comment early in the process on this petition.

Under 25 CFR 83.22(b)(1), OFA publishes notice that the following group has filed a documented petition for Federal acknowledgment as an American Indian Tribe to the Assistant Secretary—Indian Affairs: Butte Tribe of Bayou Bourbeaux c/o Mr. Rodger Collum, 1458 Highway 1226, Natchitoches, Louisiana 71457.

Also, under 25 CFR 83.22(b)(1), OFA publishes on its website the following:

i. The narrative portion of the documented petition, as submitted by the petitioner (with any redactions appropriate under 25 CFR 83.21(b));

ii. The name, location, and mailing address of the petitioner and other information to identify the entity;

iii. The date of receipt;

iv. The opportunity for individuals and entities to submit comments and evidence supporting or opposing the petitioner's request for acknowledgment within 120 days of the date of the website posting; and

v. The opportunity for individuals and entities to request to be kept informed of general actions regarding a specific petitioner.

The Department publishes this notice and request for comment in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–11568 Filed 5–30–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/ A0A501010.999900]

HEARTH Act Approval of Pueblo of Santa Clara, New Mexico Business and Residential Leasing Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Indian Affairs (BIA) approved the Pueblo of Santa Clara's Leasing Ordinance under the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012 (HEARTH Act). With this approval, the Tribe is authorized to enter into business and residential leases without further BIA approval.

DATES: BIA issued the approval on May 24, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Carla Clark, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Albuquerque, NM 87104, *carla.clark@bia.gov,* (702) 484–3233.

SUPPLEMENTARY INFORMATION:

I. Summary of the HEARTH Act

The HEARTH Act makes a voluntary, alternative land leasing process available to Tribes, by amending the Indian Long-Term Leasing Act of 1955, 25 U.S.C. 415. The HEARTH Act authorizes Tribes to negotiate and enter into business leases of Tribal trust lands with a primary term of 25 years, and up to two renewal terms of 25 years each, without the approval of the Secretary of the Interior (Secretary). The HEARTH Act also authorizes Tribes to enter into leases for residential, recreational, religious or educational purposes for a primary term of up to 75 years without the approval of the Secretary. Participating Tribes develop Tribal Leasing regulations, including an environmental review process, and then must obtain the Secretary's approval of those regulations prior to entering into leases. The HEARTH Act requires the Secretary to approve Tribal regulations if the Tribal regulations are consistent with the Department of the Interior's (Department) leasing regulations at 25

CFR part 162 and provide for an environmental review process that meets requirements set forth in the HEARTH Act. This notice announces that the Secretary, through the Assistant Secretary—Indian Affairs, has approved the Tribal regulations for the Pueblo of Santa Clara, New Mexico.

II. Federal Preemption of State and Local Taxes

The Department's regulations governing the surface leasing of trust and restricted Indian lands specify that, subject to applicable Federal law, permanent improvements on leased land, leasehold or possessory interests, and activities under the lease are not subject to State and local taxation and may be subject to taxation by the Indian Tribe with jurisdiction. See 25 CFR 162.017. As explained further in the preamble to the final regulations, the Federal government has a strong interest in promoting economic development, self-determination, and Tribal sovereignty. 77 FR 72440, 72447–48 (December 5, 2012). The principles supporting the Federal preemption of State law in the field of Indian leasing and the taxation of lease-related interests and activities applies with equal force to leases entered into under Tribal leasing regulations approved by the Federal government pursuant to the HEARTH Act.

Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108, preempts State and local taxation of permanent improvements on trust land. *Confederated Tribes of the Chehalis Reservation* v. *Thurston County,* 724 F.3d 1153, 1157 (9th Cir. 2013) (citing *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973)). Similarly, section 5108 preempts State taxation of rent payments by a lessee for leased trust lands, because ''tax on the payment of rent is indistinguishable from an impermissible tax on the land.'' *See Seminole Tribe of Florida* v. *Stranburg,* 799 F.3d 1324, 1331, n.8 (11th Cir. 2015). In addition, as explained in the preamble to the revised leasing regulations at 25 CFR part 162, Federal courts have applied a balancing test to determine whether State and local taxation of non-Indians on the reservation is preempted. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143 (1980). The *Bracker* balancing test, which is conducted against a backdrop of ''traditional notions of Indian self-government,'' requires a particularized examination of the relevant State, Federal, and Tribal interests. We hereby adopt the *Bracker* analysis from the preamble to the surface leasing regulations, 77 FR at 72447–48, as supplemented by the analysis below.

The strong Federal and Tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to Tribal leasing regulations approved under the HEARTH Act. Congress's overarching intent was to ''allow Tribes to exercise greater control over their own land, support self-determination, and eliminate bureaucratic delays that stand in the way of homeownership and economic development in Tribal communities.'' 158 Cong. Rec. H. 2682 (May 15, 2012). The HEARTH Act was intended to afford Tribes ''flexibility to adapt lease terms to suit [their] business and cultural needs'' and to ''enable [Tribes] to approve leases quickly and efficiently.'' H. Rep. 112–427 at 6 (2012).

Assessment of State and local taxes would obstruct these express Federal policies supporting Tribal economic development and self-determination, and also threaten substantial Tribal interests in effective Tribal government, economic self-sufficiency, and territorial autonomy. *See Michigan* v. *Bay Mills Indian Community,* 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (determining that ''[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on Federal funding''). The additional costs of State and local taxation have a chilling effect on potential lessees, as well as on a Tribe that, as a result, might refrain from exercising its own sovereign right to impose a Tribal tax to support its infrastructure needs. *See id.* at 810–11 (finding that State and local taxes greatly discourage Tribes from raising tax revenue from the same sources because the imposition of double taxation would impede Tribal economic growth).

Similar to BIA's surface leasing regulations, Tribal regulations under the HEARTH Act pervasively cover all aspects of leasing. *See* 25 U.S.C. 415(h)(3)(B)(i) (requiring Tribal regulations be consistent with BIA surface leasing regulations). Furthermore, the Federal government remains involved in the Tribal land leasing process by approving the Tribal leasing regulations in the first instance and providing technical assistance, upon request by a Tribe, for the development of an environmental review process. The Secretary also retains authority to take any necessary actions to remedy violations of a lease or of the Tribal regulations, including terminating the lease or rescinding approval of the Tribal regulations and reassuming lease approval responsibilities. Moreover, the Secretary continues to review, approve, and monitor individual Indian land leases and other types of leases not covered under the Tribal regulations according to the Part 162 regulations.

Accordingly, the Federal and Tribal interests weigh heavily in favor of preemption of State and local taxes on lease-related activities and interests, regardless of whether the lease is governed by Tribal leasing regulations or Part 162. Improvements, activities, and leasehold or possessory interests may be subject to taxation by the Pueblo of Santa Clara, New Mexico.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–11470 Filed 5–30–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04311000; 23XR0680A3; RX.01633F04.0020000]

Notice of Intent To Prepare an Environmental Impact Statement on the Middle Rio Grande Lower San Acacia Reach

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent; request for comments

SUMMARY: The Bureau of Reclamation (Reclamation) intends to prepare an environmental impact statement (EIS) on the Lower San Acacia Reach of the Middle Rio Grande. The project's goals are to increase water delivered to Elephant Butte Reservoir (EBR), maintain and enhance ecosystem health (such as protecting and promoting recovery of endangered species, minimizing river drying, and increasing available habitat), and increase the benefits of system maintenance actions by working with geomorphic trends of the river. Reclamation is seeking suggestions and information on the alternatives and topics to be addressed.

DATES: Submit written comments on the scope of the EIS on or before June 30, 2023.

Reclamation will hold three in-person public scoping meetings on the following dates:

1. June 20, 2023, 5 p.m. to 7 p.m. (MDT), Albuquerque, New Mexico.

2. June 21, 2023, 6 p.m. to 8 p.m. (MDT), Socorro, New Mexico.

3. June 22, 2023, 6 p.m. to 8 p.m., (MDT), Truth or Consequences, New Mexico.

ADDRESSES: Send written scoping comments, requests to be added to the project mailing list, or requests for other special assistance needs via email to *bor-sha-aao-lsari@usbr.gov.*

The meetings will be held at the following locations:

1. Albuquerque—International District Library, 7601 Central Ave., Albuquerque, New Mexico 87108.

2. Socorro—New Mexico Institute of Mining and Technology Macey Center, Upper Lobby, 909 Olive Lane, Socorro, New Mexico 87801.

3. Truth or Consequences—Sierra County Fairgrounds, Albert J. Lyon Event Center, 2953 S Broadway Street, Truth or Consequences, New Mexico 87901.

To view more information regarding this project, go to *https://www.virtualpublicmeeting.com/mrg-lsari-eis.*

FOR FURTHER INFORMATION CONTACT: Ashlee Rudolph, Bureau of Reclamation, Albuquerque Area Office, 555 Broadway Blvd. NE, Suite 100, Albuquerque, New Mexico 87102–2352; telephone (505) 462–3631; email *bor-sha-aao-lsari@usbr.gov.*

Individuals who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services to contact the above individual during normal business hours or to leave a message or question after hours. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This **Federal Register** notice provides the public with information regarding Reclamation's intent to prepare an EIS pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended. Reclamation will hold public scoping meetings to solicit comments on the scope of the EIS and the issues and alternatives that should be analyzed.

Purpose and Need

Reclamation is authorized to conduct work within the channel and floodplain of the Rio Grande under the Federal Flood Control Acts of 1948 and 1950 (Pub. L. 858 and 516, respectively). Reclamation is also authorized to engage in planning for major rehabilitation and replacement of existing assets under the Reclamation Project Act of 1902 (32 Stat. 388) and supplementary acts; the Water Resources Development Act of 2007, Section 2031 (Pub. L. 110–114); the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11), Title IX, Subtitle G; the Water Resources Planning Act of 1965, as amended (42 U.S.C. 1962a–2); and Department of the Interior Manual Part 707 DM 1.

The US Army Corps of Engineers, Bureau of Indian Affairs, U.S. Fish and Wildlife Service, Bureau of Land Management, Middle Rio Grande Conservancy District, and New Mexico Interstate Stream Commission will be invited to participate as cooperating agencies for the EIS. Other entities will be considered, as necessary, during the EIS process. Reclamation is considering realigning a portion of the Rio Grande from approximately river mile (RM) 74 to RM 54.5 (project, proposed action); this area is part of the Lower San Acacia Reach. Reclamation is the project proponent.

Reclamation and fellow agencies manage the flow of water, transport and deposition of sediment, and environmental resources within the highly dynamic Rio Grande watershed. Reclamation's responsibilities include maintaining the river channel for downstream sediment and water conveyance, maintaining and enhancing ecosystem health, and increasing the benefits of system maintenance actions. At times, these needs conflict with each other. The need to convey water can be at odds with overbank flooding for species' needs and riparian health. The deposition of heavy sediment loads carried by the river, a natural geomorphic process, impedes delivering flows to the EBR and increases maintenance costs. Therefore, maintenance of this system requires understanding and accepting the trade-offs associated with these diverse and often competing needs. Trade-offs associated with the proposed action or alternative actions are to be documented for Reclamation's consideration.

Reclamation and stakeholders identified the need for this project during focused workshops and a value planning study. Most issues during the workshops and value planning study identified sediment imbalance as their root cause which can be linked to agency needs and management practices being at odds with geomorphic trends. Key issues to be addressed by this project are conveyance losses, cost of maintenance on a system with limited benefit, declining of ecosystem health, channel perching, and aging Low Flow Conveyance Channel (LFCC) infrastructure.

The purpose of the proposed action is to deliver water to EBR; maintain and enhance ecosystem health (*i.e.,* protecting and promoting recovery of endangered species, minimizing river drying, increasing available habitat, conserving ecosystem functions), which will help meet requirements under the 2016 Middle Rio Grande Biological Opinion; and increase the benefit-to-cost ratio of system maintenance actions.

Proposed Action and Possible Alternatives

Reclamation intends to realign a portion of the Rio Grande to the west of the existing channel between RM 74 and RM 54.5. Channel realignment will likely consist of multiple segments; it may not include the full distance between RM 74 and RM 54.5. Reclamation is currently considering two preliminary engineering alternatives and the no-action alternative. Reclamation will identify a preferred alternative before a final EIS. The following alternatives are preliminary and may be revised based on public input and internal considerations. The no-action alternative is currently considered Alternative A, where the existing channel between RM 74 and RM 54.5 would remain as-is.

Preliminary Alternative B would involve the construction of a single channel downstream of Bosque del Apache National Wildlife Refuge. A single channel is defined as merging the LFCC with the active river channel. Additional features may include a channel conveying inflow from Elmendorf Drain above RM 69 and secondary high-flow channels, where they are needed. The expected benefits of preliminary Alternative B are improved water delivery and sediment transport by eliminating channel perching, reduced channel incision to allow for improved low-velocity habitat for the Rio Grande silvery minnow (*Hybognathus amarus*), maintaining or promoting riparian habitat suitable for the southwestern willow flycatcher (*Empidonax traillii extimus*), and creating more effective operation and maintenance activities by focusing maintenance on a single primary channel with no levees or structures that would need to be protected from the river. Preliminary Alternative B is anticipated to reduce evaporative losses associated with the current LFCC and ponded water between RM 61 and RM 60.

Preliminary Alternative C would involve constructing a two-channel system above RM 64 and rerouting the LFCC between RM 68 and RM 64. Like preliminary Alternative B, the active river channel would be realigned to the

west; however, the realignment would start farther downstream and would not intersect the LFCC. The expected benefits of preliminary Alternative C are improved water delivery and sediment transport by eliminating channel perching, increased conveyance within the LFCC, reduced channel incision to allow for improved low-velocity habitat for the Rio Grande silvery minnow, improved management of available southwestern willow flycatcher habitat, and a potential to reduce maintenance activities associated with sediment deposition within the river channel. It is anticipated that preliminary Alternative C would also reduce evaporative losses associated with the current LFCC and ponded water between RM 61 and RM 60.

Project Area (Area of Analysis)

The project area is the Lower San Acacia Reach of the Middle Rio Grande in Socorro County, New Mexico. This EIS focus is between the southern boundary of the Bosque del Apache National Wildlife Refuge at RM 74 (upstream end) to the Silver Canyon and LFCC confluence with the Rio Grande at RM 54.5 (downstream end).

Statutory Authority and Anticipated Permits

NEPA [42 U.S.C. 4321 *et seq.*] requires Federal agencies to conduct an environmental analysis of their proposed actions to determine whether the actions may significantly affect the human environment. The EIS will analyze the environmental effects of implementing the proposed action and alternatives. In addition to NEPA, various other Federal, state, and local authorizations may be required for the proposed action. Applicable Federal laws include, but are not limited to, the Endangered Species Act, National Historic Preservation Act, and Clean Water Act.

Schedule for the Decision-Making Process

Reclamation will review and consider comments received during scoping and will prepare a scoping report. After the draft EIS is completed, Reclamation will publish a notice of availability and request public comments on the draft EIS. After the public comment period ends, Reclamation will then develop the final EIS; Reclamation anticipates making the final EIS available to the public in late 2024. In accordance with 40 CFR 1506.11, Reclamation will not decide or issue a Record of Decision sooner than 30 days after the final EIS is released. Reclamation anticipates the issuance of a Record of Decision by March 2025.

Public Disclosure

Before including your address, phone number, email address, or other personal, identifying information in your comment submission, please be advised that the entire submission, including your personal identifying information, may be made publicly available at any time. While a commenter may request that Reclamation withhold personal identifying information from public review, Reclamation cannot guarantee that it will be able to do so.

How To Request Reasonable Accommodation

For special assistance at one of the scoping meetings, please contact Ashlee Rudoph (see **FOR FURTHER INFORMATION CONTACT** section of this notice) or TDD information in the same section, at least 5 working days before the meetings. Information regarding this project is available in alternate formats upon request.

Wayne Pullan,

Regional Director, Upper Colorado Region, Bureau of Reclamation.

[FR Doc. 2023–11468 Filed 5–30–23; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1364]

Certain Blood Flow Restriction Devices With Rotatable Windlasses and Components Thereof; Institution of Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 24, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Composite Resources, Inc. of Rock Hill, South Carolina and North American Rescue, LLC of Greer, South Carolina. Supplements were filed on April 27, 2023, May 11, 2023, and May 18, 2023. The complaint, as supplemented, 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 blood flow restriction devices with rotatable windlasses and components thereof by reason of the infringement of: certain claims of U.S. Patent No. 7,842,067 (''the '067 patent''); U.S. Patent No. 8,888,807 (''the '807 patent''); and U.S. Patent No. 10,016,203 (''the '203 patent''); and; U.S. Trademark Registration No. 3,863,064 (''the '064 mark'') and U.S. Trademark Registration No. 5,046,378 (''the '378 mark''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complaint also alleges violations of section 337 based upon the importation into the United States, or in the sale of certain blood flow restriction devices with rotatable windlasses by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States.

The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative 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 M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

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 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on May 24, 2023, *Ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended,

(a) an investigation be instituted to determine whether there is a violation of subsection (a)(1)(A) of section 337 in

the importation or sale of certain products identified in paragraph (2) by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States;

(b) 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 1–17 of the '067 patent; claims 1–30 of the '807 patent; and claims 1–13 of the '203 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(c) an investigation be instituted to determine whether there is a violation of subsection (a)(1)(C) 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 the '064 mark and the '378 mark, 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 ''single-handed combat tourniquets with rotatable windlasses that can be applied and tightened by a user to reduce blood loss from an arm or leg'';

(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 complainants are:

Composite Resources, Inc., 483 Lakeshore Pkwy, Rock Hill, SC 29730

North American Rescue, LLC, 35 Tedwall Ct., Greer, SC 29650

(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:

Anping Longji Medical Equipment Factory, No. 8, Suxin Road, Nansu Village, Anping, County, Hengshui City, Hebei Province, China

Chaozhou Jiduo Trading Co., Ltd., Shop No. 35, No. 2 Comm., Xianhe Vil., Phixi, Town, Xiangqiao District, Chaozhou City 521000, China

Dongguan Hongsui Electronic Commerce, Co., Ltd., No. 7, Lane 6, Orchard, Houjie, Dongguan City, Houjie Town, Guangdong Province, 523000, China

Dongguanwin Si Hai Precision Mold Co., Ltd., X No. 66 Jinrong Rd. Juhe Sq., Changan, Dongguan, China

Eiffel Medical Supplies Co., Ltd. 1st-3rd Floor, No. 8 Building, Run-Tang Industry Park, Shenzhen, Guangdong, 518128, China

Empire State Distributors Inc., 2975 West 33rd Street, Brooklyn, New York 11224

EMRN Medical Equipment, 295 Av. Lafleur, LaSalle, QC H8R 3H5, Canada

Express Companies, Inc., 2603 Industry St., Oceanside, CA 92054

Fuzhou Meirun Medical Equipment Technology Co., Ltd. Baiyue Cultural Village, Hecheng Town, Zixi, County Fuzhou, Jiangxi 344000, China

GD Tianwu New Material Tech Co., Ltd., 7 Xi'an Road, Zini Village, Shawan Town, Panyu District, Guangzhou, China

Henan Eyocean E-Commerce Co., Ltd., Incubation Park, No.6, Yingcai Street, Huiji District, Zhengzhou, Henan, 450044, China

Hengshui Runde Medical Instruments Co., Ltd., Xuzhangtun Village, Anping County, Hengshui City, Hebei Province, China

Huang Xia, No. 09, 2nd Villager Group, New Countryside, Sangzi Town, Xinhua County, Hunan 417600, China

Jingcai Jiang, Mingkan Huayuan C4/102 Bao'an District, Shenzhen, GuangDong, 518030, China

Putian Dima Trading Co., Ltd., No. 99, Xiake Natural Village, Aoshan, Village, Sanjiangkou Town, Putian City, Hanjiang District, Fujian Province, 351100, China

Rhino Inc., 16192 Coastal Hwy, Lewes, DE 19958

Shanghai Sixu International Freight Agent Co., Ltd., A6, No. 258, Fangdong Road, Jiuting, Songjiang District, Shanghai 201600, China

Shen Yi, Room 2201, Building 15, Changcheng building, Futian District, Shenzhen, Guangdong 518000, China

Shenzhen Anben E-Commerce Co., Ltd., No. 23, Xinpu Rd., Pupai Village, Longcheng St., Longgang Dist., Shenzhen 518000, China

Shenzhen Janxle E E Commerce Co., Ltd., Room 201 No. 16 Second Area Horsehoe, Mountain Bantian Street, Longang, Shenzhen, China

Shenzhen Smart Medical Co. Ltd., 4th Floor, C Building, ZhenHan Industrial Zone, GanKeng, BuJi, LongGang District, Shenzhen, China

Shenzhen TMI Medical Supplies Co., Ltd., 4F, Bldg. 1, Area 2, HuangMaBu Industrial District, XiXiang, Bao'an District, Shenzhen 518101, China

Shenzhen Yujie Commercial and Trading Co., Ltd. , 29th Floor, Nanguang Jiejia Building, Shennan Road, Futian District, Shenzhen, China

Sun Minghui, No. 241, Minzhi Avenue, Minxin Community, Minzhi Street, Longhua District Mintai, Building 228, Shenzhen, Guangdong, 518000, China

SZY Holdings LLC, 300 Liberty Avenue, Brooklyn, NY 11207

Wuxi Emsrun Technology Co., Ltd., No. 100 Fengbin Road, Wuxi City, Jiangsu Province, China

Wuxi Golden Hour Medical Technology Co., Ltd., Room 101–103/105, Building 1, 58, Xiuxi Road, Binhu District, Wuxi City, Jiangsu Province 214000, China,

Wuxi Puneda Technology Co., Ltd., 306–3 Quanfeng Road, Wuxi, 214037, China

Xia Guo Long, Room 316, Fuwei Building, Hongtu Road, Dongguan City, Nancheng District, Guangdong Province, 523000, China

Yinping Yin, No. 6003 Binhe Haibin Square Garden, Mango Web Co, Shenzhen, Guangdong, 518003, China

(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.

By order of the Commission.

Issued: May 24, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–11462 Filed 5–30–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Assistant Secretary for Policy, Chief Evaluation Office

Agency Information Collection Activities; Proposed Revision of Information Collection; Comment Request. The Evaluation of the Pathway Home Grant Program (Pathway Home Evaluation)

AGENCY: Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed. Currently, the Department of Labor is soliciting comments concerning the collection of data about The Evaluation of the Pathway Home Grant Program (Pathway Home Evaluation). A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments much be submitted to the office listed in the addressee section below on or before July 31, 2023.

ADDRESSES: You may submit comments by either one of the following methods: *Email: ChiefEvaluationOffice@dol.gov; Mail or Courier:* Monica Mean, Chief Evaluation Office, OASP, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–2312, Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Monica Mean by email at *ChiefEvaluationOffice@dol.gov* or by phone at (202) 693–6034

SUPPLEMENTARY INFORMATION:

I. *Background:* The Chief Evaluation Office (CEO) of the U.S. Department of Labor (DOL) intends to conduct an evaluation of the DOL-funded Pathway Home grant program, which aims to improve the ability of people in the justice system to find meaningful employment and avoid recidivism. The goal of this four-year evaluation is to build knowledge about the implementation of the Pathway Home grantees and their effectiveness in improving employment and recidivism outcomes for adults reentering the community after incarceration.

The overall study has two components: (1) an implementation evaluation of the Pathway Home grants to describe program models and services, partnerships, and participant characteristics; and (2) an impact evaluation to examine the effectiveness of the Pathway Home grants on participants' outcomes, such as credential attainment, employment and earnings, and ongoing criminal justice involvement.

This **Federal Register** Notice provides the opportunity to comment on two proposed data collection instruments that the evaluation will use: follow-up survey of impact study participants, and protocol for virtual discussions with grantee staff. The follow-up survey will be used as part of the impact study to measure outcomes for study participants. The virtual discussions with grantee staff will be used as part of the implementation study to understand the sustainability of the programs.

1. *Follow-up survey for impact study participants.* Survey of 2,500 impact study participants conducted approximately 12–15 months after their release to collect information on topics including participants' skills and credential attainment, employment and economic wellbeing, and health and stability after reentering their communities.

2. *Protocol for virtual discussions with grantee staff responsible for overseeing the grants.* Small group and one-on-one virtual discussions with grant administrators to understand sustainability of the Pathway Home grantee programs.

II. *Desired Focus of Comments:* Currently, DOL is soliciting comments on the above data collection instruments for the Pathway Home grant program. DOL is particularly interested in comments that do the following:

a. Evaluate whether the proposed collection of information is necessary for the proper performance functions of the agency, including whether the information will have practical utility;

b. Evaluate the accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions;

c. Enhance the quality, utility, and clarity of the information to be collected; and

d. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology—for example, permitting electronic submissions of responses.

III. *Current Actions:* At this time, DOL is requesting clearance for the follow-up survey of study participants, and the protocol for virtual group discussions with grantee staff.

Type of Review: Revision of a currently approved collection.

Agency: Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

OMB Control Number: 1290–0039.

Affected Public: Individuals or Households.

Annual Respondent or Recordkeeper Cost: There are no direct costs to respondents.

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

ESTIMATED ANNUAL BURDEN HOURS

Type of instrument (form/activity)	Number of respondents	Number of responses per respondent	Total number of responses	Average burden time per response (hours)	Estimated burden hours
Follow-up survey of study participants	[1] 533	1	533	.42	222
Protocol for program administrators and frontline staff virtual discussions: Grant administrators	[2] 13	1	13	1.5	20
Total	546		546		242

[1] This assumes we will survey the 2,500 impact study participants enrolled at baseline and obtain a 64 percent response rate. This results in 533 respondents when annualized over three years.

[2] This assumes we invite a total of 44 grant administrators to participate in the discussions, with a 90 percent response rate. This results in 13 respondents when annualized over three years.

Karen Livingston,

Acting Chief Evaluation Officer, U.S. Department of Labor.

[FR Doc. 2023–11455 Filed 5–30–23; 8:45 am]

BILLING CODE 4510–HX–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Attestation for Employers Seeking To Employ H–2B Nonimmigrant Workers

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-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 June 30, 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) if the information will be processed and used in a timely manner; (3) 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; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) 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: This Information Collection Request (ICR) supports the Temporary Final Rule (TFR), Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking to Change Employers, which is being promulgated by DOL and the Department of Homeland Security (DHS). The regulatory requirements have been codified at 8 CFR part 214 and 20 CFR part 655. The ICR includes the Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers under Section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103, and Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, Form ETA–9142–B–CAA–7, and other information collection requirements (*e.g.,* recruitment efforts, recordkeeping requirements). For additional substantive information about this ICR, see the related notice published in the **Federal Register** on December 15, 2022 (87 FR 76816).

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–ETA.

Title of Collection: Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers.

OMB Control Number: 1205–0554.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 4,312.

Total Estimated Number of Responses: 4,312.

Total Estimated Annual Time Burden: 39,541 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Senior PRA Analyst.

[FR Doc. 2023–11454 Filed 5–30–23; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0143]

Proposed Extension of Information Collection; Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN)

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden,

conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments on the information collection for Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN).

DATES: All comments must be received by the Office of Standards, Regulations and Variance on or before July 31, 2023.

ADDRESSES: Comments concerning the information collection requirements of this notice may be sent by any of the methods listed below. Please note that late, untimely filed comments will not be considered.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments for docket number MSHA–2023–0011.
- *Mail/Hand Delivery:* DOL–MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, VA 22202–5452. 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.
- MSHA will post all comments as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Director, Office of Standards, Regulations, and Variances, MSHA, at *MSHA.information.collections@dol.gov* (email); (202) 693–9440 (voice); or (202) 693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

I. Background

Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(h), authorizes MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811, authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and metal and nonmetal mines.

MSHA issues certifications, qualifications, and approvals to the nation's miners to conduct specific work within the mines. Miners requiring qualification or certification from MSHA will register for an MIIN. MSHA uses this unique number in place of individual Social Security numbers (SSNs) for all MSHA collections. MIIN will be used to identify miners who have exercised their option to work in areas of a mine with respirable dust concentration at or below 0.5 milligrams per cubic meter of air under 30 CFR 90.3 (Part 90 option); notice of eligibility; exercise of option and 30 CFR 90.100(b) (Respirable Dust Standard). The MIIN identifier fulfills Executive Order 13402, Strengthening Federal Efforts Against Identity Theft, which requires Federal agencies to better secure government held data.

II. Desired Focus of Comments

MSHA is soliciting comments concerning the proposed information collection related to Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN). MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;
- Evaluate the accuracy of MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The information collection request will be available on *http://www.regulations.gov.* MSHA cautions the commenter against providing any information in the submission that should not be publicly disclosed. Full comments, including personal information provided, will be made available on *www.regulations.gov* and *www.reginfo.gov.*

The public may also examine publicly available documents at DOL–MSHA, 201 12th South, Suite 4E401, Arlington, VA 22202–5452. Sign in at the receptionist's desk on the 4th floor via the East elevator. 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.

Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

This information collection request concerns provisions for Qualification/Certification Program Request for MSHA Individual Identification Number (MIIN). MSHA has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Extension, without change, of a currently approved collection.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0143.

Affected Public: Business or other for-profit.

Number of Respondents: 6,000.

Frequency: On occasion.

Number of Responses: 6,000.

Annual Burden Hours: 500 hours.

Annual Respondent or Recordkeeper Cost: $72.

MSHA Forms: MSHA Form 5000–46, Request for MSHA Individual Identification Number (MIIN).

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Song-ae Aromie Noe,

Certifying Officer, Mine Safety and Health Administration.

[FR Doc. 2023–11456 Filed 5–30–23; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2023–032]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: We have submitted a request to the Office of Management and Budget (OMB) for approval of a reinstatement of one information collection and renewal of three information collections. The reinstated information collection is prepared by companies and organizations that wish to digitize archival holdings with privately-owned equipment. The first renewal information collection is prepared by organizations that want to make paper-to-paper copies of archival holdings with their personal copiers at the National Archives at the College Park facility. The second renewal is used to advise requesters of the correct procedures to follow when requesting certified copies of records for use in civil litigation or criminal actions in courts of law, and the information to be provided so that records may be identified. The third renewal information collection is used when veterans, dependents, and other authorized individuals request information from or copies of documents in military personnel, military medical, and dependent medical records. We invite you to comment on the proposed information collections.

DATES: OMB must receive written comments on or before June 30, 2023.

ADDRESSES: Send any comments and recommendations on the proposed information collection in writing to *www.reginfo.gov/public/do/PRAMain.* You can 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: Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with any requests for additional information.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. We published a notice of proposed collection for this information collection on March 20, 2023 (88 FR 16670) and we received no comments. We are therefore submitting the described information collection to OMB for approval.

If you have comments or suggestions, they should address one or more of the following points: (a) whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether this collection affects small businesses.

In this notice, we solicit comments concerning the following information collection:

1. *Title:* Request to Digitize Records.

OMB number: 3095–0017.

Agency form number: None.

Type of review: Regular.

Affected public: Companies and organizations that wish to digitize archival holdings in the National Archives of the United States or a Presidential library for micropublication.

Estimated number of respondents: 10.

Estimated time per response: 5 hours.

Frequency of response: On occasion (when respondent wishes to request permission to digitize records).

Estimated total annual burden hours: 50.

Abstract: The information collection is prescribed by 36 CFR 1254.92. The collection is prepared by companies and organizations that wish to digitize archival holdings with privately-owned equipment. NARA uses the information to determine whether the request meets the criteria in 36 CFR 1254.94, to evaluate the records for digitization, and to schedule use of the limited space available for digitizing.

2. *Title:* Request to use personal paper-to-paper copiers at the National Archives at College Park facility.

OMB number: 3095–0035.

Agency form number: None.

Type of review: Regular.

Affected public: Business or other for-profit.

Estimated number of respondents: 5.

Estimated time per response: 3 hours.

Frequency of response: On occasion.

Estimated total annual burden hours: 15 hours.

Abstract: The information collection is prescribed by 36 CFR 1254.86. Respondents are organizations that want to make paper-to-paper copies of archival holdings with their personal copiers. NARA uses the information to determine whether the request meets the criteria in 36 CFR 1254.86 and to schedule the limited space available.

3. *Title:* Court Order Requirements.

OMB number: 3095–0038.

Agency form number: NA Form 13027.

Type of review: Regular.

Affected public: Veterans and Former Federal civilian employees, their authorized representatives, state and local governments, and businesses.

Estimated number of respondents: 5,000.

Estimated time per response: 15 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 1,250 hours.

Abstract: The information collection is prescribed by 36 CFR 1228.164. In accordance with rules issued by the Office of Personnel Management, the National Personnel Records Center (NPRC) of the National Archives and Records Administration (NARA) administers Official Personnel Folders (OPF) and Employee Medical Folders (EMF) of former Federal civilian employees. In accordance with rules issued by the Department of Defense (DOD) and the Department of Transportation (DOT), the NPRC also administers military service records of veterans after discharge, retirement, and death, and the medical records of these veterans, current members of the Armed Forces, and dependents of Armed Forces personnel. The NA Form 13027, Court Order Requirements, is used to advise requesters of (1) the correct procedures to follow when requesting certified copies of records for use in civil litigation or criminal actions in courts of law and (2) the information to be provided so that records may be identified.

4. *Title:* Forms Relating to Military Service Records.

OMB number: 3095–0039.

Agency form number: NA Forms 13036, 13042, 13055, 13075, and 13177.

Type of review: Regular.

Affected public: Veterans, their authorized representatives, state and local governments, and businesses.

Estimated number of respondents: 79,800.

Estimated time per response: 5 minutes.

Frequency of response: On occasion (when respondent wishes to request information from a military personnel, military medical, and dependent medical record).

Estimated total annual burden hours: 6,650 hours.

Abstract: The information collection is prescribed by 36 CFR 1228.164. In accordance with rules issued by the Department of Defense (DOD) and the Department of Transportation (DOT, U.S. Coast Guard), the National Personnel Records Center (NPRC) of the National Archives and Records Administration (NARA) administers military personnel and medical records of veterans after discharge, retirement, and death. In addition, NPRC

administers the medical records of dependents of service personnel. When veterans, dependents, and other authorized individuals request information from or copies of documents in military personnel, military medical, and dependent medical records, they must provide on forms or in letters certain information about the veteran and the nature of the request. A major fire at the NPRC on July 12, 1973, destroyed numerous military records. If individuals' requests involve records or information from records that may have been lost in the fire, requesters may be asked to complete NA Form 13075, Questionnaire about Military Service, or NA Form 13055, Request for Information Needed to Reconstruct Medical Data, so that NPRC staff can search alternative sources to reconstruct the requested information. Requesters who ask for medical records of dependents of service personnel and hospitalization records of military personnel are asked to complete NA Form 13042, Request for Information Needed to Locate Medical Records, so that NPRC staff can locate the desired records. Certain types of information contained in military personnel and medical records are restricted from disclosure unless the veteran provides a more specific release authorization than is normally required. Veterans are asked to complete NA Form 13036, Authorization for Release of Military Medical Patient Records, to authorize release to a third party of a restricted type of information found in the desired record. For those who have already made a request, and want to check the status, they can use NA Form 13177, Check the Status of a Clinical & Medical Treatment Records Request.

Sheena Burrell,

Executive for Information Services/CIO.

[FR Doc. 2023–11547 Filed 5–30–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Investigative Hearing

A recent Norfolk Southern Railway accident in East Palestine, Ohio, has motivated this investigative hearing.

On February 3, 2023, about 8:54 p.m. local time, eastbound Norfolk Southern Railway general merchandise freight train 32N derailed 38 railcars on main track 1 of the Norfolk Southern Fort Wayne Line of the Keystone Division in East Palestine, Ohio. The derailed equipment included 11 tank cars carrying hazardous materials that subsequently ignited, fueling fires that damaged an additional 12 non-derailed railcars. First responders implemented a 1-mile evacuation zone surrounding the derailment site that affected up to 2,000 residents. There were no reported fatalities or injuries.

The investigative hearing will discuss the following issue areas:

- Hazard Communications and Emergency Responder Preparedness for the Initial Emergency Response
- Circumstances that Led to the Decision to Vent and Burn Five Vinyl Chloride Tank Cars
- Freight Car Bearing Failure Modes and Wayside Detection Systems
- Tank Car Derailment Damage, Crashworthiness, and Hazardous Materials Package Information

Parties to the hearing are the Federal Railroad Administration; Pipeline and Hazardous Materials Safety Administration; Norfolk Southern Corporation; Trinity Rail Management Leasing Services; Oxy Vinyls, LP; Brotherhood of Locomotive Engineers and Trainmen; International Association of Sheet Metal, Air, Rail and Transportation Workers; Transportation Communications Union/IAM; Brotherhood of Railroad Signalmen; International Association of Fire Fighters; Ohio State Highway Patrol; and the Village of East Palestine.

Order of Proceedings

1. Opening Statement by the Chair of the Board of Inquiry
2. Introduction of the Board of Inquiry and Technical Panel
3. Introduction of the Parties to the Hearing
4. Introduction of Exhibits by Hearing Officer
5. Overview of the incident and the investigation by Investigator-In-Charge
6. Calling of Witnesses by Hearing Officer and Examination of Witnesses by Technical Panel, Parties, and Board of Inquiry
7. Closing Statement by the Chair of the Board of Inquiry

The investigative hearing will be held at East Palestine High School, 360 West Grant Street, East Palestine, Ohio on Thursday, June 22, 2023, 9:00 a.m. to 7:00 p.m. eastern daylight time (EDT), and Friday, June 23, 2023, 9:00 a.m. to 6:00 p.m. EDT.

Media planning to cover the investigative hearing are asked to contact Keith Holloway at (202) 314–6100 or *mediarelations@ntsb.gov.*

The investigative hearing will be transmitted live via the NTSB's YouTube channel at *https://www.youtube.com/user/NTSBgov.* An archival video of the hearing will be available via the website for 30 days after the hearing.

Individuals requiring reasonable accommodation and/or wheelchair access directions should contact Stephanie Shaw at (202) 314–6014 or by email at *EastPalestineHearing@ntsb.gov.*

NTSB Investigative Hearing Officer: Stephanie D. Shaw—*EastPalestineHearing@ntsb.gov.*

The National Transportation Safety Board is holding this public hearing pursuant to the provisions of the Government in the Sunshine Act (5 U.S.C. 552b) and as authorized by 49 CFR 845.2.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2023–11486 Filed 5–30–23; 8:45 am]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0095]

NUREG: Artificial Intelligence Strategic Plan: Fiscal Years 2023–2027

AGENCY: Nuclear Regulatory Commission.

ACTION: Final report; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing NUREG–2261, ''Artificial Intelligence Strategic Plan: Fiscal Years 2023–2027,'' dated May 31, 2023. The NRC's Artificial Intelligence (AI) Strategic Plan, establishes the vision and goals for the NRC to continue to improve its skills and capabilities to review and evaluate the application of AI to NRC-regulated activities, maintain awareness of technological innovations, and ensure the safe and secure use of AI in NRC-regulated activities. The AI Strategic Plan includes five goals: (1) ensure NRC readiness for regulatory decision-making, (2) establish an organizational framework to review AI applications, (3) strengthen and expand AI partnerships, (4) cultivate an AI proficient workforce, and (5) pursue use cases to build an AI foundation across the NRC.

DATES: This document was published in the **Federal Register** on May 31, 2023.

ADDRESSES: Please refer to Docket ID NRC–2022–0095 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0095. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's Public Document Room (PDR), Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Matthew Dennis, telephone: 301–415–3702; email: *Matthew.Dennis@nrc.gov* and Luis Betancourt, telephone: 301–415–6146; email: *Luis.Betancourt@nrc.gov.* Both are staff of the Office of Nuclear Regulatory Research at the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The purpose of NUREG–2261, ''Artificial Intelligence Strategic Plan: Fiscal Years 2023–2027,'' is to ensure the NRC's readiness to review and evaluate the use of artificial intelligence (AI) in NRC-regulated activities. NUREG–2261, ''Artificial Intelligence Strategic Plan: Fiscal Years 2023–2027,'' is available in ADAMS under Accession No. ML23132A305. To better understand activities and plans for AI across the nuclear industry, the staff hosted the 2021 Data Science and AI Regulatory Applications Public Workshops and issued a **Federal Register** notice on July 5, 2022, to solicit feedback on the draft AI Strategic Plan (87 FR 39874). Information about and presentations from the workshops can be found on the NRC public website at *https://www.nrc.gov/public-involve/conference-symposia/data-science-ai-reg-workshops.html.* These activities informed the development of the AI Strategic Plan. The NRC anticipates that the nuclear industry may begin deploying AI in NRC-regulated activities in the near future.

The AI Strategic Plan considers machine learning, natural language processing, and deep learning to be subsets of AI. In practice, the term AI describes various activities that range from data collection and analyses to support human decisionmaking to fully autonomous systems. The AI Strategic Plan adds to regulatory certainty by augmenting NRC readiness to review the use of AI in NRC-regulated activities.

The AI Strategic Plan establishes five goals to ensure the agency's readiness to review the use of AI in NRC-regulated activities. The five strategic goals are: (1) ensure NRC readiness for regulatory decision-making, (2) establish an organizational framework to review AI applications, (3) strengthen and expand AI partnerships, (4) cultivate an AI proficient workforce, and (5) pursue use cases to build an AI foundation across the NRC.

II. Public Comment Analysis

The NRC draft AI Strategic Plan for FY 2023–2027 was published in the **Federal Register** for public comment on July 5, 2022 (87 FR 39874) and the comment period closed on August 19, 2022. The NRC staff held a transcribed comment-gathering public meeting on August 3, 2022, to receive additional comments on the draft AI Strategic Plan. In addition to the comments received during the public meeting, the NRC received seven comment submissions in response to the **Federal Register** notice. In total, the NRC staff identified and responded to 105 individual comments received from individual members of the public and various organizations. The NRC responses to these comments are available in ADAMS under Accession No. ML23037A840.

Dated: May 22, 2023.

For the Nuclear Regulatory Commission.

Raymond V. Furstenau,

Director, Office of Nuclear Regulatory Research.

[FR Doc. 2023–11245 Filed 5–30–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[EA–23–058; Docket No. 70–7005; NRC–2022–0093]

Waste Control Specialists LLC; Superseding Exemption Order

AGENCY: Nuclear Regulatory Commission.

ACTION: Order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a new Order superseding a previously issued Order to Waste Control Specialists LLC (WCS) on December 3, 2014 (2014 Order), as supplemented by NRC letters to WCS from 2016 to 2022. The current and past NRC Orders are associated with an exemption from NRC regulations, which requires persons who own, acquire, deliver, receive, possess, use, or transfer Special Nuclear Material (SNM) to obtain an NRC license pursuant to the NRC requirements. The current action is in response to a request by WCS dated June 30, 2022. In the letter, WCS requested permission to: (1) move the U.S. Department of Energy (DOE) Los Alamos National Laboratory (LANL) Waste from the WCS Federal Waste Facility (FWF) disposal cell to the WCS Treatment, Storage, and Disposal Facility (TSDF) Bin Storage Area (BSA)–1 Enclosure; (2) prepare the LANL Waste for shipment in the TSDF BSA–1 Enclosure; and (3) temporarily store the LANL Waste in the TSDF BSA–1 Enclosure.

DATES: The Order is effective as of May 22, 2023.

ADDRESSES: Please refer to Docket ID NRC–2022–0093 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

• *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0093. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–287–3422; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact

the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Harry Felsher, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6559; email: *Harry.Felsher@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated: May 24, 2023.

For the Nuclear Regulatory Commission.

John W. Lubinski,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 1—Order

United States Nuclear Regulatory Commission

In the Matter of: Waste Control Specialists LLC, P.O. Box 1129, 0093, Andrews, Texas 79714, Docket No. 70–7005; NRC–2022–EA–23–058.

Order Exempting Waste Control Specialists LLC From the Requirement To Obtain a 10 CFR Part 70 License To Possess Certain Types of Special Nuclear Material

Waste Control Specialists LLC (WCS) operates a site in Andrews County, Texas, that is licensed by the state of Texas to process and store certain types of radioactive material contained in low-level radioactive waste (LLRW) and mixed waste (MW) (waste that has both a hazardous component and a radioactive component) that is regulated under both the Resource Conservation and Recovery Act (RCRA) and the Atomic Energy Act (AEA), as amended. The WCS Site also disposes of RCRA hazardous waste, toxic waste under the Toxic Substances Control Act (TSCA), and naturally occurring radioactive materials. WCS requested by letter dated June 30, 2022, that the NRC modify the conditions of an existing exemption (granted by order in 2014) to allow greater operational authority with respect to material regulated by the NRC. This Order is being issued to grant WCS an exemption from the requirements of 10 CFR part 70 to obtain a license to possess certain types of Special Nuclear Material (SNM) and to perform the activities described below subject to the conditions in Section III of this Order.

II

Under the AEA, as amended, the NRC can relinquish and a State can assume regulatory authority over radioactive material specified in an Agreement with NRC. In 1963, Texas entered into an Agreement and assumed regulatory authority over source, byproduct, and SNM less than critical mass.

On November 30, 1997, the State of Texas Department of Health (TDH) issued WCS a radioactive materials license (RML) to possess, treat, and store LLRW (RML R04971). In 1997, WCS began accepting RCRA and TSCA wastes for treatment, storage, and disposal. Later that year, WCS received a license from the TDH for treatment and storage of MW and LLRW. The MW and LLRW streams may contain quantities of SNM. In 2007, regulatory responsibility for RML R04971 was transferred to the Texas Commission on Environmental Quality (TCEQ). In September 2009, TCEQ issued RML R04100 to WCS for disposal of LLRW.

Section 70.3 of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 70, ''Domestic Licensing of Special Nuclear Material,'' requires persons who own, acquire, deliver, receive, possess, use, or transfer SNM to obtain a license pursuant to the requirements of 10 CFR part 70. The licensing requirements in 10 CFR part 70 apply to persons in Agreement States possessing greater than critical mass quantities, as defined in 10 CFR 150.11, ''Critical mass.'' However, pursuant to 10 CFR 70.17(a), ''Specific exemptions,'' ''the Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.''

In September 2000, WCS requested an exemption from the licensing requirements in 10 CFR part 70. On November 21, 2001, the NRC issued an Order to WCS (2001 Order) granting an exemption to WCS from certain NRC regulations and permitted WCS, under specified conditions, to possess waste containing SNM in greater quantities than specified in 10 CFR part 150, ''Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters Under Section 274,'' at the WCS storage and treatment facility in Andrews County, Texas, without obtaining an NRC license pursuant to 10 CFR part 70. The 2001 Order was published in the **Federal Register** (FR) on November 15, 2001 (66 FR 57489). The conditions specified in the 2001 Order were further described in the October 2001 Environmental Assessment (EA) and November 2001 Safety Evaluation Report (SER) that supported the 2001 Order.

By letters dated August 6, 2003, and March 14, 2004, WCS requested modifications to the 2001 Order which would allow it to use additional reagents for chemical stabilization of MW containing SNM. The NRC issued a superseding Order to WCS on November 4, 2004 (2004 Order). The 2004 Order changed the 2001 Order Conditions to allow WCS to use such chemical reagents as it deems necessary for treatment and stabilization of MW containing SNM, provided that the SNM mass does not exceed specified concentration limits. The 2004 Order was published on November 12, 2004 (69 FR 65468). The conditions specified in the 2004 Order were described in the October 2004 EA and October 2004 SER that supported the 2004 Order.

By letter dated December 10, 2007, WCS requested modifications to the 2004 Order to discontinue confirmation sampling upon receipt of waste that WCS verifies is adequately characterized by a waste generator to be uniform and which contains less than one-thousandth of the SNM concentration limits presented in Condition 1; and to meet the confirmatory sampling requirements of Condition 7 for sealed sources using surface smear surveys. The NRC issued a superseding Order to WCS on October 20, 2009 (2009 Order). The 2009 Order allowed WCS to discontinue waste generator and WCS confirmation sampling for waste that WCS verifies is adequately characterized by a waste generator to be uniform and which contains less than one tenth of the SNM concentration limits presented in Condition 1; allowed WCS to discontinue confirmatory sampling requirements for sealed sources; clarified Condition 2 with respect to ''pure forms'' of certain chemicals; and clarified the spatial uniformity requirement for waste received by WCS. The 2009 Order was published on October 26, 2009 (74 FR 55072). The

conditions specified in the 2009 Order were described in the October 2009 EA and SER that supported the 2009 Order.

In July 2013, by Amendment No. 22 of RML R04100, the TCEQ began to merge the license requirements in RML R04971 (for the radioactive waste treatment, storage, and processing facility) with the requirements in RML R04100 (for the LLRW land disposal facility). In Amendment No. 22 of RML R04100, the TCEQ license requirements related to the NRC 2009 Order in RML R04971 for the WCS treatment, storage, and processing facility were transferred to RML R04100. Previous NRC Orders referred to a specific location on the WCS Site as the treatment, storage, and processing facility. Subsequently, WCS began referring to that specific location on the WCS Site as the ''Treatment, Storage and Disposal Facility.'' In this Order, the NRC will use the name ''Treatment, Storage, and Disposal Facility'' and the abbreviation TSDF to reference that specific location on the WCS Site.

By letter dated July 18, 2014, WCS requested an exemption from NRC regulations to possess SNM in excess of the critical mass limits specified in 10 CFR 150.11, move the LANL Waste from the TSDF to the FWF disposal cell, and temporarily store the LANL Waste in the WCS FWF disposal cell. The WCS request referenced the actions that WCS had taken in response to the DOE investigation of an unplanned February 2014 radiation release event at the DOE Waste Isolation Pilot Plant (WIPP) Facility in New Mexico (*i.e.,* WIPP Incident). Due to the WIPP Incident, the DOE suspended operations at the WIPP Facility. As a result, WCS began receiving the LANL Waste from the DOE in April 2014. The LANL Waste is transuranic waste with SNM that originated from the DOE LANL and is destined for disposal at the DOE WIPP Facility. WCS intended to temporarily store the LANL Waste at the WCS TSDF until the DOE shipped the LANL Waste off the WCS Site.

Based on the DOE investigation of the WIPP Incident, the DOE subsequently informed WCS that some of the LANL Waste being temporarily stored at the WCS TSDF could, under certain conditions, react and potentially result in a release of transuranic radionuclides to the environment. On June 12, 2014, WCS responded to the DOE information by starting to voluntarily move the identified LANL Waste to the WCS FWF disposal cell on the WCS Site for temporary storage. However, the WCS FWF disposal cell was not a location addressed under the 2009 Order, so WCS needed NRC permission to move the LANL Waste from the TSDF to the FWF disposal cell and temporarily store the LANL Waste in the WCS FWF disposal cell.

The NRC issued a Superseding Order to WCS on December 3, 2014 (2014 Order). The 2014 Order was published on December 11, 2014 (79 FR 73647). The 2014 Order allowed WCS to move the LANL Waste from the TSDF to the FWF disposal cell and temporarily store the LANL Waste in the WCS FWF disposal cell. The conditions specified in the 2014 Order were further described in the October 2014 EA (ML14238A208), and November 2014 SER (ML14230A804) that supported the 2014 Order.

The current and previous NRC Orders to WCS (2001, 2004, 2009, and 2014) addressed the issue that 10 CFR 70.3, ''License requirements,'' requires persons who own, acquire, deliver, receive, possess, use, or transfer SNM to obtain an NRC license pursuant to the requirements in 10 CFR part 70. However, 10 CFR 150.10, ''Persons exempt,'' exempts a person in an Agreement State who possesses SNM in quantities not sufficient to form a critical mass from the NRC's imposed licensing requirements and regulations. The method for calculating the quantity of SNM not sufficient to form a critical mass is set out in 10 CFR 150.11. Therefore, prior to the NRC 2001 Order, WCS was required to comply with NRC regulatory requirements and obtain an NRC specific license to possess SNM in quantities greater than amounts established in 10 CFR 150.11. The 2001 WCS exemption request to NRC proposed to use concentration-based limits rather than mass-based limits at the WCS Site. The NRC 2001 Order granted, and the subsequent NRC Orders (2004, 2009, and 2014) continued, the use of concentration-based limits with conditions at the WCS Site.

The 2014 NRC Order to WCS contains conditions that allow WCS to possess and temporarily store DOE LANL Waste at two locations at the WCS Site (*i.e.,* FWF disposal cell, TSDF) without obtaining an NRC part 70 license. The conditions in the 2014 Order were modified by five NRC letters to WCS dated September 23, 2016 (ML16097A265), September 26, 2017 (ML17234A415), December 19, 2018 (ML18269A318), December 7, 2020 (ML20252A182), and June 8, 2022 (ML22094A131).

By letter dated June 30, 2022, and supplemented by the NRC clarification calls with WCS (ML22257A219), WCS requested that the NRC modify the conditions in the 2014 Order (as supplemented by the five NRC letters from 2016 to 2022) to allow WCS to: (1) move the DOE LANL Waste from one location at the WCS Site (the WCS FWF disposal cell) to another location at the WCS Site (the WCS TSDF BSA–1 Enclosure), (2) prepare the LANL Waste for shipment in the WCS TSDF BSA–1 Enclosure, and (3) temporarily store the LANL Waste in the WCS TSDF BSA–1 Enclosure until the DOE ships the LANL Waste off the WCS Site. After evaluating WCS's exemption request, the NRC staff decided that the appropriate action is to grant the request with Conditions. The reasons for that decision are further described in the SER (ML22221A080) for the June 30, 2022 request.

The NRC reviewed the information in the WCS request and, along with clarifying teleconference calls and other public and non-public information provided by WCS, the NRC decided that the appropriate action is to grant the WCS request but has modified the WCS request to include additional conditions as described in this 2023 Order (2023 Order). As further described in the SER for this WCS request, the NRC has determined that the conditions in this 2023 Order are authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest to allow WCS to undertake the activities described in the request.

In this 2023 Order, Conditions 1 through 7 remain the same as in the 2014 Order. A new Condition 8 is added to reflect the September 26, 2017 NRC supplemental letter to WCS (ML17234A415). The 2014 Order Conditions 8 through 11 are renumbered as Conditions 9 through 12 to address the new Condition 8. The 2014 Order Conditions 8.A. through 8.A.3. are renumbered as Conditions 9.A. through 9.A.3. and updated to reflect the September 26, 2017, NRC supplemental letter to WCS (ML17234A415). The 2014 Order Conditions 8.B. through 8.B.6 are renumbered as 9.B. through 9.B.6. and updated to reflect the five NRC supplemental letters to WCS from 2016 to 2022 (September 23, 2016 (ML16097A265), September 26, 2017 (ML17234A415), December 19, 2018 (ML18269A318), December 7, 2020 (ML20252A182), and June 8, 2022 (ML22094A131)).

The 2023 Order adds Conditions 9.C. through 9.C.2 to reflect NRC approval of WCS moving the LANL Waste from the FWF disposal cell to the TSDF BSA–1 Enclosure. The 2023 Order adds Conditions 9.D. through 9.D.2. to reflect NRC approval of WCS preparing the LANL Waste for shipment in the TSDF BSA–1 Enclosure. No additional conditions are needed to reflect NRC

approval of WCS temporarily storing the LANL Waste in the TSDF BSA–1 Enclosure because that was previously approved in the 2014 Order. As such, Conditions 1 through 12 of this 2023 Order are updated and listed in Section III below.

III

I have concluded, based on the staff's evaluation and pursuant to 10 CFR 70.17(a), that the exemption as described below at the WCS Site is authorized by law, will not endanger life or property or the common defense and security and is otherwise in the public interest. Therefore, pursuant to Sections 51, 161b, 161c, 161i, 182, 186, and 274 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 70 as applicable, *it is hereby ordered that:*

WCS is exempted from the requirements of 10 CFR part 70, including the requirements for an NRC license in 10 CFR 70.3 subject to the conditions listed below. This Order supersedes the 2014 Order, as modified by five NRC letters to WCS dated September 23, 2016 (ML16097A265), September 26, 2017 (ML17234A415), December 19, 2018 (ML18269A318), December 7, 2020 (ML20252A182), and June 8, 2022 (ML22094A131).

1. Concentrations of SNM in individual waste containers and/or during processing shall not exceed the following values:

SNM isotope	Operational limit (gram SNM/ gram waste)	Measurement uncertainty (gram SNM/ gram waste)
U–233	4.7E–04	7.1E–05
U–233	4.7E–04	7.1E–05
U–235 (10 percent enriched)	9.9E–04	1.5E–04
U–235 (100 percent enriched)	6.2E–04	9.3E–05
Pu–239	2.8E–04	4.2E–05
Pu–241	2.2E–04	3.2E–05

When mixtures of these SNM isotopes are present in the waste, the sum-of-the-fractions rule, as illustrated below, shall be used.

$$\frac{\text{U-233 conc}}{\text{U-233 limit}} + \frac{\text{100wt\%U-235 conc}}{\text{100wt\%U-235 limit}} + \frac{\text{10wt\%U-235 conc}}{\text{10wt\%U-235 limit}} + \frac{\text{Pu-239 conc}}{\text{Pu-239 limit}} + \frac{\text{Pu-241 conc}}{\text{Pu-241 limit}} \leq 1$$

The measurement uncertainty values in column 3 above represent the maximum one-sigma uncertainty associated with the measurement of the concentration of the particular radionuclide.

The SNM must be uniformly distributed throughout the waste, such that the limiting concentrations must not be exceeded on average in any contiguous mass of 600 kilograms.

2. The mass concentration of carbon, fluorine, and bismuth in the waste must be limited as follows:

SNM isotope	Carbon wt%	Fluorine wt%	Bismuth wt%
U–233	28	34	34
U–235(10)	25	35	31
U–235(100)	41	42	33
Pu–239	43	43	34
Pu–241	37	39	32

For waste containing mixtures of C, F, and Bi, the sum of the weight fractions of C, F, and Bi shall be compared to the most restrictive maximum allowable weight fractions for any one of those elements. Similarly, where mixtures of radionuclides are present in the waste, the limiting maximum allowable weight fraction of C, F, and Bi shall be applied. The presence of the above materials will be determined and documented by the generator, based on process knowledge or testing.

3. Waste accepted shall not contain total quantities of beryllium, hydrogenous material enriched in deuterium, or graphite above one tenth of one percent of the total weight of the waste. The presence of the above materials will be determined and documented by the generator, based on process knowledge, or testing.

4. Possession of highly water soluble forms of SNM shall not exceed the amount of SNM of low strategic significance defined in 10 CFR 73.2, ''Definitions.'' Highly soluble forms of SNM include, but are not limited to: uranium sulfate, uranyl acetate, uranyl chloride, uranyl formate, uranyl fluoride, uranyl nitrate, uranyl potassium carbonate, uranyl sulfate, plutonium chloride, plutonium fluoride, and plutonium nitrate. The presence of the above materials will be determined and documented by the generator, based on process knowledge or testing.

5. Processing of mixed waste containing SNM will be limited to chemical stabilization (*i.e.,* mixing waste with reagents). For batches with more than 600 kilograms of waste, the total mass of SNM shall not exceed the concentration limits in Condition 1 times 600 kilograms of waste.

6. Prior to shipment of waste, WCS shall require generators to provide a written certification containing the following information for each waste stream:

a. Waste Description. The description must detail how the waste was generated, list the physical forms in the

waste, and identify uranium chemical composition.

Waste Characterization Summary. The data must include a general description of how the waste was characterized (including the volumetric extent of the waste, and the number, location, type, and results of any analytical testing), the range of SNM concentrations, and the analytical results with error values used to develop the concentration ranges.

b. Uniformity Description. A description of the process by which the waste was generated showing that the spatial distribution of SNM is homogeneous or other information supporting spatial homogeneity.

c. Manifest Concentration. The generator must describe the methods to be used to determine the concentrations on the manifests. These methods could include direct measurement and the use of scaling factors. The generator must describe the uncertainty associated with sampling and testing used to obtain the manifest concentrations.

WCS shall review the above information and, if adequate, approve in writing this pre-shipment waste characterization and assurance plan before permitting the shipment of a waste stream. This will include statements that WCS has a written copy of all the information required above, that the characterization information is adequate and consistent with the waste description, and that the information is sufficient to demonstrate compliance with Conditions 1 through 4. Where generator process knowledge is used to demonstrate compliance with Conditions 1, 2, 3, or 4, WCS shall review this information and determine when testing is required to provide additional information in assuring compliance with the Conditions. WCS shall retain this information to permit independent review.

At the time waste is received, WCS shall require generators of SNM waste to provide a written certification with each waste manifest that states that the SNM concentrations reported on the manifest do not exceed the limits in Condition 1, and that the waste meets Conditions 2 through 4.

WCS shall require generators to sample and determine the SNM concentration for each waste stream, not to include sealed sources, at a frequency of once per 600 kg if the concentrations are above one tenth the SNM limits of Condition 1. The measurement uncertainty shall not exceed the uncertainty value in Condition 1 and shall be provided on the written certification.

7. WCS shall sample and determine the SNM concentration for each waste stream, not to include sealed sources, at a frequency of once per 600 kg if the concentrations are above one tenth the SNM limits of Condition 1. This confirmatory testing is not required for waste to be disposed of at DOE's WIPP Facility.

8. Upon possession, all waste applies towards the aboveground SNM possession limit except the waste: (1) disposed at the WCS Site; or (2) transported off the WCS Site—unless the waste is transported from the WCS Site to the WCS-owned rail spur.

9. The ''WIPP Incident'' is the February 14, 2014, unplanned radiation release event at the DOE WIPP Facility in New Mexico. The following relate to WCS storing DOE transuranic waste that originated at the LANL, which are destined to be disposed of at the DOE WIPP Facility (*i.e.,* ''LANL Waste''), at either the WCS TSDF or the WCS FWF disposal cell:

A. *The following conditions are applicable to LANL Waste stored at the FWF disposal cell and other SNM-bearing waste stored or disposed of at the FWF:*

1. The following waste is allowed to be stored at the WCS FWF disposal cell: LANL Waste in accordance with the concentration-based limits specified in Conditions 1 through 7, provided that it is in Standard Waste Boxes (SWBs) analyzed to be safe in the DOE ''Nuclear Critical Safety Evaluation,'' WIPP–016, Rev. 4. The lids of the SWBs shall be bolted or similarly secured to the body and the SWBs shall be placed inside Modular Concrete Canisters (MCCs) consistent with the configurations analyzed in WIPP–016.

2. The LANL Waste shall be isolated from other SNM-bearing waste by a minimum of 6.096 meters (20 feet).

3. The LANL Waste in MCCs shall be stacked no more than one MCC high.

B. *The following conditions are applicable to all the LANL Waste stored at either the TSDF or the FWF disposal cell:*

1. WCS shall follow the general reporting and recordkeeping requirements of 10 CFR part 74, ''Material Control and Accounting of Special Nuclear Material,'' that are applicable to those who possess SNM of 1 gram or more. Those requirements are: (1) notification to the NRC within 1 hour of discovery of any unauthorized removal of SNM which WCS is authorized to possess; and (2) maintenance of a recordkeeping program showing the receipt, inventory, acquisition, transfer, and disposal of all SNM in WCS' possession.

2. The contents and matrices of the LANL Waste in the inner containers shall conform to the description in the WCS non-public information.

3. The physical security plan for the LANL Waste shall be maintained to specifically include detection, assessment, and response methods and procedures for the LANL Waste for as long as the LANL Waste is at the WCS Site.

4. WCS is allowed to possess the LANL Waste until December 31, 2024.

5. The LANL Waste shall remain unopened in the inner container in which it was shipped, unless WCS needs to take an action on one of the inner containers based on knowledge from DOE's investigation of the WIPP Incident. Only one inner container may be open at a time.

6. WCS shall keep NRC informed of the status of the DOE investigation of the WIPP Incident. If DOE determines that some of LANL Waste at the WCS Site was similar to the waste that DOE determines to have contributed to the WIPP Incident, then WCS shall notify the NRC.

C. *The following conditions are applicable while moving the LANL Waste from the FWF disposal cell to the TSDF BSA–1 Enclosure:*

1. The Final WCS Documented Safety Analysis shall be followed while moving the LANL Waste from the FWF disposal cell to the TSDF BSA–1 Enclosure, including performing the following sub-activities for each MCC:

- remove the protective sand layer within the FWF disposal cell,
- remove the MCC from its FWF disposal cell storage location,
- place the MCC on the moving equipment,
- move the MCC into the TSDF BSA–1 Enclosure, and
- place the MCC in the TSDF BSA–1 Enclosure.

2. While moving the LANL Waste from the FWF disposal cell to the TSDF BSA–1 Enclosure, WCS shall ensure the following:

- there is no fuel storage or flammable material areas in either the FWF or near the route from the FWF disposal cell to the TSDF BSA–1 Enclosure,
- fuel leaks are quickly dispersed and isolated, and
- there is no vehicle traffic along the route from the FWF disposal cell to the TSDF BSA–1 Enclosure.

D. *The following conditions are applicable while preparing the LANL Waste for shipment in the TSDF BSA–1 Enclosure:*

1. The Final WCS Documented Safety Analysis shall be followed while preparing the LANL Waste for shipment in the TSDF BSA–1 Enclosure (*i.e.,*

under negative pressure with high efficiency particulate air (HEPA) filtration system and temperature control using heating, ventilation, and air conditioning (HVAC) system), including performing the following sub-activities for each MCC:

- remove the pea gravel from the MCC, and
- for each SWB in that MCC:
  - replace the lifting straps of the SWB in the MCC,
  - remove the SWB from the MCC,
  - replace filters in the SWB (as needed),
  - add additional filters in the SWB (as needed),
  - perform borescope work in the SWB (as needed),
  - take air samples from the head space within the SWB (as needed), and
  - place the SWB in temporary storage within the BSA–1 Enclosure.

2. While preparing the LANL Waste for shipment in the TSDF BSA–1 Enclosure, WCS shall ensure the following:

- there are no explosive material storage areas in the TSDF BSA–1 Enclosure, and
- there is no vehicle traffic in the TSDF BSA–1 Enclosure.

10. WCS shall notify the NRC, Region IV office within 24 hours if any of the above Conditions are violated. A written notification of the event must be provided within 7 days.

11. WCS shall obtain NRC's approval prior to changing any activities associated with the above Conditions.

12. The Director of the Office of Nuclear Material Safety and Safeguards (or designee), may, in writing, relax or rescind any of the above conditions upon demonstration by WCS of good cause.

IV

In accordance with 10 CFR 2.202, WCS must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of its publication in the **Federal Register**. In addition, WCS and any other person adversely affected by this Order may request a hearing on this Order within 20 days of its publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) first-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting

the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a person other than WCS requests a hearing, that person shall set forth with particularity the manner in which their interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by WCS or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received.

Dated: May 22, 2023.

For the Nuclear Regulatory Commission.

John W. Lubinski,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 2—Availability of Documents

Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS accession No./ **Federal Register** citation
2023 NRC EA for 2023 Order, dated May 15, 2023	ML22228A134.
Summary of NRC Clarification Calls with WCS	ML22257A219.
2022 WCS Request for Superseding Order, dated June 30, 2022	ML22200A046.
NRC Letter Supplementing 2014 Order, dated June 8, 2022	ML22094A131.
NRC Letter Supplementing 2014 Order, dated December 7, 2020	ML20252A182.
NRC Letter Supplementing 2014 Order, dated December 19, 2018	ML18269A318.
NRC Letter Supplementing 2014 Order, dated September 26, 2017	ML17234A415.
NRC Letter Supplementing 2014 Order, dated September 23, 2016	ML16097A265.
2014 Order, dated December 3, 2014	79 FR 73647.
2009 Order, dated October 20, 2009	74 FR 55071.
2004 Order, dated November 5, 2004	69 FR 65468.
2001 Order, dated October 30, 2001	66 FR 57489.

[FR Doc. 2023–11442 Filed 5–30–23; 8:45 am]

BILLING CODE P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collections for OMB Review; Comment Request; Special Financial Assistance Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval of information collections.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval under the Paperwork Reduction Act of collections of information contained in PBGC's regulation on special financial assistance. The purpose of the information collections is to gather information necessary for PBGC to operate the special financial assistance program. This notice informs the public of PBGC's request and solicits public comment on the collections of information.

DATES: Comments must be submitted on or before June 30, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collections should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collections by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of the collections of information may be obtained by writing to Disclosure Division (*disclosure@pbgc.gov*), Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, or calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Melissa Rifkin (*rifkin.melissa@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; 202–229–6563. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Section 4262 of the Employee Retirement Income Security Act of 1974 (ERISA) requires PBGC to provide special financial assistance (SFA) to certain

financially troubled multiemployer plans upon application for assistance. Part 4262 of PBGC's regulations, ''Special Financial Assistance by PBGC,'' provides guidance to multiemployer pension plan sponsors on eligibility for SFA, determining the amount of SFA, content of an application for SFA, the process of applying, PBGC's review of SFA applications, restrictions and conditions, and reporting and notice requirements.

To apply for SFA, a plan sponsor must file an application with PBGC and include information about the plan, plan documentation, and actuarial information, as specified in §§ 4262.6 through 4262.9. Also, if the plan is changing certain assumptions for purposes of its requested amount of SFA, then the plan sponsor may use PBGC's SFA assumptions guidance. PBGC needs the application information to review a plan's eligibility for SFA and amount of requested SFA. In this renewal, PBGC is modifying the instructions of the application for SFA to require full census data of all terminated vested participants that were included in the SFA projections. PBGC will use this information to conduct an independent death audit. In addition, PBGC is adding a new ''assumptions summaries'' template, and a cover letter that a plan, in certain circumstances, may use to withdraw a previously filed application for SFA and seek expedited review of a revised application. These two additions are intended to make PBGC's review process more efficient. PBGC estimates that over the next 3 years an annual average of 59 plan sponsors will file applications for SFA with an average annual hour burden of 649 hours and an average annual cost burden of $1,888,000.

Under § 4262.10(g), a plan sponsor may, but is not required to, file a lock-in application as a plan's initial application. The lock-in application contains basic information about the plan and a statement of intent to lock-in base data. PBGC needs the information in the lock-in application to ensure that a plan sponsor intends to lock-in the plan's base data. In this renewal, PBGC is modifying language in the lock-in application's form and instructions to add information for filing a ''revised lock-in application.'' A revised lock-in application may be used by a plan that was not eligible for SFA on the filing date of the plan's earlier lock-in application, based on the information available on that date. PBGC estimates that over the next 3 years an annual average of 23 plan sponsors will file lock-in applications, including revised lock-in applications, for SFA with an average annual hour burden of 23 hours and an average annual cost burden of $18,400.

Under § 4262.16(i), a plan sponsor of a plan that has received SFA must file an Annual Statement of Compliance with the restrictions and conditions under section 4262 of ERISA and part 4262 once every year through 2051. PBGC needs the information in the Annual Statement of Compliance to ensure that a plan is compliant with the imposed restrictions and conditions. Based on its experience with these filings, PBGC is clarifying the types of documents to be attached to the Annual Statement of Compliance and adding a template that filers may use to submit the required account and investment information. PBGC estimates that over the next 3 years an annual average of 120 plan sponsors will file Annual Statements of Compliance with an average annual hour burden of 240 hours and an average annual cost burden of $288,000.

Under § 4262.15(c), a plan sponsor of a plan with benefits that were suspended under sections 305(e)(9) or 4245(a) of ERISA must issue notices of reinstatement to participants and beneficiaries whose benefits were suspended and are being reinstated. Participants and beneficiaries need the notice of reinstatement to better understand the calculation and timing of their reinstated benefits and, if applicable, make-up payments. PBGC estimates that over the next 3 years an average of 5 plans per year will be required to send notices to participants with suspended benefits. PBGC estimates that these notices will impose an average annual hour burden of 10 hours and average annual cost burden of $10,000.

Finally, under § 4262.16(d), (f), (g) and (h) a plan sponsor must file a request for a determination from PBGC for approval for an exception under certain circumstances for SFA conditions under § 4262.16 relating to reductions in contributions, transfers or mergers, and withdrawal liability. PBGC needs the information required for such a request to determine whether to approve an exception from the specified condition of receiving SFA. PBGC estimates that over the next 3 years, PBGC will receive an average of 3.2 requests per year for determinations. PBGC estimates an average annual hour burden of 15.6 hours and average annual cost burden of $44,000.

The estimated aggregate average annual hour burden for the next 3 years for the information collections in part 4262 is 937.6 hours for employer and fund office administrative, clerical, and supervisory time. The estimated aggregate average annual cost burden for the next 3 years for the information collections in part 4262 is $2,248,400, for approximately 5,621 contract hours assuming an average hourly rate of $400 for work done by outside actuaries and attorneys. The actual hour burden and cost burden per plan will vary depending on plan size and other factors.

The existing collections of information were approved under OMB control number 1212–0074 (expires July 31, 2023). On February 15, PBGC published in the **Federal Register** (at 88 FR 9914) a notice informing the public of its intent to request an extension of the collections of information. No comments were received. PBGC is requesting that OMB extend approval of the collections (with modifications) for 3 years. 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.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–11564 Filed 5–30–23; 8:45 am]

BILLING CODE 7709–02–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–203, OMB Control No. 3235–0195]

Proposed Collection; Comment Request; Extension: Rule 17Ab2–1 and Form CA–1

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'') is soliciting comments on the collection of information provided for in Rule 17Ab2–1 (17 CFR 240.17Ab2–1) and Form CA–1: Registration of Clearing Agencies (17 CFR 249b.200) under the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17Ab2–1 and Form CA–1 require clearing agencies to register with the Commission and to meet certain requirements with regard to, among other things, the clearing agency's organization, capacities, and rules. The information is collected from the clearing agency upon the initial application for registration on Form CA–1. Thereafter, information is collected by amendment to the initial Form CA–1 when changes in circumstances that render certain information on Form CA–1 inaccurate, misleading, or incomplete necessitate modification of the information previously provided to the Commission.

The Commission uses the information disclosed on Form CA–1 to (i) determine whether an applicant meets the standards for registration set forth in Section 17A of the Exchange Act, (ii) enforce compliance with the Exchange Act's registration requirement, and (iii) provide information about specific registered clearing agencies for compliance and investigatory purposes. Without Rule 17Ab2–1, the Commission could not perform these duties as statutorily required.

The Commission staff estimates that the average Form CA–1 requires approximately 340 hours to complete and submit for approval, and that on average, the Commission receives one application each year. The Commission staff estimates that completion of an initial Form CA–1 will result in an internal cost of compliance of approximately $145,360 per year. The Commission staff estimates that it receives one amendment per year, and that an amendment requires approximately 60 hours of the exempt or registered clearing agency's staff time. The Commission staff estimates that amendment of a filed Form CA–1 will result in an internal cost of compliance of approximately $28,020 per year. Therefore, the aggregate hour burden is approximately 400 hours per year (340 + 60) and the aggregate internal cost of compliance is approximately $173,380 per year ($145,360 + $28,020).

The external costs associated with work on Form CA–1 include fees charged by outside lawyers and accountants to assist the applicant or registrant to collect and prepare the information sought by the form (though such consultations are not required by the Commission). The Commission staff estimates that these external costs are more likely when novel questions arise under a new application, rather than under periodic review and amendment. The staff estimates an annual external cost of 45 hours of an Attorney's time (estimated at $462 per hour) and 10 hours of a Senior Accountant's time (estimated at $241 per hour) for preparation of the Form CA–1, resulting in an aggregate external cost of approximately $23,200 per year ($20,790 + $2,410).

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted by July 31, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Please direct your written comments to: David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: May 25, 2023.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–11549 Filed 5–30–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97559; File No. SR–FICC–2023–007]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Fees for a New Pair-Off Message That May Be Processed Through the EPN Service

May 24, 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 May 18, 2023, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. FICC filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of modifications to the FICC Mortgage-Backed Securities Division (''MBSD'') EPN Rules (''EPN Rules'') to adopt fees for a pair-off Message that EPN Users may process through the EPN Service, as described in greater detail below.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Overview of the Proposed Rule Change

The purpose of this proposed rule change is to adopt fees for a new Message that EPN Users may process through the EPN Service relating to the pair-off of trades in their TBA (''to-be-announced'') contracts in agency mortgage-backed securities. The proposed fees are designed to recover the cost of providing this service and would be set at a rate that is lower than the rate charged for other Messages processed through the EPN Service to incentivize EPN Users to use this voluntary service.

Background

While some trades in agency mortgage-backed securities submitted to FICC for processing on a TBA basis are ''specified pool trades'' (transactions

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] Capitalized terms not defined herein are defined in the EPN Rules, as applicable, *available at https://www.dtcc.com/legal/rules-and-procedures.*

based on a particular set of underlying mortgages), most are not. For those trades, a critical step in the trading and settlement of the TBA contracts is for sellers to inform their buyer counterparties what pools of mortgages will be delivered to satisfy that trade. The EPN Service provides EPN Users with an automated way to transmit this information regarding their TBA contracts through Messages.

The new pair-off Message, which will be announced to EPN Users by Important Notice, would allow EPN Users that are buyers in a TBA contract transaction to notify their seller counterparties of which trades in that transaction should pair-off. Currently messages regarding pair-offs are transmitted between buyers and sellers by electronic mail using spreadsheets, which creates some risk that information sharing is incomplete, incorrect, inconsistent and not timely. In connection with its ongoing dialogue with mortgage-backed security industry participants, FICC was asked to develop and offer pair-off Messages through the EPN Service to minimize these risks. By automating and standardizing the transmittal of this information, the pair-off Messages would reduce those risks to the mortgage-backed securities market. The new pair-off Messages will be designed similarly to the other Messages transmitted through the EPN Service, where buyers would receive an acknowledgement message verifying delivery and receipt of the initial pair-off Message, and sellers would have the ability to return a ''DK'' message if the trades or the terms of the trades in the pair-off Message are not known. The use of this Message will be voluntary and would allow users to eliminate the current manual process of transmitting information regarding the pair-off of transactions.

The proposed rate for the new pair-off Message was designed to be consistent with the fees for other Messages currently processed through the EPN Service. Rates for current Messages are charged per million because these Messages involve pools to satisfy TBA trades and specified pool trades, where the proposed rate for the new pair-off Messages would be charged per Message because these Messages would be sent at the TBA trade-level.

In this fee structure, fees are generally lower for Messages submitted earlier in the day to encourage submission of the initial Message earlier in the day to allow for a response Message to be sent on the same day. Therefore, the rate increases for initial Messages submitted later in the day. The fee is lower for Messages submitted after the 3:00 p.m. cut-off time for response Messages. The fee rates being proposed are slightly lower than the rates for processing other Messages through the EPN Service, which both reflects the low cost to FICC to build these additional Messages and incentivizes EPN Users to use this new, voluntary service.

Proposed Rule Change

FICC is proposing to adopt fees for the use of the pair-off Messages that may be processed through the EPN Service. The proposed fees would be identified in the EPN Service Schedule of Charges in the EPN Rules, as follows: pair-off send Messages would be $0.10 per Message if sent from the opening of business to 1:00 p.m., $0.50 per Message if sent from 1:00 p.m. to 2:00 p.m., $1.00 per Message if sent from 2:00 p.m. to 3:00 p.m., and $0.75 per Message if sent from 3:00 p.m. to close of business; pair-off receive Messages would be $0.50 per Message if received from opening of business to 1:00 p.m., $0.25 per Message if received from 1:00 p.m. to 3:00 p.m., and $0.15 per Message if received from 3:00 p.m. to close of business.

FICC is also proposing to clarify the descriptions of other fees for the EPN Service to use consistent language in describing fees in the EPN Service Schedule of Charges. For example, these proposed changes would refer to the beginning of the business day as ''Opening of Business'' and refer to end of the business day as ''Close of Business'' consistently in the Schedule of Charges. These clarifications would avoid any confusion in the descriptions of these fees in the EPN Service Schedule of Charges, making them clearer to EPN Users.

Member Impact

The proposed fees would impact all EPN Users who voluntarily elect to use the new pair-off Messages. As described above, the proposed fee rates are designed to be comparable to the current fee rates charged for Messages processed through the EPN Service and would be set at a rate that is lower than the rates for processing other Messages in order to incentivize EPN Users to use this voluntary service.

Implementation Timeframe

FICC would implement the proposed rule change on August 31, 2023.

2. Statutory Basis

FICC believes this proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, FICC believes this proposal is consistent with sections 17A(b)(3)(D) and (b)(3)(F) of the Act[6] and Rule 17Ad–22(e)(23)(ii), as promulgated under the Act,[7] for the reasons described below.

Section 17A(b)(3)(D) of the Act requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.[8] FICC believes the proposed fees would be allocated equitably among EPN Users that use the new pair-off Message. FICC believes that the proposed fees are reasonable because they are based on the expected investment costs to develop pair-off Messages and such fee changes are expected to recover such investment and operating costs in an appropriate timeframe. As noted above, FICC has set these fees at a rate that is lower than the rate charged for other Messages processed through the EPN Service to incentivize EPN Users to use this voluntary service. FICC notes that once the proposed pair-off Message fees are implemented, the fees would be periodically reviewed under FICC's procedures to determine whether FICC is continuing to appropriately control its costs and to regularly review pricing levels against costs of operation.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[9] FICC believes the proposed rule change is consistent with section 17A(b)(3)(F) of the Act because the new pair-off Message would automate and standardize the transmittal of information related to transaction pair-offs, minimizing the risks presented by the current process of transmitting this information through electronic mail and spreadsheets. By reducing the risks that information sharing is incomplete, incorrect, inconsistent and not timely, the new pair-off Messages would promote the prompt and accurate clearance and settlement of securities transactions and, therefore, are consistent with the requirements of the Act, in particular section 17A(b)(3)(F) of the Act.[10]

Rule 17Ad–22(e)(23)(ii) under the Act requires a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they

[6] 15 U.S.C. 78q–1(b)(3)(D) and (b)(3)(F).

[7] 17 CFR 240.17Ad–22(e)(23)(ii).

[8] 15 U.S.C. 78q–1(b)(3)(D).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] *Id.*

incur by participating in the covered clearing agency.[11] The proposed fees would be clearly and transparently published in the EPN Service Schedule of Charges in the EPN Rules, which are available on a public website,[12] thereby enabling EPN Users to identify the fees associated with using the new pair-off Messages. Additionally, the proposed changes to clarify the descriptions of other fees for the EPN Service would make those descriptions consistent throughout the EPN Service Schedule of Charges, reducing the risk of any confusion in the descriptions of these fees and making them clearer to EPN Users. As such, FICC believes the proposed rule change is consistent with Rule 17Ad–22(e)(23)(ii) under the Act.[13]

(B) Clearing Agency's Statement on Burden on Competition

FICC does not believe the proposed rule changes would impact competition. The proposed rule changes would adopt fees for the use of a voluntary service. Because EPN Users would not be obligated to use the new pair-off Messages, FICC believes the proposed rule change would not have any impact on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

FICC has not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

FICC reserves the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act[14] and paragraph (f) of Rule 19b–4 thereunder.[15] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–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.

All submissions should refer to File Number SR–FICC–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 (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–FICC–2023–007 and should be submitted on or before June 21, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–11444 Filed 5–30–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

SEC File No. 270–638, OMB Control No. 3235–0690]

Proposed Collection; Comment Request; Extension: Form SF–3

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form SF–3 (17 CFR 239.45) is a short form registration statement used for non-shelf issuers of asset-backed securities to register a public offering of their securities under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). Form SF–3 takes approximately 1,380.50 hours per response and is filed by approximately 71 issuers annually. The information collected is intended to ensure that the information required to be filed by the Commission permits verification of compliance with securities law requirements and assures

[11] 17 CFR 240.17Ad–22(e)(23)(ii).

[12] *See supra* note 5.

[13] 17 CFR 240.17Ad–22(e)(23)(ii).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f).

[16] 17 CFR 200.30–3(a)(12).

the public availability of such information in the asset-backed securities market. We estimate that 25% of the 1,380.50 hours per response (345.12 hours) is prepared by the issuer for a total annual reporting burden of 24,504 hours (345.12 hours per response × 71 responses).

Written comments are invited on: (a) whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication by July 31, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct your written comment to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: May 24, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–11450 Filed 5–30–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–610, OMB Control No. 3235–0707]

Proposed Collection; Comment Request; Extension: Form SF–1

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form SF–1 (17 CFR 239.44) is the registration statement for non-shelf issuers of assets-backed securities register a public offering of their securities under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). The information collected is intended to ensure that the information required to be filed by the Commission permits verification of compliance with securities law requirements and assures the public availability of such information in the asset-backed securities market. Form SF–1 takes approximately 1,381.33 hours per response and is filed by approximately 6 respondents. We estimate that 25% of the 1,381.33 hours per response (345.33 hours) is prepared by the registrant for a total annual reporting burden of 2,072 hours (345.33 hours per response × 6 responses).

Written comments are invited on: (a) whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication by July 31, 2023.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct your written comment to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: May 24, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–11452 Filed 5–30–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17943 and #17944; CALIFORNIA Disaster Number CA–00381]

Presidential Declaration of a Major Disaster for the HOOPA VALLEY TRIBE

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the Hoopa Valley Tribe (FEMA–4707–DR), dated 05/23/2023. Incident: Severe Winter Storms and Mudslides. Incident Period: 02/14/2023 through 03/05/2023.

DATES: Issued on 05/23/2023.

Physical Loan Application Deadline Date: 07/24/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 02/23/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/23/2023, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Area: (Physical Damage and Economic Injury Loans): Hoopa Valley Tribe.

Contiguous Counties (Economic Injury Loans Only): Humboldt.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.750
Homeowners without Credit Available Elsewhere	2.375
Businesses with Credit Available Elsewhere	8.000
Businesses without Credit Available Elsewhere	4.000
Non-Profit Organizations with Credit Available Elsewhere	2.375
Non-Profit Organizations without Credit Available Elsewhere	2.375
For Economic Injury:	

	Percent
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for physical damage is 17943 B and for economic injury is 17944 0.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–11548 Filed 5–30–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 17939 and # 17940; WEST VIRGINIA Disaster Number WV–00058]

Administrative Declaration of a Disaster for the State of West Virginia

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of West Virginia dated 05/24/2023.

Incident: Flooding.

Incident Period: 08/14/2022 through 08/15/2022.

DATES: Issued on 05/24/2023.

Physical Loan Application Deadline Date: 07/24/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 02/26/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Kanawha.
Contiguous Counties:

West Virginia: Boone, Clay, Fayette, Jackson, Lincoln, Nicholas, Putnam, Raleigh, Roane.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.375
Homeowners without Credit Available Elsewhere	2.188
Businesses with Credit Available Elsewhere	6.080
Businesses without Credit Available Elsewhere	3.040
Non-Profit Organizations with Credit Available Elsewhere	1.875
Non-Profit Organizations without Credit Available Elsewhere	1.875
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	3.040
Non-Profit Organizations without Credit Available Elsewhere	1.875

The number assigned to this disaster for physical damage is 17939 6 and for economic injury is 17940 0.

The State which received an EIDL Declaration # is West Virginia.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–11437 Filed 5–30–23; 8:45 am]

BILLING CODE 8026–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36699 [1]]

Norfolk Southern Railway Company and The Cincinnati, New Orleans, and Texas Pacific Railway Company—Acquisition—Trustees of the Cincinnati Southern Railway

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1 in Docket No. FD 36699; Notice of Acceptance of Application and a Related Verified Notice of Exemption; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (STB or Board) is accepting for consideration an application (Application) and a related verified notice of exemption, both filed on May 1, 2023, by Norfolk Southern Railway Company (NSR), on behalf of itself and its wholly owned subsidiary, The Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP) (collectively, Applicants). The Application seeks Board approval for NSR to acquire from the Trustees of the Cincinnati Southern Railway (Trustees) and operate approximately 338.2 miles of rail line between Cincinnati, Ohio, and Chattanooga, Tenn., known as the Cincinnati Southern Railway (the CSR Line or the Line). This proposal is referred to as the Transaction. In the verified notice of exemption, Applicants seek authority for CNOTP to continue to operate the Line following its acquisition by Applicants. The Board finds that the Application is complete. The Board also makes the preliminary determination, based on the evidence presented in the Application, that the Transaction is a minor transaction. The Board emphasizes that this is not a final determination and may be rebutted by subsequent filings and evidence submitted into the record for this proceeding.

DATES: The effective date of this decision is May 31, 2023. Any person who wishes to participate in this proceeding as a Party of Record must file, no later than June 15, 2023, a notice of intent to participate. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application and related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by June 30, 2023. Responses to comments, protests, requests for conditions, other opposition, and rebuttal in support of the Application or related filings must be filed by July 28, 2023. *See* Appendix (Procedural Schedule). A final decision in this matter will be served no later than September 11, 2023. Further procedural orders, if any, would be issued by the Board, if necessary.

ADDRESSES: Any filing submitted in this proceeding must be filed with the Board either via e-filing or in writing addressed to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. In addition, one copy of each filing must be sent (and may be sent by email only if service by email is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Applicants NSR and CNOTP's representative, Raymond A. Atkins, Sidley Austin LLP, 1501 K Street NW,

[1] This decision embraces *The Cincinnati, New Orleans & Texas Pacific Railway—Intra-Corporate Family Operation Exemption—Line of Norfolk Southern Railway,* Docket No. FD 36699 (Sub–No. 1).

Washington, DC 20005; and (4) any other person designated as a Party of Record on the service list.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 740–5567. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: Applicants seek the Board's prior review and authorization pursuant to 49 U.S.C. 11323–25 and 49 CFR part 1180 for NSR to acquire from the Trustees and to operate the CSR Line pursuant to an asset purchase and sale agreement executed by Applicants and the Trustees on November 21, 2022 (PSA). (Appl. 1, 10.) NSR is a Class I rail carrier that operates approximately 19,300 route miles in the District of Columbia and 21 states, including Tennessee, Kentucky, and Ohio. (*Id.* at 18.) CNOTP, a wholly owned subsidiary of NSR and Class III rail carrier, has leased and operated the CSR Line since 1881. (*Id.* at 1–2, 18.) Applicants state that the CSR Line is operated as part of the NSR system, and that, although the lease between CNOTP and the Trustees would be terminated as part of this Transaction, Applicants intend for CNOTP to operate the Line for the foreseeable future. (*Id.* at 2.)

According to Applicants, the CSR Line extends from the City of Cincinnati, Hamilton County, Ohio, at the point of connection to NSR estimated to be at or near calculated milepost 0.0±, and proceeds south to the point of connection to The Alabama Great Southern Railroad Company (another subsidiary of NSR) in the City of Chattanooga, Hamilton County, Tenn., at or near calculated milepost 338.2±, together with all branch lines, sidings, and other appurtenant railroad facilities associated therewith.[2] (*Id.* at 3.)

Financial Arrangements. According to Applicants, no new securities would be issued in connection with the Transaction. (*Id.* at 13.) Applicants anticipate that the purchase price would be paid from cash on hand and/or NSR's credit facilities. (*Id.*)

Passenger Service Impacts. Applicants state that there would be no impact on commuter or other passenger service because there are no current passenger or commuter operations on the CSR Line and the Transaction does not contemplate introducing such operations. (*Id.* at 23–24.)

Discontinuances/Abandonments. Applicants state that rail service would not be abandoned or discontinued on any portion of the CSR Line as a result of the Transaction. (*Id.* at 24.) However, the Application does state that, as part of the PSA, Applicants have agreed to engage in good faith negotiations with the State of Ohio to donate to the state as interim trail manager under the National Trails System Act, 16 U.S.C. 1241–51, on customary terms and subject to obtaining any required STB authority, an approximately 21.52-mile NSR line in Ohio that is not part of, and does not connect with, the CSR Line. (Appl. 24.)

Public Interest Considerations. Applicants state that the Transaction would not result in a lessening of competition, creation of a monopoly, or restraint of trade in any region of the United States. (*Id.* at 13.) According to Applicants, the Transaction would not reduce the number of competitive options available to any shipper, as the number of rail carriers serving each shipper on the Line would remain the same and Applicants would maintain the same interchanges with the same connecting rail carriers at the same locations where those rail carriers currently interchange traffic. (*Id.* at 14.) Applicants maintain that they do not plan to make operational changes as a result of the Transaction. (*Id.*)

Time Schedule for Consummation. Applicants state that the Transaction is scheduled to be consummated as soon as practicable after the Board's decision approving the Application becomes effective and upon satisfaction of all other conditions precedent to closing set forth in the PSA, including approval of the proposed sale by the voters of Cincinnati. (*Id.* at 11.)

Environmental Impacts. Applicants state that, pursuant to 49 CFR 1105.6(c)(1), no environmental reporting is required because the Transaction would not lead to operational changes exceeding the thresholds for environmental review in 49 CFR 1105.7(e)(4) & (5). (Appl. 21.)

Historic Preservation Impacts. Applicants state that no historic report is required because the Transaction is ''for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older.'' (*Id.* at 22–23 (quoting 49 CFR 1105.8(b)(1)).)

Labor Impacts. Applicants state that they do not plan to make any changes to the number of employees working on the Line in connection with the Transaction and that no NSR or CNOTP employees would be dismissed or displaced as a result of the Transaction. (Appl. 16.) Applicants also assert that, in accordance with 49 U.S.C. 11326 and Board precedent, the appropriate employee protection conditions to impose are those set out in *New York Dock Railway—Control—Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway* v. *United States,* 609 F.2d 83 (2d Cir. 1979), as modified by *Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation Inc.,* 6 I.C.C.2d 799, 814–26 (1990), *aff'd sub nom. Railway Labor Executives' Association* v. *Interstate Commerce Commission,* 930 F.2d 511 (6th Cir. 1991). (Appl. 16.)

Related Filing. In Docket No. FD 36699 (Sub-No. 1), Applicants have filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(3) for an intra-corporate family transaction that would permit CNOTP to continue to operate the CSR Line following consummation of the Transaction in Docket No. FD 36699, which would terminate CNOTP's existing lease with the Trustees. Applicants state that they intend to consummate the intra-corporate family transaction contemporaneously with the Transaction in Docket No. FD 36699. As a condition to use of this exemption, Applicants state that they do not object to imposition of the employee protective conditions set out in *Mendocino Coast Railway, Inc.—Lease & Operate,* 354 I.C.C. 732 (1978), as modified in *Mendocino Coast Railway, Inc.—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

Primary Application and Related Filing Accepted. The Board finds that the proposed Transaction would be a ''minor transaction'' under 49 CFR 1180.2(c), and the Board accepts the Application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. *See* 49 U.S.C. 11321–26; 49 CFR part 1180. The Board is also accepting for consideration the related verified notice of exemption filed in Docket No. FD 36699 (Sub–No. 1), which is also in compliance with the applicable regulations. The Board reserves the right to require the filing of supplemental information as necessary to complete the record.

When a transaction does not involve the merger or control of two or more Class I railroads, the Board's treatment differs depending upon whether the transaction would have ''regional or national transportation significance.'' 49 U.S.C 11325. Under 49 CFR 1180.2, a transaction that does not involve two or

[2] Applicants state that, given the long history of the CSR Line, the identification of specific mileposts at the Line's termini has varied slightly over time but that the description of the Line provided in the Application here is correct. (Appl. 3 n.9.)

more Class I railroads is to be classified as ''minor''—and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is to be classified as ''significant'' if neither of these determinations can be made.

Nothing in the record thus far suggests that the Transaction would have anticompetitive effects. According to Applicants, the purpose of the Transaction is to convert Applicants' interest in the CSR Line from a leasehold to fee simple ownership, eliminating the need for increasingly complicated and time-consuming negotiations to periodically extend and modify the lease. (Appl. 3.) As such, Applicants state that they will continue to operate the CSR Line in the same manner that they have operated it for more than a century, with no change in service patterns or train operations anticipated as a result of the Transaction. (*Id.* at 7.) Specifically, they claim that there will be no reduction in the competitive options available to shippers and that no connecting railroad will be foreclosed from interchange. (*Id.*) Applicants state that where, as here, no shipper would have fewer competitive rail options and longstanding operations would continue unchanged as a result of a transaction, the Board has found it is unlikely such a transaction would have anticompetitive effects. (*Id.* at 6.)

Therefore, based on the information provided in the Application, the Board finds the proposed Transaction to be a minor transaction under 49 CFR 1180.2(c). Such a categorization does not mean that the proposed Transaction is insignificant or not of importance. Indeed, after the record in the proceeding is fully developed, the Board will carefully review the proposed Transaction to make certain that it does not substantially lessen competition, create a monopoly, or restrain trade, and that any anticompetitive effects are outweighed by the public interest. *See* 49 U.S.C 11324(d)(1)–(2). Pursuant to the applicable standard, the Board may also impose conditions on the Transaction.

Procedural Schedule. Any person who wishes to participate in this proceeding as a Party of Record must file a notice of intent to participate no later than June 15, 2023; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the Application, including filings by DOJ and DOT, must be filed by June 30, 2023; and responses to comments, protests, requests for conditions, and other opposition on the transportation merits of the Transaction must be filed by July 28, 2023. The Board is required to issue ''a final decision by the 45th day after the date on which it concludes the evidentiary proceedings,'' 49 U.S.C. 11325(d)(2), and will do so here.[3] The Board reserves the right to adjust the schedule as circumstances may warrant.

For further information regarding dates, see the Appendix to this decision.

Notice of Intent To Participate. Any person who wishes to participate in this proceeding as a Party of Record must file with the Board, no later than June 15, 2023, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, and Applicants' representative.

If a request is made in the notice of intent to participate to have more than one name added to the service list as a Party of Record representing a particular entity, the extra name(s) will be added to the service list as a ''Non-Party.'' Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status must accompany that request with a written certification that they have complied with the service requirements set forth at 49 CFR 1180.4 and any other requirements set forth in this decision.

Service on Parties of Record. Each Party of Record will be required to serve upon all other Parties of Record, within 10 days of the service date of this decision, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each Party of Record will also be required to file with the Board, within 10 days of the service date of this decision, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a Party of Record after the service date of this decision must have its own certificate of service indicating that all Parties of Record on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not Parties of Record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a Party of Record.

Service of Decisions, Orders, and Notices. The Board will serve copies of its decisions, orders, and notices on those persons who are designated on the service list as a Party of Record or Non-Party. All other interested persons are encouraged to obtain copies of decisions, orders, and notices via the Board's website at *www.stb.gov.*

Access to Filings. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 CFR 1180.4(a)(3). The Application and other filings in this proceeding will be furnished to interested persons upon request and will also be available on the Board's website at *www.stb.gov.* In addition, the Application may be obtained from Applicants' representative at the address indicated above.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Application filed in Docket No. FD 36699 and the related verified notice of exemption filed in Docket No. FD 36699 (Sub–No. 1) are accepted for consideration.

2. The parties to this proceeding must comply with the procedural schedule shown in the Appendix to this decision and the procedural requirements described in this decision.

3. This decision is effective on May 31, 2023.

Decided: May 24, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Kenyatta Clay,

Clearance Clerk.

Appendix

Procedural Schedule

May 1, 2023—Application filed.

May 31, 2023—Board notice of acceptance of application served and published in the **Federal Register**.

June 15, 2023—Notices of intent to participate in this proceeding due.

June 30, 2023—All comments, protests, requests for conditions, and any other evidence and argument in

[3] This notice will be published in the **Federal Register** on May 31, 2023; all subsequent deadlines will be calculated from this date. Deadlines for filings are calculated in accordance with 49 CFR 1104.7(a).

opposition to the application, including filings of DOJ and DOT, due.

July 28, 2023—Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the application due.

September 11, 2023—Date by which a final decision will be served.

October 11, 2023 [4]—Date by which a final decision will become effective.

[FR Doc. 2023–11555 Filed 5–30–23; 8:45 am]

BILLING CODE 4915–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notification of the Second United States-Mexico-Canada Agreement Labor Council Meeting

AGENCY: Office of the United States Trade Representative.

ACTION: Notice and request for comments.

SUMMARY: The Parties to the United States-Mexico-Canada Agreement (USMCA) intend to hold the second meeting of the Labor Council on June 28–29, 2023. The meeting will include a closed in-person government-to-government Labor Council session in Mexico City, Mexico, and a virtual public session on implementation of the USMCA labor chapter. The Office of the United States Trade Representative (USTR) and the U.S. Department of Labor (DOL) invite comments and questions from the public in advance of the virtual public session.

DATES:

June 1, 2023: Details for registering for participation in the virtual public session will be made available on DOL and USTR websites.

June 12, 2023: The deadline for submission of questions or comments.

June 29, 2023, 1:00 p.m. to 3:30 p.m. EDT: The Labor Council will convene a virtual public session.

ADDRESSES: Submit written questions and/or comments to *ILAB-Outreach@DOL.gov* and *MBX.USTR.USMCAhotline@ustr.eop.gov.* All submissions must include the subject line *USMCA Labor Council Meeting.*

FOR FURTHER INFORMATION CONTACT: Brenna Dougan, Deputy Assistant U.S. Trade Representative for Labor Affairs, USTR at 202–395–7391, or Samantha Tate, Division Chief for USMCA Monitoring and Enforcement, Office of Trade and Labor Affairs, Bureau of International Labor Affairs, DOL at 202–693–4920.

SUPPLEMENTARY INFORMATION:

I. Background

Article 23.14 of the USMCA establishes a Labor Council composed of senior government representatives from trade and labor ministries that must meet within one year of the date of entry into force of the USMCA. On June 29, 2021, the Labor Council conducted the initial meeting. Thereafter, the Labor Council will meet every two years unless the Parties decide otherwise. The June 28–29, 2023, meeting is being held pursuant to this requirement. The Labor Council may consider any matter within the scope of Chapter 23 (Labor) and perform other functions as the Parties may decide.

In conducting its activities, including meetings, the Labor Council must provide a means for receiving and considering the views of interested persons on matters related to the labor chapter. If practicable, meetings will include a public session or other means for Labor Council members to meet with the public to discuss matters relating to the implementation of Chapter 23 (Labor). Accordingly, the Parties invite questions and comments from interested persons, and the July 28–29, 2023, Labor Council meeting will include a virtual public session.

Labor Council decisions and reports are made by consensus and will be made publicly available unless the Council decides otherwise. The Labor Council issues a joint summary report or statement on its work at the end of each Council meeting.

II. Labor Council Meeting

The Labor Council will include an in-person, government-to-government closed session to discuss the Parties' Chapter 23 (Labor) obligations and a virtual public session. The government-to-government session will not be open to the public.

III. Public Session on USMCA Chapter 23 Implementation

The Labor Council invites members of the public to participate in a virtual public session on June 29, 2023, from 1:00 p.m. to 3:30 p.m. EDT, to address USMCA Chapter 23 (Labor) implementation. Details for registering for virtual participation in the public session will be made available by June 1, 2023, on both the USTR website at *https://ustr.gov/issue-areas/labor,* and the DOL website at *https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca.*

IV. Comments

The Labor Council is interested in the views of interested persons on matters related to the USMCA labor chapter. DOL and USTR invite specific comments and questions about the labor chapter that could be addressed at the public session. When preparing comments and questions, we encourage submitters to refer to Chapter 23 of the USMCA (*https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23-Labor.pdf*) and the USMCA Interagency Labor Committee for Monitoring and Enforcement Interim Procedural Guidelines for Petitions Pursuant to the USMCA (*https://www.federalregister.gov/documents/2020/06/30/2020-14086/interagency-labor-committee-for-monitoring-and-enforcement-procedural-guidelines-for-petitions*).

Joshua Kagan,

Assistant U.S. Trade Representative for Labor, Office of the United States Trade Representative.

[FR Doc. 2023–11560 Filed 5–30–23; 8:45 am]

BILLING CODE 3390–F3–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice of Airport Improvement Program Property Release; Bremerton National Airport, Bremerton, Washington

AGENCY: Federal Aviation Administration (FAA), Transportation (DOT).

ACTION: Notice of request to release airport improvement program property.

SUMMARY: Notice is being given that the FAA is considering a request from the Port of Bremerton, Washington to waive the Airport Improvement Program property requirements for approximately 20.65 acres of airport property located at Bremerton National Airport, Bremerton, Washington.

DATES: Comments are due within 30 days of the date of the publication of this notice in the **Federal Register**. Emailed comments can be provided to Ms. Mandi M. Lesauis, Compliance Specialist, Northwest Mountain Region, *mandi.lesauis@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Mandi M. Lesauis, Compliance Specialist, Northwest Mountain Region, *mandi.lesauis@faa.gov,* (206) 231–4140.

SUPPLEMENTARY INFORMATION: The subject properties are located in the southwest section of the airport. This release will allow the Port of Bremerton

[4] The final decision will become effective 30 days after it is served.

to sell 20.65 acres to develop Airport Industrial Way and provide access to industrial airport properties. There will be proceeds generated from the proposed release of this property for capital improvements at the airport. The Port of Bremerton, Washington will receive not less than fair market value for the property and the revenue generated from the sale will be used for airport purposes. It has been determined through study that the subject 20.65 acres will not be needed for aeronautical purposes.

Authority: Title 49.U.S.C. 47153(c).

Issued in Des Moines, Washington, on May 24, 2023.

Warren D. Ferrell,

Manager, Seattle Airports District Office.

[FR Doc. 2023–11457 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0203; FMCSA–2011–0089; FMCSA–2014–0213; FMCSA–2015–0115; FMCSA–2016–0007; FMCSA–2018–0057; FMCSA–2019–0027]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for seven individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ‘‘no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.’’ The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions are applicable on June 10, 2023. The exemptions expire on June 10, 2025. Comments must be received on or before June 30, 2023.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2010–0203, Docket No. FMCSA–2011–0089, Docket No. FMCSA–2014–0213, Docket No. FMCSA–2015–0115, Docket No. FMCSA–2016–0007, Docket No. FMCSA–2018–0057, or Docket No. FMCSA–2019–0027 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov/,* insert the docket number (FMCSA–2010–0203, FMCSA–2011–0089, FMCSA–2014–0213, FMCSA–2015–0115, FMCSA–2016–0007, FMCSA–2018–0057, or FMCSA–2019–0027) in the keyword box and click ‘‘Search.’’ Next, sort the results by ‘‘Posted (Newer-Older),’’ choose the first notice listed, and click on the ‘‘Comment’’ button. Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, 1200 New Jersey Avenue SE, Washington DC 20590–0001 between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ‘‘Public Participation’’ portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 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 or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2010–0203, Docket No. FMCSA–2011–0089, Docket No. FMCSA–2014–0213, Docket No. FMCSA–2015–0115, Docket No. FMCSA–2016–0007, Docket No. FMCSA–2018–0057, or Docket No. FMCSA–2019–0027), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *www.regulations.gov/,* insert the docket number (FMCSA–2010–0203, FMCSA–2011–0089, FMCSA–2014–0213, FMCSA–2015–0115, FMCSA–2016–0007, FMCSA–2018–0057, or FMCSA–2019–0027) in the keyword box and click ‘‘Search.’’ Next, sort the results by ‘‘Posted (Newer-Older),’’ choose the first notice listed, click the ‘‘Comment’’ button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2010–0203, FMCSA–2011–0089, FMCSA–2014–0213, FMCSA–2015–0115, FMCSA–2016–0007, FMCSA–2018–0057, or FMCSA–2019–0027) 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 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.

C. 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

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 statutes also allow the Agency to renew exemptions at the end of the 5-year period. However, FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The seven individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the seven applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The seven drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for commercial driver's license (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

As of June 10, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following seven individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

John D. Archer (MO)
Brian Brown (PA)
Marvin Fender (CO)
Daniel Gast (KS)
Denton Hineline (WA)
Steve Hunsaker (ID)
Bryan R. Jones (PA)

The drivers were included in docket number FMCSA–2010–0203, FMCSA–2011–0089, FMCSA–2014–0213, FMCSA–2015–0115, FMCSA–2016–0007, FMCSA–2018–0057, or FMCSA–2019–0027. Their exemptions are applicable as of June 10, 2023 and will expire on June 10, 2025.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the seven exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,
Associate Administrator for Policy.

[FR Doc. 2023–11438 Filed 5–30–23; 8:45 am]
BILLING CODE 4910–EX–P

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2023–0010]

National Public Transportation Safety Plan

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of availability of proposed National Public Transportation Safety Plan; request for comments.

SUMMARY: The Federal Transit Administration (FTA) invites public comment on a proposed update to the National Public Transportation Safety Plan (National Safety Plan). The proposed National Safety Plan would rescind and replace the plan that FTA published in January 2017. This new version of the National Safety Plan, like the version before it, is intended to guide the national effort to manage safety risk in our nation's public transportation systems. It lays out a performance-based approach to reduce

injuries and fatalities on transit systems under FTA's safety jurisdiction. This proposed update to the plan also supports the USDOT's long-term goal of reaching zero fatalities on America's roadways, as presented in the January 2022 National Roadway Safety Strategy, by adding safety performance criteria for vehicular collisions and providing voluntary standards for bus transit. Pursuant to the Bipartisan Infrastructure Law, the proposed update to the plan also establishes performance measures for Public Transportation Agency Safety Plan (PTASP) risk reduction programs.

DATES: Comments should be filed by July 31, 2023. FTA will consider comments received after that date to the extent practicable.

ADDRESSES: You may send comments, identified by docket number FTA–2023–0010, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for sending comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery/Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Instructions: All submissions received must include the agency name and docket number (FTA–2023–0010). All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* or the street address listed above.

FOR FURTHER INFORMATION CONTACT: For program matters, contact Arnebya Belton, Office of Transit Safety and Oversight, 202–366–7546 or *arnebya.belton@dot.gov.* For legal matters, contact Emily Jessup, Office of Chief Counsel, 202–366–8907 or *emily.jessup@dot.gov.* Office hours are from 8:30 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: This notice provides a summary of the proposed update to the National Safety Plan. The National Safety Plan itself is not included in this notice; instead, the proposed update to the plan is posted in the docket for this notice. FTA seeks public comment on this proposed National Safety Plan.

Background and Overview

Congress first directed FTA to create and implement a National Public Transportation Safety Plan (National Safety Plan) under the Moving Ahead for Progress in the 21st Century (MAP–21) Act, which authorized a new Public Transportation Safety Program (Safety Program) at 49 U.S.C. 5329 (Pub. L. 112–141). The Safety Program was reauthorized by the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94) and again by the Bipartisan Infrastructure Law, enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117–58).

On February 5, 2016, FTA first published a **Federal Register** notice (81 FR 6372) seeking comment on a proposed National Safety Plan. FTA conducted a number of public outreach sessions and a webinar series related to the proposed National Safety Plan and the PTASP notice of proposed rulemaking that also was published in the **Federal Register** on February 5, 2016 (81 FR 6343). Subsequently, FTA published a summary of the final changes to the National Safety Plan and responses to comments in the **Federal Register** (82 FR 5628) and published the finalized plan to the docket and on FTA's website.

Pursuant to 49 U.S.C. 5329(b), the National Safety Plan includes several elements intended to improve the safety of all public transportation systems that receive Federal financial assistance under 49 U.S.C. Chapter 53. The Bipartisan Infrastructure Law adds new elements that must be included in the National Safety Plan, including:

- Safety performance measures related to the PTASP safety risk reduction program;
- In consultation with the Secretary of Health and Human Services, precautionary and reactive actions required to ensure public and personnel safety and health during an emergency; and
- Consideration, where appropriate, of performance-based and risk-based methodologies.

The Bipartisan Infrastructure Law also requires that the minimum safety performance standards for public transportation vehicles used in revenue operations take into consideration, to the extent practicable, innovations in driver assistance technologies and driver protection infrastructure, where appropriate, and a reduction in visibility impairments that contribute to pedestrian fatalities.

This proposed update continues to mature FTA's National Public Transportation Safety Program and addresses new requirements in the Bipartisan Infrastructure Law to further advance transit safety.

The proposed National Safety Plan is organized into the following three chapters:

Chapter I Keeping Safety the Top Priority: Chapter I presents FTA's safety vision, strategic objectives, and an overview of FTA's National Public Transportation Safety Program; and provides high-level safety performance data related to FTA safety priorities.

Chapter II Safety Performance Criteria: Chapter II defines safety performance measures for transit agencies required to establish and implement Agency Safety Plans under FTA's PTASP regulation.

Chapter III Voluntary Minimum Safety Standards: Chapter III provides voluntary minimum safety performance standards for public transportation vehicles used in revenue operations and voluntary minimum safety standards to ensure the safe operation of public transportation systems, as well as recommended practices that may support the transit industry in assessing and mitigating safety risk and help improve safety performance.

FTA is considering the development of mandatory standards for Rail Transit Roadway Worker Protection and Transit Worker Fitness for Duty through rulemaking that may supersede the voluntary minimum safety standards and recommended practices identified in Category A of Chapter III.

Voluntary Safety Standards and Recommended Practices

The proposed National Safety Plan includes an updated list of voluntary minimum safety standards and recommended practices to support mitigation of safety risk and to improve safety performance. The list in the proposed National Safety Plan includes new categories beyond those included in the 2017 version of plan, such as transit worker safety, pedestrian and bicyclist safety, rail grade crossing safety, tunnel ventilation, and fire safety. The proposed list is more comprehensive than the list in 2017, incorporating the large number of voluntary minimum safety standards and recommended practices issued and identified in the intervening years. The proposed list is also organized into a greater number of discrete categories to

facilitate understanding. Pursuant to the Bipartisan Infrastructure Law, the proposed National Safety Plan also includes precautionary and reactive actions to ensure public and personnel safety and health during an emergency. FTA coordinated with the Department of Health and Human Services on the list of such recommended actions.

Safety Performance Measures

Under FTA's PTASP regulation, transit agencies must set performance targets based on the safety performance measures established in the National Safety Plan (49 CFR 673.11(a)(3)). The 2017 version of the National Safety Plan identified seven performance measures to support PTASP performance target setting. The proposed update to the National Safety Plan increases the number of these measures from seven to 14. The proposed seven new performance measures are: Collision Rate, Pedestrian Collision Rate, Vehicular Collision Rate, Transit Worker Fatality Rate, Transit Worker Injury Rate, Assaults on Transit Workers, and Rate of Assaults on Transit Workers. These additions are consistent with the Bipartisan Infrastructure Law's increased focus on bus collisions and transit worker safety.

In addition to the measures described above, the Bipartisan Infrastructure Law directs FTA to include performance measures for the safety risk reduction program required under 49 U.S.C. 5329(d)(1)(I) in the National Safety Plan. In accordance with 49 U.S.C. 5329(b)(2)(A), the National Safety Plan identifies eight measures required for safety risk reduction programs, which apply to Section 5307 recipients that serve an urbanized area of 200,000 or more: Major Events, Major Events Rate, Collisions, Collisions Rate, Injuries, Injury Rate, Assaults on Transit Workers, and Rate of Assaults on Transit Workers. FTA is proposing these measures as they align with the goals of the safety risk reduction program as described in FTA's PTASP notice of proposed rulemaking, namely reducing the number and rates of safety events and injuries, reducing vehicular and pedestrian safety events involving transit vehicles, and mitigating assaults on transit workers. FTA's proposal to identify Major Events, Major Event Rate; Injuries, and Injury Rate as performance measures addresses the safety risk reduction program goal of reducing the number and rates of safety events and injuries. Similarly, proposing Collisions and Collisions Rate as performance measures addresses the goal of reducing vehicular and pedestrian safety events and the measures of Assaults on Transit Workers and Rate of Assaults on Transit Workers address the reduction of assaults on transit workers.

Pursuant to the Bipartisan Infrastructure Law, performance targets for the risk reduction program must be set based on a 3-year rolling average of NTD data. FTA recognizes that certain transit agencies may not yet report detailed safety event information to the NTD that corresponds to these performance measures. FTA proposed requirements to address this situation in a Notice of Proposed Rulemaking for the PTASP regulation, which was published in the **Federal Register** on April 26, 2023 (88 FR 25336).

FTA also notes that some of the eight performance measures for the safety risk reduction program overlap with the 14 measures for all agencies subject to the PTASP regulation described above. Section 5307 recipients that serve an urbanized area with a population of 200,000 or more may choose to use the same target for both measures, provided the target for the safety risk reduction program is based on a 3-year rolling average of NTD data.

Performance targets for a risk reduction program at 49 U.S.C. 5329(d)(4) are not required until FTA has finalized the National Safety Plan to include these performance measures. However, nothing precludes an Agency from implementing a risk reduction program in advance and updating it once the performance measures are finalized.

In the National Safety Plan, FTA also proposes that when setting safety performance targets, transit agencies should use the following modal groups: rail, fixed route bus, and non-fixed route bus. This is responsive to 49 U.S.C. 5329(b)(2)(A), which requires FTA to identify safety performance criteria for all modes of public transportation.

After reviewing and responding to the comments received on this proposed National Safety Plan, FTA will issue a final National Safety Plan.

Nuria I. Fernandez,

Administrator.

[FR Doc. 2023–11551 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0057]

Czinger Vehicles—Grant of Petition for Temporary Exemption From Certain Requirements of FMVSS No. 205, Glazing Materials

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of grant of petition for temporary exemption.

SUMMARY: This notice grants the petition of Czinger Vehicles (Czinger) for a temporary exemption from windshield abrasion resistance requirements in Federal motor vehicle safety standard (FMVSS) No. 205, Glazing materials. The basis for the exemption is that compliance with these requirements would cause substantial economic hardship to a low volume manufacturer that has tried in good faith to comply with the standard. This action follows our publication in the **Federal Register** of a document announcing receipt of Czinger's petition and soliciting public comments. We received no comments on the petition.

DATES: The exemption from the windshield abrasion resistance requirements in FMVSS No. 205 is effective from August 1, 2023, through July 31, 2026.

FOR FURTHER INFORMATION CONTACT: Callie Roach, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–2992; Fax: 202–366–3820.

SUPPLEMENTARY INFORMATION: NHTSA is granting a request from Czinger for a temporary exemption from FMVSS No. 205's abrasion resistance requirements for windshields for its first vehicle model, the 21C. In accordance with statutory and regulatory requirements, NHTSA is granting the petition on the basis that compliance would cause substantial economic hardship to a low volume manufacturer that has tried in good faith to comply with the standard.

I. Relevant Legal Authority and Regulations

a. Statutory and Regulatory Requirements for Temporary Exemptions

NHTSA is responsible for promulgating and enforcing FMVSS designed to improve motor vehicle safety. Generally, a manufacturer may

not manufacture for sale, sell, offer for sale, or introduce or deliver for introduction into interstate commerce a vehicle that does not comply with all applicable FMVSS.[1] There are limited exceptions to this general prohibition.[2] One path permits manufacturers to petition NHTSA for an exemption for noncompliant vehicles under specified statutory bases.[3]

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified at 49 U.S.C. Chapter 301, authorizes the Secretary of Transportation to exempt, on a temporary basis and under specified circumstances, and on terms the Secretary considers appropriate, motor vehicles from a FMVSS or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority for implementing this section to NHTSA.[4]

The Safety Act authorizes NHTSA (by delegation) to grant, in whole or in part, a temporary exemption to a vehicle manufacturer if certain specified findings are made.[5] The agency must find that the exemption is consistent with the public interest and the objectives of the Safety Act.[6] In addition, exemptions under § 30113 must meet one of four bases. Czinger petitioned under the first of these bases, asserting that ''[c]ompliance with the standard[s] [from which exemption is sought] would cause substantial economic hardship to a manufacturer that has tried to comply with the standard[s] in good faith.'' [7]

NHTSA established 49 CFR part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* to implement the statutory provisions concerning temporary exemptions. The requirements in 49 CFR 555.5 state that the petitioner must set forth the basis of the petition by providing the information required under 49 CFR 555.6, and the reasons why the exemption would be in the public interest and consistent with the objectives of the Safety Act. A petition submitted on the substantial economic hardship basis must include the information specified in 49 CFR 555.6(a).

b. FMVSS No. 205 Abrasion Requirements for Windshields

Czinger's petition seeks an exemption from requirements in FMVSS No. 205, *Glazing materials.* The purpose of FMVSS No. 205 is to reduce injuries (*e.g.,* lacerations) resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the windows in collisions. Most of the performance requirements for glazing, including the requirement from which Czinger is seeking an exemption, are found in an industry standard, the ''American National Standards Institute American National Standard for Safety Glazing Materials for Glazing Motor Vehicles and Motor Vehicle Equipment Operating on Land Highways-Safety Standard'' (ANSI/SAE Z26.1–1996), which FMVSS No. 205 incorporates by reference.

Czinger's petition concerns requirements for glazing used in windshields. ANSI/SAE Z26.1–1996 sets forth groups of tests that must be met by different glazing types. The standard explains that ''[s]afety glazing materials in motor vehicles shall comply with the applicable requirements listed in this subsection and shown in Table 1, item by item, in definite groupings of tests that are appropriate for the safety glazing material in question, and the location in the motor vehicle in which it is intended to be used.'' For example, AS–1 glazing may be used anywhere in vehicles, including windshields. For AS–1 glazing, the standard provides a list of tests for Laminated Glass, Class 1 Multiple Glazed Unit, and Class 2 Multiple Glazed Unit. For AS–1 glazing, Laminated Glass must meet Test Nos. 1, 2, 3, 4, 9, 12, 15, 18, and 26. As additional background, although the glazing Czinger proposes to use in the 21C's windshield is polycarbonate, NHTSA does not prohibit the material from being used in windshields so long as it meets the tests for one of the glazing types listed. In an interpretation letter issued to Exatec, LLC, NHTSA explained that glazing types not listed in the standard may be used interchangeably with the corresponding materials specified in the standard if and when other materials are developed that possess properties such that they meet one or another of the prescribed groups of tests.[8]

Czinger's petition requests an exemption from the requirement that windshield glazing meet the performance requirements specified in Test 18 for abrasion resistance. The purpose of these abrasion requirements is to ensure that the glazing will resist scratching that can distort the driver's view and thus reduce visibility. Test 18 requires that a specimen of the glazing be subjected to abrasion for 1000 cycles in the manner described in ANSI/SAE Z26.1–1996 section 5.17. After the specimen has been abraded, the amount of light scattered by the specimen cannot exceed 2.0%.

II. Czinger's Petition and Supplemental Information

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Czinger submitted a petition on December 12, 2021 for a temporary exemption from the windshield abrasion resistance requirements in FMVSS No. 205, *Glazing materials.* In addition to its original petition, Czinger submitted supplemental information on October 21, 2022 and January 25, 2023. Copies of these materials have been placed in the docket identified at the beginning of this document.

In its petition, Czinger describes itself as a small volume start-up producer of innovative sports cars.[9] Czinger states that it is located in Los Angeles, California and was founded in 2021.[10] Czinger further states that once production begins in 2023, the company will produce approximately 50 cars per year worldwide.[11] The forecasted production and US sales estimates provided by Czinger indicate that, for the three years for which Czinger is requesting a temporary exemption, Czinger expects to sell a total of 55 vehicles to the U.S. market.[12]

Czinger is seeking an exemption for the Czinger 21C model. Czinger states that its 21C model vehicle is presently under development and describes it as a hypercar comprised of lightweight materials and a hybrid electric powertrain system as its foundation.[13] Czinger describes the 21C as a ''still-in development high-technology, ultra-high performance, high quality Hypercar.'' [14] In support of these assertions, Czinger states that the ''advanced AI developed multi material chassis delivers exceptional light weight'' and that the ''crash structures have been optimized to deliver the safest Hyper-sports car on the

[1] 49 U.S.C. 30112(a)(1).

[2] 49 U.S.C. 30112(b); 49 U.S.C. 30113; 49 U.S.C. 30114.

[3] 49 U.S.C. 30113.

[4] 49 CFR 1.95.

[5] 49 U.S.C. 30113(b)(3).

[6] 49 U.S.C. 30113(b)(3)(A).

[7] 49 U.S.C. 30113(b)(3)(B)(i).

[8] See letter to Mr. Clemens Kaiser (September 23, 2005), available at *https://www.nhtsa.gov/interpretations/04-005908drn.*

[9] Czinger petition at page 3.

[10] *Id.*

[11] *Id.*

[12] *Id.* at page 6. Czinger's forecasted production for Model Years 2023, 2024, and 2025 is 20 vehicles, 50 vehicles, and 10 vehicles respectively, with an estimated 10 vehicles, 35 vehicles, and 10 vehicles sold in the U.S. in those years.

[13] *Id.* at page 3.

[14] *Id.*

market.'' [15] Czinger states that the 21C's hybrid power train uses the world's most power-dense production internal combustion engine as its foundation and that the total strong hybrid system delivers a peak output of 1250hp (1233bhp).[16] Czinger also states that the 21C's low drag configuration optimizes light-weighting and aerodynamics, allowing for greater efficiency at all speeds.[17] Czinger explains that the vehicle is produced using Additive Manufacturing technology (the industrial production name for 3D printing), which Czinger asserts requires less material, less energy, and less infrastructure than current, widely used, production techniques.[18]

Requested Exemption. Czinger petitioned for an exemption from requirements for glazing it seeks to use in the windshield of Czinger's 21C model on the basis that compliance with the standard would cause substantial economic hardship. Czinger is seeking a temporary exemption for three years to allow Czinger to produce a total of 55 noncompliant vehicles. Czinger states that all glazing on the 21C will be compliant with FMVSS No. 205 with the exception of the windshield.[19] Czinger states that it believes that the only requirements with which the windshield will not comply are those regarding abrasion resistance.[20] In supplemental information submitted on October 21, 2022, Czinger confirmed that the glazing for use in the 21C's windshield meets the performance requirements in Tests Nos. 1, 2, 3, 4, 9, 12, 15, and 26.[21] Czinger also confirmed that the glazing is not expected to meet the abrasion requirements in Test 18.[22]

Eligibility. To be eligible for a temporary exemption on the substantial economic hardship basis, the petitioner's total motor vehicle production in the most recent year of production must be not more than 10,000 vehicles.[23] To demonstrate compliance with this requirement, and pursuant to 49 CFR 555.6(a)(2)(v), Czinger stated that it has not produced any motor vehicles to date.[24]

Substantial economic hardship. In support of its claim that compliance with the windshield abrasion resistance requirements would cause substantial economic hardship, Czinger states that it is experiencing substantial economic hardship, which would be exacerbated by the denial of its exemption petition.[25] Czinger states that it has 35 employees and has been operating since 2021 without any sales.[26] Czinger states that, in a best-case scenario, the company will have two additional years with high expenses and no sales while product development for the 21C is completed.[27]

Czinger states that compliance with the standard would result in an extra loss of $38 million.[28] Czinger explains that the additional loss would result from an additional $3.7 million in research and development costs, a 6-month delay bringing its product to market, and a 15% loss of 21C sales due to the car's modified aesthetics (as necessitated by a laminated windshield).[29]

In further support of its petition, Czinger notes that it has been enduring the pandemic and supply chain issues which, Czinger states, are straining even established OEMs.[30] As a startup, Czinger states that it needs flexibility to endure these challenges.[31]

In supplemental information submitted in January 2023, Czinger indicated that because compliance with the windshield abrasion requirement cannot be achieved with the current vehicle design, in the absence of an exemption, Czinger would produce the vehicle for export only.[32] Czinger states that if the exemption were granted for only one year, production for the U.S. market would be reduced by 82% and if the exemption were granted for only two years, production for the U.S. market would be reduced by 18%.[33] Czinger also provided information about the losses of revenue associated with those lower production volumes. Given the development costs Czinger has incurred to date, Czinger states that the loss in sales from not being able to sell vehicles in the U.S. would result in financial failure of the business.[34]

In the supplemental information submitted in January 2023, Czinger also stated that if the exemption were granted, it would allow Czinger to ''secure revenue essential to its continuation and allow it to form a bridge to be in a position to produce vehicles where such exemptions are not required.'' [35] Czinger noted that while its first vehicle model, the 21C, is a low volume hypercar, the majority of Czinger's future business will be higher volume vehicles such as the Czinger Hyper GT which was revealed at Monterey Car Week in August 2022.[36] This subsequent model, Czinger states, uses a more conventional windshield shape for which the production material will be conventional automotive glass.[37]

Good Faith Efforts to Comply. Pursuant to 49 CFR 555.6(a)(2), a petition for a temporary exemption made under the substantial economic hardship basis must include a description of the petitioner's efforts to comply with the standard for which the exemption is sought. In support of its petition, Czinger asserts that it has put considerable good faith efforts into FMVSS compliance.[38]

Czinger states that the 21C has been designed with in-line seating for two occupants.[39] The central seating position, Czinger explains, allows for an extremely streamlined frontal profile, reducing drag and improving fuel economy, as well as improving performance.[40] Czinger states that this ''fighter jet'' design has been highly regarded by media, and more significantly, by prospective clients.[41]

Czinger states that the wrap-around cockpit is realized by a unique double curvature windscreen, which, during prototype stage, was produced in polycarbonate by Isoclima, a supplier in Europe.[42] Czinger states that the hard polycarbonate material passes European requirements in accordance with ECE R43, including impact performance and abrasion haze resistance.[43] Czinger states that because of the extreme size and shape of the 21C windshield, its supplier, Isoclima, has informed Czinger that the windshield must be produced in polycarbonate.[44]

Czinger also states that at an early stage in the development of the 21C, its supplier Isoclima indicated that it believed the polycarbonate windshield would meet regulatory requirements for the USA market.[45] Czinger states that, based on this information, Czinger

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at page 4.

[19] *Id.*

[20] *Id.*

[21] Czinger's Supplemental Information Submission from October 2022 at page 2.

[22] *Id.* at page 2.

[23] 49 U.S.C. 30113(d).

[24] Czinger petition at page 4.

[25] *Id.* at page 6.

[26] *Id.*

[27] *Id.*

[28] *Id.* at page 7.

[29] *Id.*

[30] *Id.* at page 8.

[31] *Id.*

[32] Czinger's Supplemental Information Submission from January 2023 at page 3.

[33] *Id.*

[34] *Id.*

[35] *Id.* at page 2.

[36] *Id.*

[37] *Id.*

[38] Czinger's petition at page 8.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at page 9.

[45] *Id.*

proceeded with the polycarbonate windshield development.[46]

Czinger also states that, despite Isoclima's opinion that the shape of the 21C windshield could not be produced in laminated glass, Czinger invested time and money trying to develop, with the help of multiple suppliers, the planned windshield shape in laminated glass.[47] Specifically, Czinger states that it engaged a Los Angeles-based artisan glazing supplier and tried 20 iterations of tooling strategies, produced over 80 test samples, and made some design changes to improve formability.[48] These efforts, Czinger states, have not been successful.[49]

In supplemental information submitted in January 2023, Czinger stated that it undertook a comprehensive assessment, at a cost of $80,000, of different physical manufacturing techniques with its windshield supplier, Isoclima, in a concerted effort to achieve a solution to manufacture the windshield in glass.[50] The effort, Czinger states, proved unsuccessful and the conclusion was that due to the geometry of the windshield, it could not be manufactured in glass.[51]

Public Interest. Czinger asserts that granting its petition is consistent with the public interest and the Safety Act for the following reasons:

1. The 21C model range will comply with all FMVSS other than the windshield requirements in FMVSS 205.[52]
2. The exempted cars will have a windshield that meets all EU requirements.[53]
3. The exempted cars will not present an unacceptable safety risk.[54]

In support of this assertion, Czinger states that the 21C's crash performance and occupant protection performance is improved when using polycarbonate, compared to laminated glass.[55] Czinger states that it has run crash simulations measuring occupant injury criteria and observes overall improvements in performance with the polycarbonate windshield.[56] Czinger also notes that the 21C has an advanced dynamic knee bolster that deploys a lower IP surface to minimize forward movement of the driver in an unbelted impact scenario.[57] Czinger asserts that this system, in combination with the highly optimized DAPS (Divergent Adaptive Production System) front crash structure, virtually negates the possibility of head impact to the windshield.[58]

As regards visibility, Czinger states its belief that since polycarbonate windshields are permitted in aircrafts, the risks of unacceptable impaired driver visibility due to abrasion *are de minimis.* Czinger also states that 21C's windshield glazing passes the European requirements for abrasion haze resistance in ECE R43.[59] In supplemental information submitted in October 2022, Czinger stated that the 21C's polycarbonate windshield will also meet all of the required tests for AS–4 glazing, which is rigid plastic glazing for use in specific areas of vehicles.[60] AS–4 glazing is required to meet Test Nos. 2, 10, 13, 16, 17, 19, 20, 21, and 24 . In support of its assertion that the 21C's windshield glazing meets the AS–4 requirements, Czinger submitted a copy of a 2016 third party laboratory test report that states that the 3mm and 6mm thick samples of the Isoclima material, which Czinger states that it is using in its windshield, have passed Item 4 (AS4) testing. A copy of this report is included in Czinger's supplementary submission from October 2022 and available in the docket identified at the beginning of this notice.

4. The 21C will be produced in the U.S. in very low numbers and will not be used daily due to its unconventional design.[61]

In support of this assertion, Czinger states that the 21C will be a hand-built specialty car, high-priced and with an unusual design.[62] Czinger states that it believes owners of 21C vehicles will use their vehicles occasionally, rather than for regular transportation, and predicts that the 21Cs will be driven a mere 350 miles per year.[63] In support of this estimate, Czinger provided data for 33 hypercars valued at more than $1 million demonstrating an average accumulated mileage of 259 miles per year.[64] Czinger provided additional information about the hypercar use case in the supplemental information submitted in October 2022. Czinger stated that a hypercar is atypical when compared to more conventional vehicles.[65] Czinger also stated that it performed some analysis with a sample of 53 hypercars across a range of brands and found that the average mileage of these vehicles was 266 miles per year.[66]

5. The denial of the exemption request could have a negative effect on U.S. employment.[67]

In support of this assertion, Czinger states that denying its petition could result in temporary job loses, not only at Czinger, but throughout its distribution chain.[68] Czinger also notes that the same negative effect was identified by NHTSA in a 2006 decision notice granting an exemption to Ferrari.[69]

6. The 21C's innovative technology is a benefit to the public.[70]

In support of this assertion, Czinger states that the 21C offers very significant public interest benefits—the use of Additive Manufacturing technology, weight-saving technology, advanced hybrid drivetrain technology, and innovative crash protection technology.[71] Czinger states that granting its requested exemption would expedite bringing these technologies to the U.S. market.[72]

Additional Czinger Steps. Czinger states that each 21C sold under an exemption will undergo regular,

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Czinger's Supplemental Information Submission from January 2023 at page 2.

[51] *Id.*

[52] *Id.* at page 10.

[53] *Id.*

[54] *Id.* at pages 10–11.

[55] *Id.* at page 11.

[56] *Id.* at page 11.

[57] *Id.*

[58] *Id.*

[59] *Id.* at page 8.

[60] AS–4 glazing may be used in the windshield of low-speed vehicles, in interior partitions and auxiliary wind deflectors, folding doors, standee windows in buses, flexible curtains or readily removable windows or in ventilators used in conjunction with readily removable windows, openings in the roof not requisite for driving visibility, trailers, glazing to the rear of the driver in trucks or truck tractor cabs where other means of affording visibility of the highway to the side and rear of the vehicle are provided, the rear windows of convertible passenger car tops, the rear doors of taxicabs, readily removable windows of buses having a GVWR of more than 4540 kg (10,000lb), windows and doors in motorhomes (except for the windshields and windows to the immediate right or left of the driver), windows and doors in slide-in campers and pickup covers, and windows and doors in buses except for the windshield, windows to the immediate right or left of the driver, and rearmost windows if used for driving visibility. See 49 CFR 571.205 S5.4 and ANSI/SAE Z26.1–1996 page 8.

[61] Czinger Petition at page 11.

[62] *Id.*

[63] *Id.*

[64] *Id.* at page 15.

[65] Czinger's Supplemental Information submitted in October 2022 at page 3.

[66] *Id.*

[67] *Id.* at page 11.

[68] *Id.*

[69] *Id.* at 11 citing a May 22, 2006 notice (71 FR 29389) stating ''[w]e note that Ferrari is a well-established company with a small but not insignificant U.S. presence, and we believe that an 85 percent sales reduction would negatively affect U.S. employment. Specifically, reduction in sales would likely affect employment not only at Ferrari North America, but also at Ferrari dealers, repair specialists, and several small service providers that transport Ferrari vehicles from the port of entry to the rest of the United States. Traditionally, the agency has concluded that the public interest is served in affording continued employment to the petitioner's U.S. work force.''

[70] *Id* at page 12.

[71] *Id.*

[72] *Id.*

frequent inspections, and any windshield with degraded visibility will be identified and replaced free of charge. In supplemental information submitted in October 2022, Czinger stated that it would be willing to install tear offs, which are thin protective films.[73] Czinger states that it could install these films on the windshield and the films could be a regular service item.[74]

III. Request for Public Comment

On July 7, 2022, NHTSA published a notice in the **Federal Register** announcing receipt of Czinger's petition and requesting public comment.[75] The notice provided a 30-day comment period, which closed on August 8, 2022. No comments were received.

IV. Agency Analysis and Decision

In this section we provide our analysis and decision regarding Czinger's temporary exemption request from certain requirements in FMVSS No. 205. As explained below, we are granting Czinger's petition for the 21C to be exempted from the requirement for the glazing materials in the 21C's windshield to meet Test 18. The agency's rationale for this decision is as follows:

Eligibility. As discussed above, a manufacturer is eligible to apply for an economic hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles. In its petition, Czinger indicated that at the time of submitting the petition, it had not produced any vehicles for sale and stated that it predicted producing 55 vehicles during the exemption period if an exemption were granted. Accordingly, we have determined that Czinger is eligible to apply for an economic hardship exemption as a low volume manufacturer.

Economic Hardship. Czinger states that compliance with the standard will result in an extra loss of $38 million.[76] Czinger states that it has 35 employees and has been operating since 2021 without any sales.[77] Czinger states that, in a best case scenario, the company will have two additional years with high expenses and no sales while product development for the 21C is completed.[78] Czinger explains that denial of its petition would result in an additional loss of $3.7 million in research and development costs, a 6-month delay bringing its product to market, and an estimated 15% loss of 21C sales due to the car's modified aesthetics (as necessitated by a laminated windshield).[79] The confidential information Czinger submitted in its petition supports its assertion that it is experiencing substantial economic hardship, which would be exacerbated by the denial of its exemption petition.

The touchstone that NHTSA uses in determining the existence of substantial economic hardship is an applicant's financial health, as indicated by its income statements. NHTSA has tended to consider a continuing and cumulative net loss position as strong evidence of hardship.[80] The theory behind NHTSA's rationale is that if a company with a continuing net loss is required to divert its limited resources to resolve a compliance problem on an immediate basis, it may be unable to use those resources to resolve other problems that may affect its viability. The agency has considered this especially important in its treatment of petitioners that are just starting to manufacture vehicles. Based on these factors, we conclude that Czinger has demonstrated the requisite economic hardship.

Good Faith Efforts to Comply. In addition to demonstrating that compliance with the standard for which it is seeking an exemption would result in substantial economic hardship, Czinger must demonstrate that it has made good faith efforts to comply with the standard. NHTSA believes Czinger has met this requirement.

In this present case, NHTSA finds that Czinger had reason to believe that it would be able to create a FMVSS-compliant version of its unique vehicle design. Despite the vehicle's unique inline cockpit seating arrangement necessitating a unique double curvature windshield, Czinger had early assurances that its supplier would be able to produce a windshield that met Czinger's shape requirements while also meeting FMVSS requirements. NHTSA also finds that, at the point that Czinger realized that the 21C's windshield would not meet the abrasion resistance requirements, it took good faith efforts to try to source a compliant windshield. Specifically, we note Czinger's statement that it began efforts in August 2020 to locate a supplier that could produce the windshield shape in laminated glass. Czinger stated that it engaged a Los Angeles-based artisan glazing supplier and tried 20 iterations of tooling strategies, produced over 80 test samples and made some design changes to improve formability. When these efforts were not successful, Czinger sought this exemption.

As explained in its petition and supplemental information from January 2023, Czinger intends to stop production of the 21C for the U.S. market at the end of the requested exemption period because it has determined that it is not possible to create a FMVSS No. 205 compliant windshield in the shape required for the 21C. NHTSA has no reason to doubt this statement and believes that it further demonstrates that Czinger has made good faith efforts to comply with the standard but is unable to do so.

Public Interest. The final consideration for granting an exemption under 49 U.S.C. 30113 and Part 555 is whether granting the exemption is in the public interest and consistent with the objectives of the Safety Act. NHTSA finds that in Czinger's case it is.

In its petition, Czinger cites six reasons that granting its petition is in the public interest. The first four of these reasons are related to safety. Czinger states, first, that the 21C will comply with all applicable FMVSS except for windshield glazing requirements in FMVSS No. 205; second, that the exempted vehicles will have a windshield that meets all EU requirements; third, that the exempted vehicles will not present an unacceptable safety risk; and fourth, that the 21C will be built in small numbers and will not be driven daily due to its unconventional design.

While NHTSA acknowledges that Czinger is only requesting an exemption from one requirement and Czinger will only produce a small number of the vehicles, this information alone is insufficient to demonstrate that granting the exemption is in the public interest. That is, a request for exemption from a single requirement for a small number of vehicles could be inconsistent with the public interest if that one exemption presents an unreasonable risk to motor vehicle safety. For this reason, NHTSA first considered how granting the exemption would impact safety.

Czinger's request is for an exemption from certain requirements for windshield glazing. The abrasion resistance requirements are considered to be crash avoidance requirements because the safety benefit of the requirements is derived from the prevention of crashes as opposed to the mitigation of the results of crash impacts (*i.e.,* crashworthiness). This means that instead of just considering how the exemption may impact the

[73] Czinger's Supplemental Information submitted in October 2022 at page 3.

[74] *Id.*

[75] 87 FR 40585.

[76] *Id.* at page 7.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] March 11, 1994 grant of petition of Bugatti Automobili, S.p.A., (59 FR 11649 at 11650).

safety to occupants of an exempt vehicle, we must also consider how the exemption may impact the safety of other road users.

We now turn to Czinger's second point and its assertions about how it is able to assure that the 21C's windshield will provide adequate driving visibility despite not meeting the abrasion resistance requirements in Test No. 18 in ANSI/SAE Z26.1–1996. Czinger asserts that the exemption presents minimal risk to safety because the windshield complies with all European requirements for windshield glazing, including the abrasion resistance requirements in ECE R43. While NHTSA has not conducted a full analysis of the differences between Test 18 and the requirements in ECE R43, NHTSA does consider compliance with the ECE standard to be an indication that the glazing used for the 21C's windshield has some level of resistance to abrasion, which is expected to help maintain driver visibility.

In further support of the assertion that the exemption's safety impact will be limited, Czinger provided information regarding the compliance of the 21C's windshield with another abrasion resistance requirement in ANSI/SAE Z26.1–1996. Specifically, Czinger states that the glazing for use in windshields would meet all requirements for AS–4 glazing, including requirements for abrasion resistance. AS–4 glazing is permitted to be used in specific locations in a motor vehicle and must comply with Test Nos. 2, 10, 13, 16, 17, 19, 20, 21, and 24. The abrasion resistance requirements are found in Test 17 and differ from the requirements in Test 18 in two key aspects. First, while Test 17 and Test 18 use the same test method, specimens are abraded for 100 cycles in Test 17 and 1000 cycles in Test 18. Second, while Test 17 requires that the light scattered by the specimens not exceed 15.0%, Test 18 requires that the light scattered by the specimens not exceed 2.0%. As with the information regarding compliance with ECE R43, NHTSA considers the information regarding compliance with the less stringent AS–4 requirements of Test 17 to be some indication of the windshield's abrasion resistance. This information is supportive of Czinger's assertion that the safety impacts of granting the exemption would be minimal.

The decision to grant or deny an economic hardship exemption under part 555 does not turn on whether the failure to meet the standard is consequential to safety.[81] Instead, the decision is based on whether the petitioner meets the criteria for an economic hardship exemption and whether, on balance, granting the petition is in the public interest and consistent with the Safety Act.[82] In implementing this authority, NHTSA considers the risk associated with the particular noncompliance and determines whether the specific circumstances warrant granting an exemption to a low volume manufacturer that would otherwise face economic hardship. NHTSA also considers whether granting the exemption would introduce a defect that presents an unreasonable risk to safety. The presence of such a defect would implicate NHTSA's defect authority under the Safety Act and NHTSA would be compelled to find that granting the exemption is not consistent with the Safety Act.

Considering the impacts of not meeting the abrasion resistance requirements is just one part of NHTSA's consideration of the overall safety impacts of granting Czinger's exemption request. NHTSA also considers whether there are mitigating factors that may reduce the risk associated with exemption, as well as whether there are any other safety risks associated with the vehicle.

In order to mitigate risks associated with the noncompliance, Czinger proposed two different additional steps that it could take. First, in its petition, Czinger notes that each 21C sold under the exemption would undergo regular, frequent inspections. Czinger states that any windshield with degraded visibility would be identified and replaced free-of-charge. NHTSA believes that this is an appropriate mitigation measure and has decided to grant Czinger's exemption subject to this term.

Czinger also suggested that it could install tear off screen protectors on the windshield that could be periodically replaced. NHTSA does not have sufficient information to evaluate the performance or safety impact of these tear off protectors. In particular, NHTSA does not know whether installation of the tear off protectors could decrease the overall safety of the vehicle. Accordingly, NHTSA is not requiring Czinger to install a protective screen on the 21C's windshield. Additionally, NHTSA cautions Czinger that if it chooses to install such a screen, it should take steps to ensure that the screen does not impair the safety of the windshield.

NHTSA has considered the information provided by Czinger in its petition and supplemental documentation and concludes that noncompliance with the abrasion resistance requirements, if mitigated by frequent inspection, would not result in an unreasonable risk to safety.

Apart from consideration of the risks associated with not meeting the abrasion resistance requirements, NHTSA believes it is appropriate to consider how polycarbonate windshields may differ from glass windshields in other ways. Czinger's petition is novel in that it is requesting an exemption from a requirement that has posed a barrier to the use of polycarbonate glazing and other plastics in vehicle windshields other than in low-speed vehicles.[83] Because of this requirement, windshield glazing has, until now and to NHTSA's knowledge, included a glass component that enabled the glazing to comply with the abrasion resistance requirements in Test 18. Heretofore, there has not been a need for NHTSA to consider whether there are any additional requirements that should be met for windshields beyond those considered for glass glazing. This is an important consideration when evaluating a request for an exemption from the abrasion resistance requirements. Glass and plastic have different characteristics, such that when plastic glazing is permitted for use in other locations in a vehicle (*e.g.,* AS–4 glazing), the glazing must also comply with tests that would not be applicable to glass glazing, such as those for dimensional stability, chemical resistance, weathering, and flammability. By providing information supporting its assertion that the plastic glazing meets requirements for AS–4 glazing, Czinger has addressed much of this concern. However, because AS–4 glazing is not permitted for exterior windows in areas requisite for driving visibility, NHTSA notes that the safety performance of AS–4 plastic glazing is

[81] However, as this glazing does not provide the same level of safety performance as compliant glazing, NHTSA notes that it views the failure to meet the abrasion resistance requirements of Test 18 as ''consequential'' to motor vehicle safety, and not as a basis, *e.g.,* for grant of a petition for inconsequential non-compliance under 49 CFR part 556.

[82] In contrast to the other three statutory bases for exemptions under 49 U.S.C. 30113(b)(3)(B), which articulate safety limitations (''safety level at least equal to the safety level of the standard,'' ''not unreasonably lower the safety level of that vehicle,'' and ''overall safety level at least equal to the overall safety level of nonexempt vehicles''), the economic hardship exemption contains no such limitation. NHTSA is left to apply the exemption in a manner that is in the public interest and consistent with the Safety Act.

[83] 49 CFR 571.205 S5.4.

not equivalent to glass glazing permitted for use in windshields.

Czinger's third statement supporting its assertion that granting its exemption request is in the public interest and consistent with the Safety Act pertains to additional safety features included in the 21C. Czinger asserts that the vehicles will not present an unacceptable safety risk and states that the crash performance and occupant protection performance of the vehicles is improved when using polycarbonate, compared to laminated glazing. Specifically, Czinger states that it has performed crash simulations measuring occupant injury criteria and has observed overall improvements in performance. Czinger also states that the 21C has an advanced knee bolster system to minimize forward movement of the driver in an unbelted impact scenario, reducing the possibility of head impact to the windscreen.

As noted earlier, NHTSA considers, as part of its evaluation of whether granting a petition is in the public interest and consistent with the Safety Act, the impact on safety resulting from the noncompliance. If the noncompliance presented an unreasonable risk to motor vehicle safety, NHTSA would deny the exemption, regardless of whether the vehicles contained other features that increased the overall safety of the vehicles. That is, safety improvements in one area cannot offset unreasonable risks to safety in another. Therefore, NHTSA does not consider Czinger's addition of the advanced *crashworthiness* features described above as having a direct bearing on whether noncompliance with the specific *crash avoidance* feature (glazing abrasion resistance) from which it seeks exemption presents an unreasonable risk to safety. However, NHTSA does consider the addition of such safety features when considering the overall safety impact of the exemption and the public interest benefits of supporting a start-up manufacturer that is working to develop and deploy new safety features. In this context, NHTSA has taken into account Czinger's addition of these advanced crashworthiness features in today's decision.

Czinger's fourth assertion is that the 21C will be produced in very small numbers and will not be used daily due to its unconventional design. Czinger asserts that the safety risks associated with the exemption would be minimal because the exempt vehicles would be driven significantly less than conventional vehicles. In support of this assertion, Czinger states that the 21C vehicles will cost more than $2 million and will likely be purchased as collectors' items and be well cared for throughout their life. Czinger also provided mileage data from other hypercars demonstrating an average of 266 miles traveled per year. NHTSA agrees that it is appropriate to compare the 21C to other hypercars when considering the likely use of the vehicles. For this reason, NHTSA believes that Czinger's projection that the vehicles will be driven, on average, 350 miles a year is reasonable. NHTSA also agrees that limited use on public roads would minimize the risks associated with granting the exemption. Czinger estimates that it will only produce 55 vehicles for the U.S. market over the exemption period. While not impacting the safety of the use of individual vehicles, the limited production run of the vehicle would minimize the overall safety impact of granting the exemption.

Overall, NHTSA has considered the safety risks associated with Czinger's exemption request and believes that the safety impacts of granting the request would be minimal given the limited nature of the exemption, the limited number of vehicles affected, the expected limited use of the vehicles, and Czinger's commitment to inspect the windshields frequently and replace abraded windshields free of charge.

We now turn to Czinger's last two assertions supporting its argument that granting the petition is in the public interest. Czinger states that the denial of the exemption request could have a negative effect on U.S. employment and that the 21C's innovative technology is a benefit to the public. The information Czinger submitted indicating that it would face financial failure if the exemption were denied also supports Czinger's assertion that denying the petition would have a negative impact on U.S. employment, not just on Czinger's 35 employees, but also on its U.S. suppliers. In support of its assertion that the 21C's innovative technology is a benefit to the public, Czinger notes that the 21C uses Additive Manufacturing technology, weight-saving technology, advanced hybrid drivetrain technology, and innovative crash protection technology. NHTSA agrees that both of these points weigh in favor of granting Czinger's petition.

Based on the information Czinger provided, NHTSA believes that, on balance, given the criteria for an economic hardship exemption, the limited nature of the exemption, the limited number of vehicles affected, the expected limited use of the vehicles, and Czinger's commitment to inspect the windshields frequently and replace abraded windshields free of charge, granting Czinger's petition is in the public interest and consistent with the Safety Act. NHTSA believes that the exemption will have minimal impact on motor vehicle safety due to the limited number of vehicles affected and the mitigating factors that reduce the safety risks associated with the requested exemption. NHTSA also finds that granting Czinger's exemption request will help a start-up company manufacture vehicles in the U.S., creating U.S. manufacturing jobs while also supporting development of innovative manufacturing processes in the automotive sector and affording consumers a wider variety of motor vehicle choices.

Number of Exempt Vehicles. The statutory cap for exemptions for low-volume manufacturers seeking a substantial hardship exemption requires that the manufacturer must have an annual world-wide production of 10,000 vehicles or less. Czinger originally petitioned for an exemption of up to 55 vehicles over the exemption period. However, in supplemental information submitted in January 2023, Czinger noted that it intended to produce up to 110 vehicles during the three-year exemption period, a substantial portion of which Czinger estimates will be exported to other countries. This falls well below the statutory cap, and NHTSA is granting the exemption for the entire estimated production of the 21C during the exemption period, for a total of 110 vehicles that may be manufactured and sold under the exemption.

Effective Date of the Exemption. In correspondence from April 5, 2023, Czinger requested that, if granted, its exemption begin on August 1, 2023. NHTSA is granting this request.

V. Conclusion

In consideration of the foregoing, we conclude that compliance with the abrasion resistance requirements for windshields in FMVSS No. 205 would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. We further conclude that granting an exemption from this requirement would be in the public interest and consistent with the Safety Act.

In accordance with 49 U.S.C. 30113(b)(3)(B)(i), the Czinger 21C is granted NHTSA Temporary Exemption No. EX 23–01, from the abrasion resistance requirements for AS–1 glazing to be used in the 21C's windshield for up to 110 vehicles produced over the exemption period.

This exemption is effective from August 1, 2023 until July 31, 2026.

As explained above, the grant of this exemption is subject to the following conditions.

1. Czinger shall provide inspections of the windshield glazing of each 21C produced under this exemption, free of charge, at least once every six months during the service life of the vehicle.

2. Czinger shall replace, free of charge, the windshield of any exempted 21C vehicle produced under this exemption if the windshield becomes abraded due to normal wear and tear such that the abrasion noticeably impairs driver visibility.

3. Czinger shall report to NHTSA any instances in which it replaced a windshield on a 21C exempted vehicle that had become abraded due to normal use. Such report shall be made no later than 30 calendar days after such replacement.

4. The label required to be affixed pursuant to 49 CFR 555.9 must read in relevant part, ''except for the abrasion resistance requirements for windshields in Standard No. 205, Glazing materials, exempted pursuant to NHTSA Exemption No. EX 23–01.''

Authority: 49 U.S.C. 30113 and 49 U.S.C. 30166; delegations of authority at 49 CFR 1.95 and 49 CFR 501.4.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.4.

Sophie Shulman,

Deputy Administrator.

[FR Doc. 2023–11453 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2020–0044]

Pipeline Safety: Request for Special Permit; Florida Gas Transmission Company, LLC

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to solicit public comments on a request for a special permit received from Florida Gas Transmission Company, LLC (FGT). The special permit request is seeking relief from compliance with certain requirements in the Federal pipeline safety regulations. At the conclusion of the 30-day comment period, PHMSA will review the comments received from this notice as part of its evaluation to grant or deny the special permit request.

DATES: Submit any comments regarding this special permit request by June 30, 2023.

ADDRESSES: Comments should reference the docket number for the specific special permit request and may be submitted in the following ways:

- *E-Gov Website: http://www.Regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two (2) copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov.*

Note: There is a privacy statement published on *http://www.Regulations.gov.* Comments, including any personal information provided, are posted without changes or edits to *http://www.Regulations.gov.*

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of Federal Regulations (CFR) 190.343, you may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Kay McIver, DOT, PHMSA–PHP–80, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.

FOR FURTHER INFORMATION CONTACT:

General: Ms. Kay McIver by telephone at 202–366–0113, or by email at *kay.mciver@dot.gov.*

Technical: Mr. Steve Nanney by telephone at 713–272–2855, or by email at *steve.nanney@dot.gov.*

SUPPLEMENTARY INFORMATION: PHMSA received a special permit request on March 24, 2023, from FGT seeking a waiver from the requirements of 49 CFR 192.611(a)(3)(iii): Change in class location: Confirmation or revision of maximum allowable operating pressure. Section 49 CFR 192.611(a)(3)(iii) requires a pressure test of 0.667 times the alternative maximum allowable operating (Alternative MAOP) for a Class 2 to Class 3 location change. The requested pipeline segment extensions are proposed to be added to special permit Docket Number PHMSA–2020–0044, due to the pipeline segments being contiguous to existing special permit segments.

This special permit is being requested for extending class location changes in lieu of pressure testing or pressure reduction for five (5) special permit segment extensions totaling 10,219 feet (approximately 1.935 miles) of the FGT pipeline system. The proposed special permit segments have been previously pressure tested to either 1,899 pounds per square inch gauge (psig), 1,920 psig, or 1,925 psig. The pipe wall thickness and strength meet the requirements of 49 CFR 192.611(a)(1)(ii) for a Class 2 to Class 3 location change. The pipeline segments are as follows:

Special permit segment No.	Outside diameter (inches)	Line name	Proposed special permit segment extension (feet)	County, state	Class summary	Year installed	Alternative MAOP/test pressure (psig)	Pressure test to alternative MAOP factor
166347	18	St. Petersburg Sarasota Connector.	269	Hillsborough, FL	2 to 3	1992	1,333/1,899	1.424
166349	18	St. Petersburg Sarasota Connector.	3,537	Hillsborough, FL	2 to 3	1992	1,333/1,899	1.424
166250	30	West Leg Station 26–27 MP 160.2.	5,799	Hernando, FL	2 to 3	1994	1,322/1,920	1.452
166256	30	West Leg Station 26–27 MP 160.2.	404	Pasco, FL	2 to 3	1994	1,322/1,920	1.452
166129	36	West Leg Loop	210	Hernando, FL	2 to 3	2007	1,322/1,925	1.456

The FGT pipeline segments have not been pressure tested to a high enough pressure to meet the requirements in 49 CFR 192.611(a)(3)(iii). The special permit segments are included in an existing Alternative MAOP special permit (PHMSA–2008–0077) that allows the special permit segments to operate at class location stress levels that meet 49 CFR 192.620(a)(1).

The special permit request, proposed special permit with conditions, and draft environmental assessment (DEA) for the FGT pipelines are available for review and public comment in Docket No. PHMSA–2020–0044. We invite interested persons to review and submit comments on the special permit request, proposed special permit with conditions, and DEA in the docket. Please submit comments on any potential safety, environmental, and other relevant considerations implicated by the special permit request. Comments may include relevant data.

Before issuing a decision on the special permit request, PHMSA will evaluate all comments received on or before the comment closing date. Comments received after the closing date will be evaluated, if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment it receives in making a decision to grant or deny this request.

Issued in Washington, DC, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2023–11459 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. 2020–0001]

Pipeline Safety: Request for Special Permit; Florida Gas Transmission Company, LLC

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to solicit public comments on a request for special permit received from Florida Gas Transmission Company, LLC (FGT). The special permit request is seeking relief from compliance with certain requirements in the federal pipeline safety regulations. At the conclusion of the 30-day comment period, PHMSA will review the comments received from this notice as part of its evaluation to grant or deny the special permit request.

DATES: Submit any comments regarding this special permit request by June 30, 2023.

ADDRESSES: Comments should reference the docket number for this special permit request and may be submitted in the following ways:

- *E-Gov Website: http://www.Regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two (2) copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov.*

Note: There is a privacy statement published on *http://www.Regulations.gov.* Comments, including any personal information provided, are posted without changes or edits to *http://www.Regulations.gov.*

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI. Pursuant to 49 Code of Federal Regulations (CFR) 190.343, you may ask PHMSA to give confidential treatment to information you give to the agency by taking the following steps: (1) mark each page of the original document submission containing CBI as ''Confidential''; (2) send PHMSA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. Unless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Kay McIver, DOT, PHMSA–PHP–80, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary PHMSA receives that is not

specifically designated as CBI will be placed in the public docket for this matter.

FOR FURTHER INFORMATION CONTACT:

General: Ms. Kay McIver by telephone at 202–366–0113, or by email at *kay.mciver@dot.gov.*

Technical: Mr. Steve Nanney by telephone at 713–272–2855, or by email at *steve.nanney@dot.gov.*

SUPPLEMENTARY INFORMATION: PHMSA received a special permit request from FGT on March 24, 2023, seeking a waiver from the requirements of 49 CFR 192.611(a) and (d): Change in class location: Confirmation or revision of maximum allowable operating pressure and 49 CFR 192.619(a): Maximum allowable operating pressure: Steel or plastic pipelines.

This special permit is being requested for extending class location changes in lieu of pipe replacement, pressure reduction, or new pressure tests for Class 1 to 3 location changes on one (1) gas transmission special permit segment totaling 455 feet (approximately 0.086 miles). The pipeline segment is as follows:

Special permit segment number	Outside diameter (inches)	Line name	Length (feet)	Start survey station (feet)	End survey station (feet)	County, state	Number dwell-ings	Year installed	Seam type	MAOP (psig)	Pressure test (psig)
165857 extension	26	Mainline Loop CMPR STA 17–18.	455	2077+36	2081+91	Lake, FL	4	1968	DSAW	977	1,340

Note: DSAW is double submerged arc welded longitudinal seam pipe.

The special permit request, proposed special permit with conditions, and draft environmental assessment (DEA) for the above listed FGT pipeline segment is available for review and public comments in Docket Number PHMSA–2020–0001. PHMSA invites interested persons to review and submit comments on the special permit request and DEA in the docket. Please submit comments on any potential safety, environmental, and other relevant considerations implicated by the special permit request. Comments may include relevant data.

Before issuing a decision on the special permit request, PHMSA will evaluate all comments received on or before the comments closing date. Comments received after the closing date will be evaluated, if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment it receives in making its decision to grant or deny this special permit request.

Issued in Washington, DC, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2023–11460 Filed 5–30–23; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treasury.gov/ofac*).

Notice of OFAC Action

On May 25, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following person is blocked under the relevant sanctions authority listed below.

Individual:

1. MASLOV, MASLOV, Ivan Aleksandrovich (Cyrillic: МАСЛОВ, ИВАН АЛЕКСАНДРОВИЧ) (a.k.a. "MASLOV, Ivan Oleksandrovich"), Mali; Uchitelskaya St., Apt 2, Shatki, Nizhny Novgorod Region, Russia; DOB 11 Jul 1982; alt. DOB 03 Jan 1980; POB Arkhangelsk, Russia; alt. POB Chuguevka, Chuguevsky District, Primorsky territory, Russia; nationality Russia; Gender Male; Passport 731849424 (Russia) (individual) [RUSSIA-EO14024] (Linked To: PRIVATE MILITARY COMPANY 'WAGNER').

   Designated pursuant to section 1(a)(vii) of Executive Order 14024 of April 15, 2021, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024) for being controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Private Military Company 'WAGNER,' a person whose property and interests in property are blocked pursuant to E.O. 14024.

Dated: May 25, 2023.

Andrea Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–11561 Filed 5–30–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Notice of Electronic Tax Administration Advisory Committee Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: The Electronic Tax Administration Advisory Committee (ETAAC) will hold a public meeting in-person and via telephone conference line on Wednesday, June 28, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Alec Johnston, Office of National Public Liaison, at (202) 317–4299, or send an email to *publicliaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 5 U.S.C. 10(a)(2) of the Federal Advisory Committee Act, that a public meeting of the ETAAC will be held on Wednesday, June 28, 2023, from 9:00 a.m. to 11:00 a.m. EDT. The meeting will take place at the IRS headquarters building, 1111 Constitution Ave. NW, Washington, DC. For those unable to join in person, a conference line will be provided.

The purpose of the ETAAC is to provide continuing advice regarding the development and implementation of the IRS organizational strategy for electronic tax administration. ETAAC is an organized public forum for discussion of electronic tax administration issues such as prevention of identity theft and refund fraud. It supports the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. ETAAC members convey the public's perceptions of IRS electronic tax administration activities, offer constructive observations about current or proposed policies, programs, and procedures, and suggest improvements.

Please call or email Alec Johnston to confirm your attendance. Mr. Johnston can be reached at 202–317–4299 or *PublicLiaison@irs.gov.* Should you wish the ETAAC to consider a written statement, please call 202–317–4299 or email: *PublicLiaison@irs.gov.*

Dated: May 17, 2023.

John A. Lipold,

Designated Federal Official, Office of National Public Liaison, Internal Revenue Service.

[FR Doc. 2023–11563 Filed 5–30–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Financial Crimes Enforcement Network (FinCEN)

AGENCY: Financial Crimes Enforcement Network, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Comments should be received on or before June 30, 2023 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Financial Crimes Enforcement Network (FinCEN)

1. Title: Information Collection Requirements in Connection with the Imposition of a Special Measure Against Commercial Bank of Syria, Including its Subsidiary, Syrian Lebanese Commercial Bank, as a Financial Institution of Primary Money Laundering Concern.

OMB Control Number: 1506–0036.

Report Number: Not applicable.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the imposition of a special measure against the Commercial Bank of Syria, including its subsidiary Syrian Lebanese Commercial Bank, as a financial institution of primary money

laundering concern pursuant to the authority contained in 31 U.S.C. 5318A. See 31 CFR 1010.653.

Type of Review: Extension without change of a currently approved collection.

Affected Public: Businesses or other for-profit institutions, and not-for-profit institutions.

Frequency: One time notification and recordkeeping associated with the notification. See *31 CFR part 1010.653(b)(2)(i)(A)* and *31 CFR part 1010.653(b)(3)(i).*

Estimated Number of Respondents: 15,960.

RESPONDENT FINANCIAL INSTITUTIONS BY CATEGORY

Type of institution	Count
Banks, savings associations, thrifts, trust companies [1]	5,102
Credit Unions [2]	4,917
Broker-dealers [3]	3,527
Mutual funds [4]	1,378
Futures commission merchants and introducing brokers in commodities [5]	1,036
Total	15,960

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden: 15,960 hours (15,960 respondents × 1 hour).

[1] All counts are from the Q3 2022 Federal Financial Institutions Examination Council (FFIEC) Call Report data, available at *https://cdr.ffiec.gov/public/pws/downloadbulkdata.aspx.* Data for institutions that are not insured, are insured under non-FDIC deposit insurance regimes, or do not have a Federal functional regulator are from the FDIC's Research Information System, available at *https://www.fdic.gov/foia/ris/index.html.*

[2] Credit union data are from the National Credit Union Administration (NCUA) for Q3 2022, available at *https://ncua.gov/analysis/credit-union-corporate-call-report-data.*

[3] According to the SEC, there are 3,527 brokers or dealers in securities as of the end of fiscal year 2021. *See* SEC, *Fiscal Year 2023 Congressional Budget Justification,* p. 33, *https://www.sec.gov/files/FY%202023%20Congressional%20Budget%20Justification%20Annual%20Performance%20Plan_FINAL.pdf.*

[4] According to information provided by the SEC as of December 2022 (including filings made through January 20, 2023), there are 1,378 open-end registered investment companies that report on Form N–CEN. FinCEN assesses that such companies would be responsible for implementing the requirements imposed through the final rule issued on March 15, 2006.

[5] As of November 30, 2022, there are 62 futures commission merchants. *See* Commodity Futures Trading Commission, ''Financial Data for FCMs'', dated November 2022, available at *https://www.cftc.gov/MarketReports/financialfcmdata/index.htm.* Additionally, as of December 31, 2022, there are 974 introducing brokers in commodities according to the Commodity Futures Trading Commission. These two counts total 1,036.

2. Title: Information Collection Requirements in Connection with the Imposition of the Fifth Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern.

OMB Control Number: 1506–0074.

Report Number: Not applicable.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the imposition of a special measure against the Islamic Republic of Iran as a jurisdiction of primary money laundering concern pursuant to the authority contained in 31 U.S.C. 5318A. See 31 CFR 1010.661.

Type of Review: Extension without change of a currently approved collection.

Affected Public: Businesses or other for-profit institutions, and not-for-profit institutions.

Frequency: One time notification and recordkeeping associate with the notification. See 31 CFR 1010.661(b)(3)(i)(A) and 1010.661(b)(4)(i).

Estimated Number of Respondents: 15,960.

RESPONDENT FINANCIAL INSTITUTIONS BY CATEGORY

Type of Institution	Count
Banks, savings associations, thrifts, trust companies [6]	5,102
Credit Unions [7]	4,917
Broker-dealers [8]	3,527
Mutual funds [9]	1,378
Futures commission merchants and introducing brokers in commodities [10]	1,036
Total	15,960

[6] All counts are from the Q3 2022 Federal Financial Institutions Examination Council (FFIEC) Call Report data, available at *https://cdr.ffiec.gov/public/pws/downloadbulkdata.aspx.* Data for institutions that are not insured, are insured under non-FDIC deposit insurance regimes, or do not have a Federal functional regulator are from the FDIC's Research Information System, available at *https://www.fdic.gov/foia/ris/index.html.*

[7] Credit union data are from the National Credit Union Administration (NCUA) for Q3 2022, available at *https://ncua.gov/analysis/credit-union-corporate-call-report-data.*

[8] According to the SEC, there are 3,527 brokers or dealers in securities as of the end of fiscal year 2021. *See* SEC, *Fiscal Year 2023 Congressional Budget Justification,* p. 33, *https://www.sec.gov/files/FY%202023%20Congressional%20Budget%20Justification%20Annual%20Performance%20Plan_FINAL.pdf.*

[9] According to information provided by the SEC as of December 2022 (including filings made through January 20, 2023), there are 1,378 open-end registered investment companies that report on Form N–CEN. FinCEN assesses that such companies would be responsible for implementing the requirements imposed through the final rule issued on March 15, 2006.

[10] As of November 30, 2022, there are 62 futures commission merchants. *See* Commodity Futures Trading Commission, ''Financial Data for FCMs'', dated November 2022, available at *https://www.cftc.gov/MarketReports/financialfcmdata/index.htm.* Additionally, as of December 31, 2022, there are 974 introducing brokers in commodities according to the Commodity Futures Trading Commission. These two counts total 1,036.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden: 15,960 hours (15,960 respondents × 1 hour).

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–11458 Filed 5–30–23; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0922]

Agency Information Collection Activity: IBM Skillsbuild Training Program Application—Pilot Program

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 31, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0922'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0922'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: White House Cyber Initiative, as supported by VA Principal Deputy Under Secretary for VA Benefits, Mr. Michael Frueh.

Title: IBM Skillsbuild Training Program Application—Pilot Program, VAF 22–10282.

OMB Control Number: 2900–0922.

Type of Review: Revision of a previously approved collection.

Abstract: The IBM SkillsBuild Program is an IBM-sponsored pilot training program administered by VA to provide free virtual Information Technology (IT) training. SkillsBuild is a free online learning platform that provides adult learners with the opportunity to gain or improve IT skills that meet the needs of employers in the High-Technology industry. VA will provide the opportunity for Veterans, Service members, spouse, children, and caregivers to access free, self-paced, virtual training and credentials in Cybersecurity and Data Analytics. This virtual training in the field of Cybersecurity and Data Analytics is an enhanced resource for Veterans and transitioning Service members who are seeking job training and credentials to pursue a career in Technology. The IBM Skillsbuild Training Program Application (Intake Form), VA Form 22–10282 will allow eligible candidates to register and apply on a first-come, first-served basis to participate in the program, and the form will be sent via email to *Vettecpartner@va.gov* for processing.

Affected Public: Individuals or households.

Estimated Annual Burden: 100 hours.

Estimated Average Burden Time per Respondent: 10 minutes.

Frequency of Response: Once.

Estimated Number of Respondents: 600.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–11478 Filed 5–30–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 104 May 31, 2023

Part II

Department of Homeland Security

U.S. Customs and Border Protection

Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers; Notice

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of intent to distribute offset for Fiscal Year 2023.

SUMMARY: Pursuant to the *Continued Dumping and Subsidy Offset Act of 2000,* this document is U.S. Customs and Border Protection's (CBP) notice of intent to distribute assessed antidumping or countervailing duties (known as the continued dumping and subsidy offset) for Fiscal Year 2023 in connection with countervailing duty orders, antidumping duty orders, or findings under the *Antidumping Act of 1921.* This document provides the instructions for affected domestic producers, or anyone alleging eligibility to receive a distribution, to file certifications to claim a distribution in relation to the listed orders or findings.

DATES: Certifications to obtain a continued dumping and subsidy offset under a particular order or finding must be received by July 31, 2023. Any certification received after July 31, 2023 will be summarily denied, making claimants ineligible for the distribution.

ADDRESSES: Certifications and any other correspondence (whether by mail, or an express or courier service) must be addressed to U.S. Customs and Border Protection, Revenue Division, Attention: CDSOA Team, 6650 Telecom Drive, Suite 100, Indianapolis, IN, 46278.

FOR FURTHER INFORMATION CONTACT: Robin Batt, CDSOA Team, Revenue Division, 6650 Telecom Drive, Suite 100, Indianapolis, IN, 46278; telephone (317) 614–4462.

SUPPLEMENTARY INFORMATION:

Background

The *Continued Dumping and Subsidy Offset Act of 2000* (CDSOA) was enacted on October 28, 2000, as part of the *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act,* 2001 (the ''Act''). The provisions of the CDSOA are contained in title X (sections 1001–1003) of the appendix of the Act (H.R. 5426).

The CDSOA amended title VII of the *Tariff Act of 1930* by adding section 754 (codified at 19 U.S.C. 1675c) to provide that assessed duties received pursuant to a countervailing duty order, an antidumping duty order, or a finding under the *Antidumping Act of 1921* will be distributed to affected domestic producers for certain qualifying expenditures that these producers incur after the issuance of such an order or finding. The term ''affected domestic producer'' means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) who:

(A) Was a petitioner or interested party in support of a petition with respect to which an antidumping duty order, a finding under the *Antidumping Act of 1921,* or a countervailing duty order has been entered;

(B) Remains in operation continuing to produce the product covered by the countervailing duty order, the antidumping duty order, or the finding under the *Antidumping Act of 1921;* and

(C) Has not been acquired by another company or business that is related to a company that opposed the antidumping or countervailing duty investigation that led to the order or finding (*e.g.,* opposed the petition or otherwise presented evidence in opposition to the petition). The distribution that these parties may receive is known as the continued dumping and subsidy offset.

Section 7601(a) of the *Deficit Reduction Act of 2005* repealed 19 U.S.C. 1675c. According to section 7701 of the *Deficit Reduction Act,* the repeal takes effect as if enacted on October 1, 2005. However, section 7601(b) provides that all duties collected on an entry filed before October 1, 2007, must be distributed as if 19 U.S.C. 1675c had not been repealed by section 7601(a). The funds available for distribution were also affected by section 822 of the *Claims Resolution Act of 2010* and section 504 of the *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.*

Historically, the antidumping and countervailing duties assessed and received by U.S. Customs and Border Protection (CBP) on CDSOA-subject entries, along with the interest assessed and received on those duties pursuant to 19 U.S.C. 1677g, were transferred to the CDSOA Special Account for distribution. 66 FR 48546, Sept. 21, 2001; *see also* 19 CFR 159.64(e). Other types of interest, including delinquency interest that accrued pursuant to 19 U.S.C. 1505(d), equitable interest under common law, and interest under 19 U.S.C. 580, were not subject to distribution. *Id.*

Section 605 of the *Trade Facilitation and Trade Enforcement Act of 2015* (TFTEA) (Pub. L. 114–125, February 24, 2016; codified as 19 U.S.C. 4401), provided new authority for CBP to deposit into the CDSOA Special Account for distribution delinquency interest that accrued pursuant to 19 U.S.C. 1505(d), equitable interest under common law, and interest under 19 U.S.C. 580 for all surety payments received by CBP on or after October 1, 2014, on CDSOA subject entries, as well as post-judgment interest received by CBP on those surety payments (*see* 28 U.S.C. 1961).

On March 28, 2022, President Biden ordered the sequester of non-exempt budgetary resources for Fiscal Year 2023 pursuant to section 251A of the *Balanced Budget and Emergency Deficit Control Act of 1985,* as amended (87 FR 18603, March 31, 2022). To implement this sequester during Fiscal Year 2023, the calculation of the Office of Management and Budget (OMB) requires a reduction of 5.7 percent of the assessed duties and interest received in the CDSOA Special Account (account number 015–12–5688). OMB has concluded that any amounts sequestered in the CDSOA Special Account during Fiscal Year 2023 will become available in the subsequent fiscal year (*see* 2 U.S.C. 906(k)(6)). As a result, CBP intends to include the funds that are temporarily reduced via sequester during Fiscal Year 2023 in the continued dumping and subsidy offset for Fiscal Year 2023, which will be distributed not later than 60 days after the first day of Fiscal Year 2024 in accordance with 19 U.S.C. 1675c(c). In other words, the continued dumping and subsidy offset that affected domestic producers receive for Fiscal Year 2023 will include the funds that were temporarily sequestered during Fiscal Year 2023.

Because of the statutory constraints in the assessments of antidumping and countervailing duties, as well as the additional time involved when the Government must initiate litigation to collect delinquent antidumping and countervailing duties, the CDSOA distribution process will be continued for an undetermined period. Consequently, the full impact of the CDSOA repeal on amounts available for distribution has been delayed for several years. It should also be noted that amounts distributed may be subject to recovery as a result of reliquidations, court actions, administrative errors, and other reasons.

List of Orders or Findings and Affected Domestic Producers

It is the responsibility of the U.S. International Trade Commission (USITC) to ascertain and timely forward

to CBP a list of the affected domestic producers that are potentially eligible to receive an offset in connection with an order or finding. In this regard, it is noted that the USITC has supplied CBP with the list of individual antidumping and countervailing duty cases, and the affected domestic producers associated with each case who are potentially eligible to receive an offset. This list appears at the end of this document.

A significant amount of litigation has challenged various provisions of the CDSOA, including the definition of the term ''affected domestic producer.'' In two decisions, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) upheld the constitutionality of the support requirement contained in the CDSOA. Specifically, in *SKF USA Inc.* v. *United States Customs & Border Prot.,* 556 F.3d 1337 (Fed. Cir. 2009), the Federal Circuit held that the CDSOA's support requirement did not violate either the First or Fifth Amendment. The Supreme Court of the United States denied plaintiff's petition for certiorari, *SKF USA, Inc.* v. *United States Customs & Border Prot.,* 560 U.S. 903 (2010). Similarly, in *PS Chez Sidney, L.L.C.* v. *United States,* 409 Fed. Appx. 327 (Fed. Cir. 2010), the Federal Circuit summarily reversed the U.S. Court of International Trade's judgment that the support requirement was unconstitutional, allowing only plaintiff's non-constitutional claims to go forward. *See PS Chez Sidney, L.L.C.* v. *United States,* 684 F.3d 1374 (Fed. Cir. 2012). Furthermore, in two cases interpreting the CDSOA's language, the Federal Circuit concluded that a producer who never indicates support for a dumping petition by letter or through questionnaire response, despite the act of otherwise filling out a questionnaire, cannot be an affected domestic producer. *Ashley Furniture Indus., Inc. et al.* v. *United States,* 734 F.3d 1306 (Fed. Cir. 2013), *cert. denied,* 135 S. Ct. 72 (2014); *Giorgio Foods, Inc.* v. *United States et al.,* 785 F.3d 595 (Fed. Cir. 2015).

Domestic producers who are not on the USITC list but believe they nonetheless are eligible for a CDSOA distribution under one or more antidumping and/or countervailing duty cases are required, as are all potential claimants that expressly appear on the list, to properly file their certification(s) within 60 days after this notice is published. Such domestic producers must allege all other bases for eligibility in their certification(s). CBP will evaluate the merits of such claims in accordance with the relevant statutes, regulations, and decisions. Certifications that are not timely filed within the requisite 60 days and/or that fail to sufficiently establish a basis for eligibility will be summarily denied. Additionally, CBP may not make a final decision regarding a claimant's eligibility to receive funds until certain legal issues which may affect that claimant's eligibility are resolved. In these instances, CBP may withhold an amount of funds corresponding to the claimant's alleged *pro rata* share of funds from distribution pending the resolution of those legal issues.

It should also be noted that the Federal Circuit ruled in *Canadian Lumber Trade Alliance* v. *United States,* 517 F.3d 1319 (Fed. Cir. 2008), *cert. denied sub nom. United States Steel* v. *Canadian Lumber Trade Alliance,* 129 S. Ct. 344 (2008), that CBP was not authorized to distribute such antidumping and countervailing duties to the extent they were derived from goods from countries that are parties to the North American Free Trade Agreement (NAFTA). Due to this decision, CBP does not list cases related to NAFTA on the Preliminary Amounts Available report, and no distributions will be issued on these cases.

Regulations Implementing the CDSOA

It is noted that CBP published Treasury Decision (T.D.) 01–68 (Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers) in the **Federal Register** (66 FR 48546) on September 21, 2001, which was effective as of that date, to implement the CDSOA. The final rule added subpart F to part 159 of title 19, Code of Federal Regulations (19 CFR part 159, subpart F (sections 159.61–159.64)). More specific guidance regarding the filing of certifications is provided in this notice to aid affected domestic producers and other domestic producers alleging eligibility (''claimants'' or ''domestic producers'').

Notice of Intent To Distribute Offset

This document announces that CBP intends to distribute to affected domestic producers the assessed antidumping or countervailing duties, section 1677g interest, and interest provided for in 19 U.S.C. 4401 that are available for distribution in Fiscal Year 2023 in connection with those antidumping duty orders or findings or countervailing duty orders that are listed in this document. All distributions will be issued by paper check to the address provided by the claimants. Section 159.62(a) of title 19, Code of Federal Regulations (19 CFR 159.62(a)), provides that CBP will publish such a notice of intention to distribute at least 90 calendar days before the end of a fiscal year. Failure to publish the notice at least 90 calendar days before the end of the fiscal year will not affect an affected domestic producer's obligation to file a timely certification within 60 days after the notice is published. *See Dixon Ticonderoga* v. *United States,* 468 F.3d 1353, 1354 (Fed. Cir. 2006).

Certifications; Submission and Content

To obtain a distribution of the offset under a given order or finding (including any distribution under 19 U.S.C. 4401), an affected domestic producer (and anyone alleging eligibility to receive a distribution) must submit a certification for each order or finding under which a distribution is sought, to CBP, indicating its desire to receive a distribution. To be eligible to obtain a distribution, certifications must be received by CBP no later than 60 calendar days after the date of publication of this notice of intent to distribute in the **Federal Register**. Claimants are encouraged to submit certifications electronically at *https://www.pay.gov* under the Public Form Name, ''Continued Dumping and Subsidy Offset Act of 2000 Certification'' (CBP Form Number 7401) to ensure CBP's timely receipt and to avoid any potential delivery delays associated with mail or courier service. All certifications not received by the 60th day will not be eligible to receive a distribution.

As required by 19 CFR 159.62(b), this notice provides the case name and number of the order or finding concerned, as well as the specific instructions for filing a certification under section 159.63 to claim a distribution. Section 159.62(b) also provides that the dollar amounts subject to distribution that are contained in the Special Account for each listed order or finding are to appear in this notice. However, these dollar amounts were not available in time for inclusion in this publication. The preliminary amounts will be posted on the CBP website (*https://www.cbp.gov*). However, the final amounts available for disbursement may be higher or lower than the preliminary amounts.

CBP will provide general information to claimants regarding the preparation of certification(s). However, it remains the sole responsibility of the domestic producer to ensure that the certification is correct, complete, and accurate so as to demonstrate the eligibility of the domestic producer for the distribution requested. Failure to ensure that the certification is correct, complete, and accurate as provided in this notice will result in the domestic producer not

receiving a distribution and/or a demand for the return of funds.

Specifically, to obtain a distribution of the offset under a given order or finding (including any distribution under 19 U.S.C. 4401), each potential claimant must timely submit a certification containing the required information detailed below as to the eligibility of the domestic producer (or anyone alleging eligibility) to receive the requested distribution and the total amount of the distribution that the domestic producer is claiming. Certifications should be submitted electronically at *https://www.pay.gov* utilizing Public Form Name, ''Continued Dumping and Subsidy Offset Act of 2000 Certification'' (CBP Form Number 7401) or by mail to U.S. Customs and Border Protection, Revenue Division, Attention: CDSOA Team, 6650 Telecom Drive, Suite 100, Indianapolis, IN, 46278. The certification must enumerate the qualifying expenditures incurred by the domestic producer since the issuance of an order or finding and it must demonstrate that the domestic producer is eligible to receive a distribution as an affected domestic producer or allege another basis for eligibility. Any false statements made in connection with certifications submitted to CBP may give rise to liability under the *False Claims Act* (*see* 31 U.S.C. 3729–3733) and/or to criminal prosecution.

A successor to a company that was an affected domestic producer at the time of acquisition should consult 19 CFR 159.61(b)(1)(i). Any company that files a certification claiming to be the successor company to an affected domestic producer will be deemed to have consented to joint and several liability for the return of any overpayments arising under 19 CFR 159.64(b)(3) that were previously paid to the predecessor. CBP may require the successor company to provide documents to support its eligibility to receive a distribution as set out in 19 CFR 159.63(d). Additionally, any individual or company who purchases any portion of the operating assets of an affected domestic producer, a successor to an affected domestic producer, or an entity that otherwise previously received distributions may be jointly and severally liable for the return of any overpayments arising under 19 CFR 159.64(b)(3) that were previously paid to the entity from which the operating assets were purchased or its predecessor, regardless of whether the purchasing individual or company is deemed a successor company for purposes of receiving distributions.

A member company (or its successor) of an association that appears on the list of affected domestic producers in this notice, where the member company itself does not appear on this list, should consult 19 CFR 159.61(b)(1)(ii). Specifically, for a certification under 19 CFR 159.61(b)(1)(ii), the claimant must name the association of which it is a member, specifically establish that it was a member of the association at the time the association filed the petition with the USITC, and establish that the claimant is a current member of the association.

In order to promote accurate filings and more efficiently process the distributions, we offer the following guidance:

- If claimants are members of an association but the association does not file on their behalf, the association will need to provide its members with a statement that contains notarized company-specific information including dates of membership and an original signature from an authorized representative of the association.
- An association filing a certification on behalf of a member must also provide a power of attorney or other evidence of legal authorization from each of the domestic producers it is representing.
- Any association filing a certification on behalf of a member is responsible for verifying the legal sufficiency and accuracy of the member's financial records, which support the claim, and is responsible for that certification. As such, an association filing a certification on behalf of a member is jointly and severally liable with the member for repayment of any claim found to have been paid or overpaid in error.

The association may file a certification in its own right to claim an offset for that order or finding, but its qualifying expenditures would be limited to those expenditures that the association itself has incurred after the date of the order or finding in connection with the particular case.

As provided in 19 CFR 159.63(a), certifications to obtain a distribution of an offset (including any distribution under 19 U.S.C. 4401) must be received by CBP no later than 60 calendar days after the date of publication of the notice of intent in the **Federal Register**. All certifications received after the 60-day deadline will be summarily denied, making claimants ineligible for the distribution regardless of whether or not they appeared on the USITC list.

A list of all certifications received will be published on the CBP website (*https://www.cbp.gov*) shortly after the receipt deadline. This publication will not confirm acceptance or validity of the certification, but merely receipt of the certification. Due to the high volume of certifications, CBP is unable to respond to individual telephone or written inquiries regarding the status of a certification appearing on the list.

While there is no required format for a certification, CBP has developed a standard certification form to aid claimants in filing certifications. The certification form is available at *https://www.pay.gov* under the Public Form Name ''Continued Dumping and Subsidy Offset Act of 2000 Certification'' (CBP Form Number 7401) or by directing a web browser to *https://www.pay.gov/public/form/start/8776895/.* The certification form can be submitted electronically through *https://www.pay.gov* or by mail. All certifications not submitted electronically must include original signatures.

Regardless of the format for a certification, per 19 CFR 159.63(b), the certification must contain the following information:

(1) The date of this **Federal Register** notice;

(2) The Department of Commerce antidumping or countervailing duty case number (for example, A–331–802);

(3) The case name (product/country);

(4) The name of the domestic producer and any name qualifier, if applicable (for example, any other name under which the domestic producer does business or is also known);

(5) The mailing address of the domestic producer (if a post office box, the physical street address must also appear) including, if applicable, a specific room number or department;

(6) The Internal Revenue Service (IRS) number (with suffix) of the domestic producer, employer identification number, or social security number, as applicable;

(7) The specific business organization of the domestic producer (corporation, partnership, sole proprietorship);

(8) The name(s) of any individual(s) designated by the domestic producer as the contact person(s) concerning the certification, together with the phone number(s), mailing address, and, if available, facsimile transmission number(s) and electronic mail (email) address(es) for the person(s). Correspondence from CBP may be directed to the designated contact(s) by either mail or phone or both;

(9) The total dollar amount claimed;

(10) The dollar amount claimed by category, as described in the section below entitled ''Amount Claimed for Distribution'';

(11) A statement of eligibility, as described in the section below entitled ''Eligibility to Receive Distribution''; and

(12) For certifications not submitted electronically through *https://www.pay.gov*, an original signature by an individual legally authorized to bind the producer.

Qualifying Expenditures That May Be Claimed for Distribution

Qualifying expenditures that may be offset under the CDSOA encompass those expenditures incurred by the domestic producer after issuance of an antidumping duty order or finding or a countervailing duty order (including expenditures incurred on the date of the order's issuance), and prior to its termination, provided that such expenditures fall within certain categories. *See* 19 CFR 159.61(c). The CDSOA repeal language parallels the termination of an order or finding. Therefore, for duty orders or findings that have not been previously revoked or were not revoked prior to October 1, 2007, expenses must be incurred before October 1, 2007, to be eligible for offset. For duty orders or findings that were revoked prior to October 1, 2007, expenses must be incurred before the effective date of the revocation to be eligible for offset. For example, assume for case A–331–802 Certain Frozen Warm-Water Shrimp and Prawns from Ecuador, that the order date is February 1, 2005, and that the revocation effective date is August 15, 2007. In this case, eligible expenditures would have to be incurred on or after February 1, 2005, up to and including August 14, 2007; expenditures incurred on or after August 15, 2007, cannot be included as eligible qualifying expenditures for A–331–802.

For the convenience and ease of the domestic producers, CBP is providing guidance on what the agency takes into consideration when making a calculation for each of the following categories:

(1) Manufacturing facilities (Any facility used for the transformation of raw material into a finished product that is the subject of the related order or finding);

(2) Equipment (Goods that are used in a business environment to aid in the manufacturing of a product that is the subject of the related order or finding);

(3) Research and development (Seeking knowledge and determining the best techniques for production of the product that is the subject of the related order or finding);

(4) Personnel training (Teaching of specific useful skills to personnel, that will improve performance in the production process of the product that is the subject of the related order or finding);

(5) Acquisition of technology (Acquisition of applied scientific knowledge and materials to achieve an objective in the production process of the product that is the subject of the related order or finding);

(6) Health care benefits for employees paid for by the employer (Health care benefits paid to employees who are producing the specific product that is the subject of the related order or finding);

(7) Pension benefits for employees paid for by the employer (Pension benefits paid to employees who are producing the specific product that is the subject of the related order or finding);

(8) Environmental equipment, training, or technology (Equipment, training, or technology used in the production of the product that is the subject of the related order or finding, that will assist in preventing potentially harmful factors from affecting the environment);

(9) Acquisition of raw materials and other inputs (Purchase of unprocessed materials or other inputs needed for the production of the product that is the subject of the related order or finding); and

(10) Working capital or other funds needed to maintain production (Assets of a business that can be applied to its production of the product that is the subject of the related order or finding).

Amount Claimed for Distribution

In calculating the amount of the distribution being claimed as an offset, the certification must indicate:

(1) The total amount of any qualifying expenditures previously certified by the domestic producer, and the amount certified by category;

(2) The total amount of those expenditures which have been the subject of any prior distribution for the order or finding being certified under 19 U.S.C. 1675c; and

(3) The net amount for new and remaining qualifying expenditures being claimed in the current certification (the total amount previously certified as noted in item ''(1)'' above minus the total amount that was the subject of any prior distribution as noted in item ''(2)'' above). In accordance with 19 CFR 159.63(b)(2)(i)–(iii), CBP will deduct the amount of any prior distribution from the producer's claimed amount for that case. Total amounts disbursed by CBP under the CDSOA for some prior fiscal years are available on the CBP website.

Additionally, under 19 CFR 159.61(c), these qualifying expenditures must be related to the production of the same product that is the subject of the order or finding, with the exception of expenses incurred by associations which must be related to a specific case. Any false statements made to CBP concerning the amount of distribution being claimed as an offset may give rise to liability under the *False Claims Act* (*see* 31 U.S.C. 3729–3733) and/or to criminal prosecution.

Eligibility To Receive Distribution

As noted, the certification must contain a statement that the domestic producer desires to receive a distribution and is eligible to receive the distribution as an affected domestic producer or on another legal basis. Also, the domestic producer must affirm that the net amount certified for distribution does not encompass any qualifying expenditures for which distribution has previously been made (19 CFR 159.63(b)(3)(i)). Any false statements made in connection with certifications submitted to CBP may give rise to liability under the *False Claims Act* (*see* 31 U.S.C. 3729–3733) and/or to criminal prosecution.

Furthermore, under 19 CFR 159.63(b)(3)(ii), where a domestic producer files a separate certification for more than one order or finding using the same qualifying expenditures as the basis for distribution in each case, each certification must list all the other orders or findings where the producer is claiming the same qualifying expenditures.

Moreover, as required by 19 U.S.C. 1675c(b)(1) and 19 CFR 159.63(b)(3)(iii), the certification must include information as to whether the domestic producer remains in operation at the time the certifications are filed and continues to produce the product covered by the particular order or finding under which the distribution is sought. If a domestic producer is no longer in operation, or no longer produces the product covered by the order or finding, the producer will not be considered an affected domestic producer entitled to receive a distribution.

In addition, as required by 19 U.S.C. 1675c(b)(5) and 19 CFR 159.63(b)(3)(iii), the domestic producer must state whether it has been acquired by a company that opposed the investigation or was acquired by a business related to a company that opposed the investigation. If a domestic producer has been so acquired, the producer will not be considered an affected domestic producer entitled to receive a

distribution. However, CBP may not make a final decision regarding a claimant's eligibility to receive funds until certain legal issues which may affect that claimant's eligibility are resolved. In these instances, CBP may withhold an amount of funds corresponding to the claimant's alleged *pro rata* share of funds from distribution pending the resolution of those legal issues.

The certification must be executed and dated by a party legally authorized to bind the domestic producer and it must state that the information contained in the certification is true and accurate to the best of the certifier's knowledge and belief under penalty of law, and that the domestic producer has records to support the qualifying expenditures being claimed (see section below entitled ''Verification of Certification''). Moreover, as provided in 19 CFR 159.64(b)(3), all overpayments to affected domestic producers are recoverable by CBP, and CBP reserves the right to use all available collection tools to recover overpayments, including but not limited to garnishments, court orders, administrative offset, enrollment in the Treasury Offset Program, and/or offset of tax refund payments. Overpayments may occur for a variety of reasons, including but not limited to: reliquidations, court actions, settlements, insufficient verification of a certification in response to an inquiry from CBP, and administrative errors. With diminished amounts available over time, the likelihood that these events will require the recovery of funds previously distributed will increase. As a result, domestic producers who receive distributions under the CDSOA may wish to set aside any funds received in case it is subsequently determined that an overpayment has occurred. CBP considers the submission of a certification and the negotiation of any distribution checks received as acknowledgements and acceptance of the claimant's obligation to return those funds upon demand.

Review and Correction of Certification

A certification that is submitted in response to this notice of intent to distribute and received within 60 calendar days after the date of publication of the notice in the **Federal Register** may, at CBP's sole discretion, be subject to review before acceptance to ensure that all informational requirements are complied with and that any amounts set forth in the certification for qualifying expenditures, including the amount claimed for distribution, appear to be correct. A certification that is found to be materially incorrect or incomplete will be returned to the domestic producer within 15 business days after the close of the 60-calendar-day filing period, as provided in 19 CFR 159.63(c). CBP must receive a corrected certification from the domestic producer and/or an association filing on behalf of an association member within 10 business days from the date of the original denial letter. Failure to receive a corrected certification within 10 business days will result in denial of the certification at issue. The return of a certification for correction does not preclude CBP from taking other actions related to the incorrect or incomplete initial certification. It is the sole responsibility of the domestic producer to ensure that the certification is correct, complete, and accurate so as to demonstrate the eligibility of the domestic producer to the distribution requested. Failure to ensure that the certification is correct, complete, and accurate will result in the domestic producer not receiving a distribution and/or a demand for the return of funds, in addition to other potential legal and administrative consequences.

Verification of Certification

Certifications are subject to CBP's verification. The burden remains on each claimant to fully substantiate all elements of its certification. As such, claimants may be required to provide copies of additional records for further review by CBP. Therefore, parties are required to maintain, and be prepared to produce, records adequately supporting their claims for a period of five years after the filing of the certification (19 CFR 159.63(d)). The records must demonstrate that each qualifying expenditure enumerated in the certification was actually incurred, and they must support how the qualifying expenditures are determined to be related to the production of the product covered by the order or finding. Although CBP will accept comments and information from the public and other domestic producers, CBP retains complete discretion regarding the initiation and conduct of investigations stemming from such information. In the event that a distribution is made to a domestic producer from whom CBP later seeks verification of the certification and sufficient supporting documentation is not provided as determined by CBP, then the amounts paid to the affected domestic producer are recoverable by CBP as an overpayment. CBP reserves the right to use all available collection tools to recover overpayments, including but not limited to garnishments, court orders, administrative offset, enrollment in the Treasury Offset Program, and/or offset of tax refund payments. CBP considers the submission of a certification and the negotiation of any distribution checks received as acknowledgements and acceptance of the claimant's obligation to return those funds upon demand. Failure to repay overpayments upon demand may result in administrative consequences. Additionally, the submission of false statements, documents, or records in connection with a certification or verification of a certification may give rise to liability under the *False Claims Act* (*see* 31 U.S.C. 3729–3733) and/or to criminal prosecution.

Disclosure of Information in Certifications; Acceptance by Producer

The name of the claimant, the total dollar amount claimed by the party on the certification, as well as the total dollar amount that CBP actually disburses to that affected domestic producer as an offset, will be available for disclosure to the public, as specified in 19 CFR 159.63(e). To this extent, the submission of the certification is construed as an understanding and acceptance on the part of the domestic producer that this information will be disclosed to the public and a waiver of any right to privacy or non-disclosure. Additionally, a statement in a certification that this information is proprietary and exempt from disclosure may result in CBP's rejection of the certification.

List of Orders or Findings and Related Domestic Producers

The list of individual antidumping duty orders or findings and countervailing duty orders is set forth below together with the affected domestic producers associated with each order or finding who are potentially eligible to receive an offset. Those domestic producers not on the list must allege another basis for eligibility in their certification. Appearance of a domestic producer on the list is not a guarantee of distribution.

Dated: May 17, 2023.

Jeffrey Caine,

Chief Financial Officer, U.S. Customs and Border Protection.

BILLING CODE 9111–14–P

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-122-006	AA1921-49	Steel Jacks/Canada	Bloomfield Manufacturing (formerly Harrah Manufacturing) Seaburn Metal Products
A-122-047	AA1921-127	Elemental Sulphur/Canada	Duval
A-122-085	731-TA-3	Sugar and Syrups/Canada	Amstar Sugar
A-122-401	731-TA-196	Red Raspberries/Canada	Northwest Food Producers' Association Oregon Caneberry Commission Rader Farms Ron Roberts Shuksan Frozen Food Washington Red Raspberry Commission
A-122-503	731-TA-263	Iron Construction Castings/Canada	Alhambra Foundry Allegheny Foundry Bingham & Taylor Campbell Foundry Charlotte Pipe & Foundry Deeter Foundry East Jordan Foundry Le Baron Foundry Municipal Castings Neenah Foundry Opelika Foundry Pinkerton Foundry Tyler Pipe US Foundry & Manufacturing Vulcan Foundry
A-122-506	731-TA-276	Oil Country Tubular Goods/Canada	CF&I Steel Copperweld Tubing Cyclops KPC Lone Star Steel LTV Steel Maverick Tube Quanex US Steel
A-122-601	731-TA-312	Brass Sheet and Strip/Canada	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company Olin Revere Copper Products United Steelworkers of America
A-122-605	731-TA-367	Color Picture Tubes/Canada	Industrial Union Department, AFL-CIO International Association of Machinists & Aerospace Workers International Brotherhood of Electrical Workers

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			International Union of Electronic, Electrical, Technical, Salaried and Machine Workers Philips Electronic Components Group United Steelworkers of America Zenith Electronics
A-122-804	731-TA-422	Steel Rails/Canada	Bethlehem Steel CF&I Steel
A-122-814	731-TA-528	Pure Magnesium/Canada	Magnesium Corporation of America
A-122-822	731-TA-614	Corrosion-Resistant Carbon Steel Flat Products/ Canada	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries LTV Steel Lukens Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
A-122-823	731-TA-575	Cut-to-Length Carbon Steel Plate/Canada	Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-122-830	731-TA-789	Stainless Steel Plate in Coils/Canada	Allegheny Ludlum Armco Steel J&L Specialty Steel Lukens Steel North American Stainless
A-122-838	731-TA-928	Softwood Lumber/Canada	71 Lumber Co Almond Bros Lbr Co Anthony Timberlands Balfour Lbr Co Ball Lumber Banks Lumber Company Barge Forest Products Co

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Beadles Lumber Co
			Bearden Lumber
			Bennett Lumber
			Big Valley Band Mill
			Bighorn Lumber Co Inc
			Blue Mountain Lumber
			Buddy Bean Lumber
			Burgin Lumber Co Ltd
			Burt Lumber Company
			C&D Lumber Co
			Ceda-Pine Veneer
			Cersosimo Lumber Co Inc
			Charles Ingram Lumber Co Inc
			Charleston Heart Pine
			Chesterfield Lumber
			Chips
			Chocorua Valley Lumber Co
			Claude Howard Lumber
			Clearwater Forest Industries
			CLW Inc
			CM Tucker Lumber Corp
			Coalition for Fair Lumber Imports Executive Committee
			Cody Lumber Co
			Collins Pine Co
			Collums Lumber
			Columbus Lumber Co
			Contoocook River Lumber
			Conway Guiteau Lumber
			Cornwright Lumber Co
			Crown Pacific
			Daniels Lumber Inc
			Dean Lumber Co Inc
			Deltic Timber Corporation
			Devils Tower Forest Products
			DiPrizio Pine Sales
			Dorchester Lumber Co
			DR Johnson Lumber
			East Brainerd Lumber Co
			East Coast Lumber Company
			Eas-Tex Lumber
			ECK Wood Products
			Ellingson Lumber Co
			Elliott Sawmilling
			Empire Lumber Co
			Evergreen Forest Products
			Excalibur Shelving Systems Inc
			Exley Lumber Co
			FH Stoltze Land & Lumber Co
			FL Turlington Lbr Co Inc
			Fleming Lumber
			Flippo Lumber

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Floragen Forest Products
			Frank Lumber Co
			Franklin Timber Co
			Fred Tebb & Sons
			Fremont Sawmill
			Frontier Resources
			Garrison Brothers Lumber Co and Subsidiaries
			Georgia Lumber
			Gilman Building Products
			Godfrey Lumber
			Granite State Forest Prod Inc
			Great Western Lumber Co
			Greenville Molding Inc
			Griffin Lumber Company
			Guess Brothers Lumber
			Gulf Lumber
			Gulf States Paper
			Guy Bennett Lumber
			Hampton Resources
			Hancock Lumber
			Hankins Inc
			Hankins Lumber Co
			Harrigan Lumber
			Harwood Products
			Haskell Lumber Inc
			Hatfield Lumber
			Hedstrom Lumber
			Herrick Millwork Inc
			HG Toler & Son Lumber Co Inc
			HG Wood Industries LLC
			Hogan & Storey Wood Prod
			Hogan Lumber Co
			Hood Industries
			HS Hofler & Sons Lumber Co Inc
			Hubbard Forest Ind Inc
			HW Culp Lumber Co
			Idaho Veneer Co
			Industrial Wood Products
			Intermountain Res LLC
			International Paper
			J Franklin Jones Lumber Co Inc
			Jack Batte & Sons Inc
			Jasper Lumber Company
			JD Martin Lumber Co
			JE Jones Lumber Co
			Jerry G Williams & Sons
			JH Knighton Lumber Co
			Johnson Lumber Company
			Jordan Lumber & Supply
			Joseph Timber Co
			JP Haynes Lbr Co Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			JV Wells Inc
			JW Jones Lumber
			Keadle Lumber Enterprises
			Keller Lumber
			King Lumber Co
			Konkolville Lumber
			Langdale Forest Products
			Laurel Lumber Company
			Leavitt Lumber Co
			Leesville Lumber Co
			Limington Lumber Co
			Longview Fibre Co
			Lovell Lumber Co Inc
			M Kendall Lumber Co
			Manke Lumber Co
			Marriner Lumber Co
			Mason Lumber
			MB Heath & Sons Lumber Co
			MC Dixon Lumber Co Inc
			Mebane Lumber Co Inc
			Metcalf Lumber Co Inc
			Millry Mill Co Inc
			Moose Creek Lumber Co
			Moose River Lumber
			Morgan Lumber Co Inc
			Mount Yonah Lumber Co
			Nagel Lumber
			New Kearsarge Corp
			New South
			Nicolet Hardwoods
			Nieman Sawmills SD
			Nieman Sawmills WY
			North Florida
			Northern Lights Timber & Lumber
			Northern Neck Lumber Co
			Ochoco Lumber Co
			Olon Belcher Lumber Co
			Owens and Hurst Lumber
			Packaging Corp of America
			Page & Hill Forest Products
			Paper, Allied-Industrial, Chemical and Energy Workers International Union
			Parker Lumber
			Pate Lumber Co Inc
			PBS Lumber
			Pedigo Lumber Co
			Piedmont Hardwood Lumber Co
			Pine River Lumber Co
			Pinecrest Lumber Co
			Pleasant River Lumber Co
			Pleasant Western Lumber Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Plum Creek Timber
			Pollard Lumber
			Portac
			Potlatch
			Potomac Supply
			Precision Lumber Inc
			Pruitt Lumber Inc
			R Leon Williams Lumber Co
			RA Yancey Lumber
			Rajala Timber Co
			Ralph Hamel Forest Products
			Randy D Miller Lumber
			Rappahannock Lumber Co
			Regulus Stud Mills Inc
			Riley Creek Lumber
			Roanoke Lumber Co
			Robbins Lumber
			Robertson Lumber
			Roseburg Forest Products Co
			Rough & Ready
			RSG Forest Products
			Rushmore Forest Products
			RY Timber Inc
			Sam Mabry Lumber Co
			Scotch Lumber
			SDS Lumber Co
			Seacoast Mills Inc
			Seago Lumber
			Seattle-Snohomish
			Seneca Sawmill
			Shaver Wood Products
			Shearer Lumber Products
			Shuqualak Lumber
			SI Storey Lumber
			Sierra Forest Products
			Sierra Pacific Industries
			Sigfridson Wood Products
			Silver City Lumber Inc
			Somers Lbr & Mfg Inc
			South & Jones
			South Coast
			Southern Forest Industries Inc
			Southern Lumber
			St Laurent Forest Products
			Starfire Lumber Co
			Steely Lumber Co Inc
			Stimson Lumber
			Summit Timber Co
			Sundance Lumber
			Superior Lumber
			Swanson Superior Forest Products Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Swift Lumber
			Tamarack Mill
			Taylor Lumber & Treating Inc
			Temple-Inland Forest Products
			Thompson River Lumber
			Three Rivers Timber
			Thrift Brothers Lumber Co Inc
			Timco Inc
			Tolleson Lumber
			Toney Lumber
			TR Miller Mill Co
			Tradewinds of Virginia Ltd
			Travis Lumber Co
			Tree Source Industries Inc
			Tri-State Lumber
			TTT Studs
			United Brotherhood of Carpenters and Joiners
			Viking Lumber Co
			VP Kiser Lumber Co
			Walton Lumber Co Inc
			Warm Springs Forest Products
			Westvaco Corp
			Wilkins, Kaiser & Olsen Inc
			WM Shepherd Lumber Co
			WR Robinson Lumber Co Inc
			Wrenn Brothers Inc
			Wyoming Sawmills
			Yakama Forest Products
			Younce & Ralph Lumber Co Inc
			Zip-O-Log Mills Inc
A-122-840	731-TA-954	Carbon and Certain Alloy Steel Wire Rod/Canada	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
A-122-847	731-TA-1019B	Hard Red Spring Wheat/Canada	North Dakota Wheat Commission
A-201-504	731-TA-297	Porcelain-on-Steel Cooking Ware/Mexico	General Housewares
A-201-601	731-TA-333	Fresh Cut Flowers/Mexico	Burdette Coward
			California Floral Council
			Floral Trade Council
			Florida Flower Association
			Gold Coast Uanko Nursery
			Hollandia Wholesale Florist
			Manatee Fruit
			Monterey Flower Farms

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Topstar Nursery
A-201-802	731-TA-451	Gray Portland Cement and Clinker/Mexico	Alamo Cement
			Blue Circle
			BoxCrow Cement
			Calaveras Cement
			Capitol Aggregates
			Centex Cement
			Florida Crushed Stone
			Gifford-Hill
			Hanson Permanente Cement
			Ideal Basic Industries
			Independent Workers of North America (Locals 49, 52, 89, 192 and 471)
			International Union of Operating Engineers (Local 12)
			National Cement Company of Alabama
			National Cement Company of California
			Phoenix Cement
			Riverside Cement
			Southdown
			Tarmac America
			Texas Industries
A-201-805	731-TA-534	Circular Welded Nonalloy Steel Pipe/Mexico	Allied Tube & Conduit
			American Tube
			Bull Moose Tube
			Century Tube
			CSI Tubular Products
			Cyclops
			Laclede Steel
			LTV Tubular Products
			Maruichi American
			Sharon Tube
			USX
			Western Tube & Conduit
			Wheatland Tube
A-201-806	731-TA-547	Carbon Steel Wire Rope/Mexico	Bridon American
			Macwhyte
			Paulsen Wire Rope
			The Rochester Corporation
			United Automobile, Aerospace and Agricultural Implement Workers (Local 960)
			Williamsport
			Wire-rope Works
			Wire Rope Corporation of America
A-201-809	731-TA-582	Cut-to-Length Carbon Steel Plate/Mexico	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
A-201-817	731-TA-716	Oil Country Tubular Goods/Mexico	IPSCO
			Koppel Steel
			Maverick Tube
			Newport Steel
			North Star Steel
			US Steel
			USS/Kobe
A-201-820	731-TA-747	Fresh Tomatoes/Mexico	Accomack County Farm Bureau
			Ad Hoc Group of Florida, California, Georgia, Pennsylvania, South Carolina, Tennessee and Virginia Tomato Growers
			Florida Farm Bureau Federation
			Florida Fruit and Vegetable Association
			Florida Tomato Exchange
			Florida Tomato Growers Exchange
			Gadsden County Tomato Growers Association
			South Carolina Tomato Association
A-201-822	731-TA-802	Stainless Steel Sheet and Strip/Mexico	Allegheny Ludlum
			Armco
			Bethlehem Steel
			Carpenter Technology Corp
			J&L Specialty Steel
			North American Stainless
			United Steelworkers of America
A-201-827	731-TA-848	Large-Diameter Carbon Steel Seamless Pipe/Mexico	North Star Steel
			Timken
			US Steel
			United Steelworkers of America
			USS/Kobe
A-201-828	731-TA-920	Welded Large Diameter Line Pipe/Mexico	American Cast Iron Pipe
			Berg Steel Pipe
			Bethlehem Steel
			Napa Pipe/Oregon Steel Mills
			Saw Pipes USA
			Stupp
			US Steel
A-201-830	731-TA-958	Carbon and Certain Alloy Steel Wire Rod/Mexico	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Republic Technologies International
			Rocky Mountain Steel Mills
A-201-831	731-TA-1027	Prestressed Concrete Steel Wire Strand/Mexico	American Spring Wire Corp
			Insteel Wire Products Co
			Sivaco Georgia LLC
			Strand Tech Martin Inc
			Sumiden Wire Products Corp
A-201-834	731-TA-1085	Purified Carboxymethylcellulose/Mexico	Aqualon Co a Division of Hercules Inc
A-274-804	731-TA-961	Carbon and Certain Alloy Steel Wire Rod/Trinidad & Tobago	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
A-301-602	731-TA-329	Fresh Cut Flowers/Colombia	Burdette Coward
			California Floral Council
			Floral Trade Council
			Florida Flower Association
			Gold Coast Uanko Nursery
			Hollandia Wholesale Florist
			Manatee Fruit
			Monterey Flower Farms
			Pajaro Valley Greenhouses
			Topstar Nursery
A-307-803	731-TA-519	Gray Portland Cement and Clinker/Venezuela	Florida Crushed Stone
			Southdown
			Tarmac America
A-307-805	731-TA-537	Circular Welded Nonalloy Steel Pipe/Venezuela	Allied Tube & Conduit
			American Tube
			Bull Moose Tube
			Century Tube
			CSI Tubular Products
			Cyclops
			Laclede Steel
			LTV Tubular Products
			Maruichi American
			Sharon Tube
			USX
			Western Tube & Conduit
			Wheatland Tube
A-307-807	731-TA-570	Ferrosilicon/Venezuela	AIMCOR
			Alabama Silicon
			American Alloys
			Globe Metallurgical
			Oil, Chemical and Atomic Workers (Local 389)
			Silicon Metaltech

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
A-307-820	731-TA-931	Silicomanganese/Venezuela	Eramet Marietta Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 5-0639
A-331-602	731-TA-331	Fresh Cut Flowers/Ecuador	Burdette Coward California Floral Council Floral Trade Council Florida Flower Association Gold Coast Uanko Nursery Hollandia Wholesale Florist Manatee Fruit Monterey Flower Farms Topstar Nursery
A-337-803	731-TA-768	Fresh Atlantic Salmon/Chile	Atlantic Salmon of Maine Cooke Aquaculture US DE Salmon Global Aqua USA Island Aquaculture Maine Coast Nordic Scan Am Fish Farms Treats Island Fisheries Trumpet Island Salmon Farm
A-337-804	731-TA-776	Preserved Mushrooms/Chile	LK Bowman Modern Mushroom Farms Monterey Mushrooms Mount Laurel Canning Mushroom Canning Southwood Farms Sunny Dell Foods United Canning
A-337-806	731-TA-948	Individually Quick Frozen Red Raspberries/Chile	A&A Berry Farms Bahler Farms Bear Creek Farms David Burns Columbia Farms Columbia Fruit George Culp Dobbins Berry Farm Enfield Firestone Packing George Hoffman Farms Heckel Farms Wendell Kreder Curt Maberry Maberry Packing Mike & Jean's Nguyen Berry Farms Nick's Acres North Fork

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Parson Berry Farm
			Pickin 'N' Pluckin
			Postage Stamp Farm
			Rader
			RainSweet
			Scenic Fruit
			Silverstar Farms
			Tim Straub
			Thoeny Farms
			Townsend
			Tsugawa Farms
			Updike Berry Farms
			Van Laeken Farms
A-351-503	731-TA-262	Iron Construction Castings/Brazil	Alhambra Foundry
			Allegheny Foundry
			Bingham & Taylor
			Campbell Foundry
			Charlotte Pipe & Foundry
			Deeter Foundry
			East Jordan Foundry
			Le Baron Foundry
			Municipal Castings
			Neenah Foundry
			Opelika Foundry
			Pinkerton Foundry
			Tyler Pipe
			US Foundry & Manufacturing
			Vulcan Foundry
A-351-505	731-TA-278	Malleable Cast Iron Pipe Fittings/Brazil	Grinnell
			Stanley G Flagg
			Stockham Valves & Fittings
			U-Brand
			Ward Manufacturing
A-351-602	731-TA-308	Carbon Steel Butt-Weld Pipe Fittings/Brazil	Ladish
			Mills Iron Works
			Steel Forgings
			Tube Forgings of America
			Weldbend
A-351-603	731-TA-311	Brass Sheet and Strip/Brazil	Allied Industrial Workers of America
			American Brass
			Bridgeport Brass
			Chase Brass & Copper
			Hussey Copper
			International Association of Machinists & Aerospace Workers
			Mechanics Educational Society of America (Local 56)
			The Miller Company
			Olin
			Revere Copper Products
			United Steelworkers of America
A-351-605	731-TA-326	Frozen Concentrated Orange Juice/Brazil	Alcoma Packing

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			B&W Canning Berry Citrus Products Caulkins Indiantown Citrus Citrus Belle Citrus World Florida Citrus Mutual
A-351-804	731-TA-439	Industrial Nitrocellulose/Brazil	Hercules
A-351-806	731-TA-471	Silicon Metal/Brazil	American Alloys Globe Metallurgical International Union of Electronics, Electrical, Machine and Furniture Workers (Local 693) Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech SiMETCO Textile Processors, Service Trades, Health Care Professional and Technical Employees (Local 60) United Steelworkers of America (Locals 5171, 8538 and 12646)
A-351-809	731-TA-532	Circular Welded Nonalloy Steel Pipe/Brazil	Allied Tube & Conduit American Tube Bull Moose Tube Century Tube CSI Tubular Products Cyclops Laclede Steel LTV Tubular Products Maruichi American Sharon Tube USX Western Tube & Conduit Wheatland Tube
A-351-817	731-TA-574	Cut-to-Length Carbon Steel Plate/Brazil	Bethlehem Steel California Steel Industries CitiSteel USA Inc Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-351-819	731-TA-636	Stainless Steel Wire Rod/Brazil	AL Tech Specialty Steel Armco Steel Carpenter Technology Republic Engineered Steels Talley Metals Technology

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			United Steelworkers of America
A-351-820	731-TA-641	Ferrosilicon/Brazil	AIMCOR Alabama Silicon American Alloys Globe Metallurgical Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
A-351-824	731-TA-671	Silicomanganese/Brazil	Elkem Metals Oil, Chemical and Atomic Workers (Local 3-639)
A-351-825	731-TA-678	Stainless Steel Bar/Brazil	AL Tech Specialty Steel Carpenter Technology Crucible Specialty Metals Electralloy Republic Engineered Steels Slater Steels Talley Metals Technology United Steelworkers of America
A-351-826	731-TA-708	Seamless Pipe/Brazil	Koppel Steel Quanex Timken United States Steel
A-351-828	731-TA-806	Hot-Rolled Carbon Steel Flat Products/Brazil	Acme Steel Bethlehem Steel California Steel Industries Gallatin Steel Geneva Steel Gulf States Steel Independent Steelworkers IPSCO Ispat/Inland LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics US Steel United Steelworkers of America WCI Steel Weirton Steel Wheeling-Pittsburgh Steel Corp
A-351-832	731-TA-953	Carbon and Certain Alloy Steel Wire Rod/Brazil	AmeriSteel Birmingham Steel Cascade Steel Rolling Mills Connecticut Steel Corp Co-Steel Raritan GS Industries Keystone Consolidated Industries North Star Steel Texas

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
A-351-837	731-TA-1024	Prestressed Concrete Steel Wire Strand/Brazil	American Spring Wire Corp
			Insteel Wire Products Co
			Sivaco Georgia LLC
			Strand Tech Martin Inc
			Sumiden Wire Products Corp
A-351-840	731-TA-1089	Certain Orange Juice/Brazil	A Duda & Sons Inc
			Alico Inc
			John Barnelt
			Ben Hill Griffin Inc
			Bliss Citrus
			BTS A Florida General Partnership
			Cain Groves
			California Citrus Mutual
			Cedar Haven Inc
			Citrus World Inc
			Clonts Groves Inc
			Davis Enterprises Inc
			D Edwards Dickinson
			Evans Properties Inc
			Florida Citrus Commission
			Florida Citrus Mutual
			Florida Farm Bureau Federation
			Florida Fruit & Vegetable Association
			Florida State of Department of Citrus
			Flying V Inc
			GBS Groves Inc
			Graves Brothers Co
			H&S Groves
			Hartwell Groves Inc
			Holly Hill Fruit Products Co
			Jack Melton Family Inc
			K-Bob Inc
			L Dicks Inc
			Lake Pickett Partnership Inc
			Lamb Revocable Trust Gerilyn Rebecca S Lamb Trustee
			Lykes Bros Inc
			Martin J McKenna
			Orange & Sons Inc
			Osgood Groves
			William W Parshall
			PH Freeman & Sons
			Pierie Grove
			Raymond & Melissa Pierie
			Roper Growers Cooperative
			Royal Brothers Groves
			Seminole Tribe of Florida Inc
			Silverman Groves/Rilla Cooper

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Smoak Groves Inc Sorrells Groves Inc Southern Gardens Groves Corp Southern Gardens Processing Corp Southern Groves Citrus Sun Ag Inc Sunkist Growers Inc Texas Citrus Exchange Texas Citrus Mutual Texas Produce Association Travis Wise Management Inc Uncle Matt's Fresh Inc Varn Citrus Growers Inc
A-357-007	731-TA-157	Carbon Steel Wire Rod/Argentina	Atlantic Steel Continental Steel Georgetown Steel North Star Steel Raritan River Steel
A-357-405	731-TA-208	Barbed Wire and Barbless Wire Strand/Argentina	CF&I Steel Davis Walker Forbes Steel & Wire Oklahoma Steel Wire
A-357-802	731-TA-409	Light-Walled Rectangular Tube/Argentina	Bull Moose Tube Hannibal Industries Harris Tube Maruichi American Searing Industries Southwestern Pipe Western Tube & Conduit
A-357-804	731-TA-470	Silicon Metal/Argentina	American Alloys Elkem Metals Globe Metallurgical International Union of Electronics, Electrical, Machine and Furniture Workers (Local 693) Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech SiMETCO SKW Alloys Textile Processors, Service Trades, Health Care Professional and Technical Employees (Local 60) United Steelworkers of America (Locals 5171, 8538 and 12646)
A-357-809	731-TA-707	Seamless Pipe/Argentina	Koppel Steel Quanex Timken United States Steel
A-357-810	731-TA-711	Oil Country Tubular Goods/Argentina	IPSCO Koppel Steel Lone Star Steel Maverick Tube Newport Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			North Star Steel
			US Steel
			USS/Kobe
A-357-812	731-TA-892	Honey/Argentina	AH Meyer & Sons
			Adee Honey Farms
			Althoff Apiaries
			American Beekeeping Federation
			American Honey Producers Association
			Anderson Apiaries
			Arroyo Apiaries
			Artesian Honey Producers
			B Weaver Apiaries
			Bailey Enterprises
			Barkman Honey
			Basler Honey Apiary
			Beals Honey
			Bears Paw Apiaries
			Beaverhead Honey
			Bee Biz
			Bee Haven Honey
			Belliston Brothers Apiaries
			Big Sky Honey
			Bill Rhodes Honey
			Richard E Blake
			Curt Bronnenberg
			Brown's Honey Farms
			Brumley's Bees
			Buhmann Apiaries
			Carys Honey Farms
			Chaparrel Honey
			Charles Apiaries
			Mitchell Charles
			Collins Honey
			Conor Apiaries
			Coy's Honey Farm
			Dave Nelson Apiaries
			Delta Bee
			Eisele's Pollination & Honey
			Ellingsoa's
			Elliott Curtis & Sons
			Charles L Emmons, Sr
			Gause Honey
			Gene Brandi Apiaries
			Griffith Honey
			Haff Apiaries
			Hamilton Bee Farms
			Hamilton Honey
			Happie Bee
			Harvest Honey
			Harvey's Honey
			Hiatt Honey

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hoffman Honey
			Hollman Apiaries
			Honey House
			Honeybee Apiaries
			Gary M Honl
			Rand William Honl and Sydney Jo Honl
			James R & Joann Smith Trust
			Jaynes Bee Products
			Johnston Honey Farms
			Larry Johnston
			Ke-An Honey
			Kent Honeybees
			Lake-Indianhead Honey Farms
			Lamb's Honey Farm
			Las Flores Apiaries
			Mackrill Honey Farms & Sales
			Raymond Marquette
			Mason & Sons Honey
			McCoy's Sunny South Apiaries
			Merrimack Valley Apiaries & Evergreen Honey
			Met 2 Honey Farm
			Missouri River Honey
			Mitchell Brothers Honey
			Monda Honey Farm
			Montana Dakota Honey
			Northern Bloom Honey
			Noye's Apiaries
			Oakes Honey
			Oakley Honey Farms
			Old Mill Apiaries
			Opp Honey
			Oro Dulce
			Peterson's "Naturally Sweet" Honey
			Potoczak Bee Farms
			Price Apiaries
			Pure Sweet Honey Farms
			Robertson Pollination Service
			Robson Honey
			William Robson
			Rosedale Apiaries
			Ryan Apiaries
			Schmidt Honey Farms
			Simpson Apiaries
			Sioux Honey Association
			Smoot Honey
			Solby Honey
			Stahlman Apiaries
			Steve E Parks Apiaries
			Stroope Bee & Honey
			T&D Honey Bee
			Talbott's Honey

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Terry Apiaries
			Thompson Apiaries
			Triple A Farm
			Tropical Blossom Honey
			Tubbs Apiaries
			Venable Wholesale
			Walter L Wilson Buzz 76 Apiaries
			Wiebersiek Honey Farms
			Wilmer Farms
			Brent J Woodworth
			Wooten's Golden Queens
			Yaddof Apiaries
A-357-814	731-TA-898	Hot-Rolled Steel Products/Argentina	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-401-040	AA1921-114	Stainless Steel Plate/Sweden	Jessop Steel
A-401-601	731-TA-316	Brass Sheet and Strip/Sweden	Allied Industrial Workers of America
			American Brass
			Bridgeport Brass
			Chase Brass & Copper
			Hussey Copper
			International Association of Machinists & Aerospace Workers
			Mechanics Educational Society of America (Local 56)
			The Miller Company
			Olin
			Revere Copper Products
			United Steelworkers of America
A-401-603	731-TA-354	Stainless Steel Hollow Products/Sweden	AL Tech Specialty Steel
			Allegheny Ludlum Steel
			ARMCO
			Carpenter Technology
			Crucible Materials
			Damacus Tubular Products
			Specialty Tubing Group
A-401-801	731-TA-397-A	Ball Bearings/Sweden	Barden Corp
			Emerson Power Transmission
			Kubar Bearings
			MPB
			Rollway Bearings

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Torrington
A-401-801	731-TA-397-B	Cylindrical Roller Bearings/Sweden	Barden Corp Emerson Power Transmission MPB Rollway Bearings Torrington
A-401-805	731-TA-586	Cut-to-Length Carbon Steel Plate/Sweden	Bethlehem Steel California Steel Industries CitiSteel USA Inc Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-401-806	731-TA-774	Stainless Steel Wire Rod/Sweden	AL Tech Specialty Steel Carpenter Technology Republic Engineered Steels Talley Metals Technology United Steelworkers of America
A-401-808	731-TA-1087	Purified Carboxymethylcellulose/Sweden	Aqualon Co a Division of Hercules Inc
A-403-801	731-TA-454	Fresh and Chilled Atlantic Salmon/Norway	Heritage Salmon The Coalition for Fair Atlantic Salmon Trade
A-405-802	731-TA-576	Cut-to-Length Carbon Steel Plate/Finland	Bethlehem Steel California Steel Industries CitiSteel USA Inc Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-405-803	731-TA-1084	Purified Carboxymethylcellulose/Finland	Aqualon Co a Division of Hercules Inc
A-412-801	731-TA-399-A	Ball Bearings/United Kingdom	Barden Corp Emerson Power Transmission Kubar Bearings McGill Manufacturing Co MPB Rexnord Inc Rollway Bearings Torrington

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-412-801	731-TA-399-B	Cylindrical Roller Bearings/United Kingdom	Barden Corp Emerson Power Transmission MPB Rollway Bearings Torrington
A-412-803	731-TA-443	Industrial Nitrocellulose/United Kingdom	Hercules
A-412-805	731-TA-468	Sodium Thiosulfate/United Kingdom	Calabrian
A-412-814	731-TA-587	Cut-to-Length Carbon Steel Plate/United Kingdom	Bethlehem Steel California Steel Industries CitiSteel USA Inc Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-412-818	731-TA-804	Stainless Steel Sheet and Strip/United Kingdom	Allegheny Ludlum Armco Steel Bethlehem Steel Butler Armco Independent Union Carpenter Technology Corp J&L Specialty Steel North American Stainless United Steelworkers of America Zanesville Armco Independent Organization
A-412-822	731-TA-918	Stainless Steel Bar/United Kingdom	Carpenter Technology Crucible Specialty Metals Electralloy Empire Specialty Steel Republic Technologies International Slater Steels United Steelworkers of America
A-421-701	731-TA-380	Brass Sheet and Strip/Netherlands	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company North Coast Brass & Copper Olin Pegg Metals Revere Copper Products United Steelworkers of America

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-421-804	731-TA-608	Cold-Rolled Carbon Steel Flat Products/Netherlands	Armco Steel
			Bethlehem Steel
			California Steel Industries
			Gulf States Steel
			Inland Steel Industries
			LTV Steel
			National Steel
			Nextech
			Rouge Steel Co
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
A-421-805	731-TA-652	Aramid Fiber/Netherlands	E I du Pont de Nemours
A-421-807	731-TA-903	Hot-Rolled Steel Products/Netherlands	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-421-811	731-TA-1086	Purified Carboxymethylcellulose/Netherlands	Aqualon Co a Division of Hercules Inc
A-423-077	AA1921-198	Sugar/Belgium	Florida Sugar Marketing and Terminal Association
A-423-602	731-TA-365	Industrial Phosphoric Acid/Belgium	Albright & Wilson
			FMC
			Hydrite Chemical
			Monsanto
			Stauffer Chemical
A-423-805	731-TA-573	Cut-to-Length Carbon Steel Plate/Belgium	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			United Steelworkers of America
A-423-808	731-TA-788	Stainless Steel Plate in Coils/Belgium	Allegheny Ludlum Armco Steel Lukens Steel North American Stainless United Steelworkers of America
A-427-001	731-TA-44	Sorbitol/France	Lonza Pfizer
A-427-009	731-TA-96	Industrial Nitrocellulose/France	Hercules
A-427-078	AA1921-199	Sugar/France	Florida Sugar Marketing and Terminal Association
A-427-098	731-TA-25	Anhydrous Sodium Metasilicate/France	PQ
A-427-602	731-TA-313	Brass Sheet and Strip/France	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company Olin Revere Copper Products United Steelworkers of America
A-427-801	731-TA-392-A	Ball Bearings/France	Barden Corp Emerson Power Transmission Kubar Bearings McGill Manufacturing Co MPB Rexnord Inc Rollway Bearings Torrington
A-427-801	731-TA-392-B	Cylindrical Roller Bearings/France	Barden Corp Emerson Power Transmission MPB Rollway Bearings Torrington
A-427-801	731-TA-392-C	Spherical Plain Bearings/France	Barden Corp Emerson Power Transmission Kubar Bearings McGill Manufacturing Co Rexnord Inc Rollway Bearings Torrington
A-427-804	731-TA-553	Hot-Rolled Lead and Bismuth Carbon Steel Products/France	Bethlehem Steel Inland Steel Industries USS/Kobe Steel
A-427-808	731-TA-615	Corrosion-Resistant Carbon Steel Flat Products/France	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Inland Steel Industries
			LTV Steel
			Lukens Steel
			National Steel
			Nextech
			Rouge Steel Co
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
A-427-811	731-TA-637	Stainless Steel Wire Rod/France	AL Tech Specialty Steel
			Armco Steel
			Carpenter Technology
			Republic Engineered Steels
			Talley Metals Technology
			United Steelworkers of America
A-427-814	731-TA-797	Stainless Steel Sheet and Strip/France	Allegheny Ludlum
			Armco Steel
			Bethlehem Steel
			Butler Armco Independent Union
			Carpenter Technology Corp
			North American Stainless
			United Steelworkers of America
			Zanesville Armco Independent Organization
A-427-816	731-TA-816	Cut-to-Length Carbon Steel Plate/France	Bethlehem Steel
			Geneva Steel
			IPSCO Steel
			National Steel
			US Steel
			United Steelworkers of America
A-427-818	731-TA-909	Low Enriched Uranium/France	United States Enrichment Corp
			USEC Inc
A-427-820	731-TA-913	Stainless Steel Bar/France	Carpenter Technology
			Crucible Specialty Metals
			Electralloy
			Empire Specialty Steel
			Republic Technologies International
			Slater Steels
			United Steelworkers of America
A-428-082	AA1921-200	Sugar/Germany	Florida Sugar Marketing and Terminal Association
A-428-602	731-TA-317	Brass Sheet and Strip/Germany	Allied Industrial Workers of America
			American Brass
			Bridgeport Brass
			Chase Brass & Copper
			Hussey Copper
			International Association of Machinists & Aerospace Workers
			Mechanics Educational Society of America (Local 56)

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			The Miller Company Olin Revere Copper Products United Steelworkers of America
A-428-801	731-TA-391-A	Ball Bearings/Germany	Barden Corp Emerson Power Transmission Kubar Bearings McGill Manufacturing Co MPB Rexnord Inc Rollway Bearings Torrington
A-428-801	731-TA-391-B	Cylindrical Roller Bearings/Germany	Barden Corp Emerson Power Transmission MPB Rollway Bearings Torrington
A-428-801	731-TA-391-C	Spherical Plain Bearings/Germany	Barden Corp Emerson Power Transmission Rollway Bearings Torrington
A-428-802	731-TA-419	Industrial Belts/Germany	The Gates Rubber Company The Goodyear Tire and Rubber Company
A-428-803	731-TA-444	Industrial Nitrocellulose/Germany	Hercules
A-428-807	731-TA-465	Sodium Thiosulfate/Germany	Calabrian
A-428-814	731-TA-604	Cold-Rolled Carbon Steel Flat Products/Germany	Armco Steel Bethlehem Steel California Steel Industries Gulf States Steel Inland Steel Industries LTV Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
A-428-815	731-TA-616	Corrosion-Resistant Carbon Steel Flat Products/ Germany	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries LTV Steel Lukens Steel National Steel Nextech

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Rouge Steel Co
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
A-428-816	731-TA-578	Cut-to-Length Carbon Steel Plate/Germany	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
A-428-820	731-TA-709	Seamless Pipe/Germany	Koppel Steel
			Quanex
			Timken
			United States Steel
A-428-821	731-TA-736	Large Newspaper Printing Presses/Germany	Rockwell Graphics Systems
A-428-825	731-TA-798	Stainless Steel Sheet and Strip/Germany	Allegheny Ludlum
			Armco Steel
			Bethlehem Steel
			Butler Armco Independent Union
			Carpenter Technology Corp
			J&L Specialty Steel
			North American Stainless
			United Steelworkers of America
			Zanesville Armco Independent Organization
A-428-830	731-TA-914	Stainless Steel Bar/Germany	Carpenter Technology
			Crucible Specialty Metals
			Electralloy
			Empire Specialty Steel
			Republic Technologies International
			Slater Steels
			United Steelworkers of America
A-437-601	731-TA-341	Tapered Roller Bearings/Hungary	L&S Bearing
			Timken
			Torrington
A-437-804	731-TA-426	Sulfanilic Acid/Hungary	Nation Ford Chemical
A-447-801	731-TA-340C	Solid Urea/Estonia	Agrico Chemical
			American Cyanamid
			CF Industries
			First Mississippi

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Mississippi Chemical Terra International WR Grace
A-449-804	731-TA-878	Steel Concrete Reinforcing Bar/Latvia	AB Steel Mill Inc AmeriSteel Auburn Steel Birmingham Steel Border Steel Cascade Steel Rolling Mills Inc CMC Steel Group Co-Steel Inc Marion Steel North Star Steel Co Nucor Steel Rebar Trade Action Coalition Riverview Steel Sheffield Steel TAMCO TXI-Chaparral Steel Co
A-451-801	731-TA-340D	Solid Urea/Lithuania	Agrico Chemical American Cyanamid CF Industries First Mississippi Mississippi Chemical Terra International WR Grace
A-455-802	731-TA-583	Cut-to-Length Carbon Steel Plate/Poland	Bethlehem Steel California Steel Industries CitiSteel USA Inc Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-455-803	731-TA-880	Steel Concrete Reinforcing Bar/Poland	AB Steel Mill Inc AmeriSteel Auburn Steel Birmingham Steel Border Steel Cascade Steel Rolling Mills Inc CMC Steel Group Co-Steel Inc Marion Steel North Star Steel Co Nucor Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Rebar Trade Action Coalition Riverview Steel Sheffield Steel TAMCO TXI-Chaparral Steel Co
A-469-007	731-TA-126	Potassium Permanganate/Spain	Carus Chemical
A-469-803	731-TA-585	Cut-to-Length Carbon Steel Plate/Spain	Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
A-469-805	731-TA-682	Stainless Steel Bar/Spain	AL Tech Specialty Steel Carpenter Technology Crucible Specialty Metals Electralloy Republic Engineered Steels Slater Steels Talley Metals Technology United Steelworkers of America
A-469-807	731-TA-773	Stainless Steel Wire Rod/Spain	AL Tech Specialty Steel Carpenter Technology Republic Engineered Steels Talley Metals Technology United Steelworkers of America
A-469-810	731-TA-890	Stainless Steel Angle/Spain	Slater Steels United Steelworkers of America
A-469-814	731-TA-1083	Chlorinated Isocyanurates/Spain	BioLab Inc Clearon Corp Occidental Chemical Corp
A-471-806	731-TA-427	Sulfanilic Acid/Portugal	Nation Ford Chemical
A-475-059	AA1921-167	Pressure-Sensitive Plastic Tape/Italy	Minnesota Mining & Manufacturing
A-475-601	731-TA-314	Brass Sheet and Strip/Italy	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company Olin Revere Copper Products United Steelworkers of America

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-475-703	731-TA-385	Granular Polytetrafluoroethylene/Italy	E I du Pont de Nemours ICI Americas
A-475-801	731-TA-393-A	Ball Bearings/Italy	Barden Corp Emerson Power Transmission Kubar Bearings McGill Manufacturing Co MPB Rexnord Inc Rollway Bearings Torrington
A-475-801	731-TA-393-B	Cylindrical Roller Bearings/Italy	Barden Corp Emerson Power Transmission MPB Rollway Bearings Torrington
A-475-802	731-TA-413	Industrial Belts/Italy	The Gates Rubber Company The Goodyear Tire and Rubber Company
A-475-811	731-TA-659	Grain-Oriented Silicon Electrical Steel/Italy	Allegheny Ludlum Armco Steel Butler Armco Independent Union United Steelworkers of America Zanesville Armco Independent Union
A-475-814	731-TA-710	Seamless Pipe/Italy	Koppel Steel Quanex Timken United States Steel
A-475-816	731-TA-713	Oil Country Tubular Goods/Italy	Bellville Tube IPSCO Koppel Steel Lone Star Steel Maverick Tube Newport Steel North Star Steel US Steel USS/Kobe
A-475-818	731-TA-734	Pasta/Italy	A Zerega's Sons American Italian Pasta Borden D Merlino & Sons Dakota Growers Pasta Foulds Gilster-Mary Lee Gooch Foods Hershey Foods LaRinascente Macaroni Co Pasta USA Philadelphia Macaroni ST Specialty Foods
A-475-820	731-TA-770	Stainless Steel Wire Rod/Italy	AL Tech Specialty Steel Carpenter Technology Republic Engineered Steels

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Talley Metals Technology
			United Steelworkers of America
A-475-822	731-TA-790	Stainless Steel Plate in Coils/Italy	Allegheny Ludlum
			Armco Steel
			J&L Specialty Steel
			Lukens Steel
			North American Stainless
			United Steelworkers of America
A-475-824	731-TA-799	Stainless Steel Sheet and Strip/Italy	Allegheny Ludlum
			Armco Steel
			Bethlehem Steel
			Butler Armco Independent Union
			Carpenter Technology Corp
			J&L Specialty Steel
			North American Stainless
			United Steelworkers of America
			Zanesville Armco Independent Organization
A-475-826	731-TA-819	Cut-to-Length Carbon Steel Plate/Italy	Bethlehem Steel
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			IPSCO Steel
			National Steel
			US Steel
			United Steelworkers of America
A-475-828	731-TA-865	Stainless Steel Butt-Weld Pipe Fittings/Italy	Flo-Mac Inc
			Gerlin
			Markovitz Enterprises
			Shaw Alloy Piping Products
			Taylor Forge Stainless
A-475-829	731-TA-915	Stainless Steel Bar/Italy	Carpenter Technology
			Crucible Specialty Metals
			Electralloy
			Empire Specialty Steel
			Republic Technologies International
			Slater Steels
			United Steelworkers of America
A-479-801	731-TA-445	Industrial Nitrocellulose/Yugoslavia	Hercules
A-484-801	731-TA-406	Electrolytic Manganese Dioxide/Greece	Chemetals
			Kerr-McGee
			Rayovac
A-485-601	731-TA-339	Solid Urea/Romania	Agrico Chemical
			American Cyanamid
			CF Industries
			First Mississippi
			Mississippi Chemical
			Terra International
			WR Grace
A-485-602	731-TA-345	Tapered Roller Bearings/Romania	L&S Bearing
			Timken
			Torrington

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-485-801	731-TA-395	Ball Bearings/Romania	Barden Corp
			Emerson Power Transmission
			Kubar Bearings
			MPB
			Rollway Bearings
			Torrington
A-485-803	731-TA-584	Cut-to-Length Carbon Steel Plate/Romania	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
A-485-805	731-TA-849	Small-Diameter Carbon Steel Seamless Pipe/ Romania	Koppel Steel
			North Star Steel
			Sharon Tube
			Timken
			US Steel
			United Steelworkers of America
			USS/Kobe
			Vision Metals' Gulf States Tube
A-485-806	731-TA-904	Hot-Rolled Steel Products/Romania	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-489-501	731-TA-273	Welded Carbon Steel Pipe and Tube/Turkey	Allied Tube & Conduit
			American Tube
			Bernard Epps
			Bock Industries
			Bull Moose Tube
			Central Steel Tube
			Century Tube
			Copperweld Tubing
			Cyclops

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hughes Steel & Tube
			Kaiser Steel
			Laclede Steel
			Maruichi American
			Maverick Tube
			Merchant Metals
			Phoenix Steel
			Pittsburgh Tube
			Quanex
			Sharon Tube
			Southwestern Pipe
			UNR-Leavitt
			Welded Tube
			Western Tube & Conduit
			Wheatland Tube
A-489-602	731-TA-364	Aspirin/Turkey	Dow Chemical
			Monsanto
			Norwich-Eaton
A-489-805	731-TA-735	Pasta/Turkey	A Zerega's Sons
			American Italian Pasta
			Borden
			D Merlino & Sons
			Dakota Growers Pasta
			Foulds
			Gilster-Mary Lee
			Gooch Foods
			Hershey Foods
			LaRinascente Macaroni Co
			Pasta USA
			Philadelphia Macaroni
			ST Specialty Foods
A-489-807	731-TA-745	Steel Concrete Reinforcing Bar/Turkey	AmeriSteel
			Auburn Steel
			Birmingham Steel
			Commercial Metals
			Marion Steel
			New Jersey Steel
A-507-502	731-TA-287	Raw In-Shell Pistachios/Iran	Blackwell Land
			California Pistachio Orchard
			Keenan Farms
			Kern Pistachio Hulling & Drying
			Los Ranchos de Poco Pedro
			Pistachio Producers of California
			TM Duche Nut
A-508-604	731-TA-366	Industrial Phosphoric Acid/Israel	Albright & Wilson
			FMC
			Hydrite Chemical
			Monsanto
			Stauffer Chemical
A-533-502	731-TA-271	Welded Carbon Steel Pipe and Tube/India	Allied Tube & Conduit
			American Tube

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Bernard Epps
			Bock Industries
			Bull Moose Tube
			Central Steel Tube
			Century Tube
			Copperweld Tubing
			Cyclops
			Hughes Steel & Tube
			Kaiser Steel
			Laclede Steel
			Maruichi American
			Maverick Tube
			Merchant Metals
			Phoenix Steel
			Pittsburgh Tube
			Quanex
			Sharon Tube
			Southwestern Pipe
			UNR-Leavitt
			Welded Tube
			Western Tube & Conduit
			Wheatland Tube
A-533-806	731-TA-561	Sulfanilic Acid/India	R-M Industries
A-533-808	731-TA-638	Stainless Steel Wire Rod/India	AL Tech Specialty Steel
			Armco Steel
			Carpenter Technology
			Republic Engineered Steels
			Talley Metals Technology
			United Steelworkers of America
A-533-809	731-TA-639	Forged Stainless Steel Flanges/India	Gerlin
			Ideal Forging
			Maass Flange
			Markovitz Enterprises
A-533-810	731-TA-679	Stainless Steel Bar/India	AL Tech Specialty Steel
			Carpenter Technology
			Crucible Specialty Metals
			Electralloy
			Republic Engineered Steels
			Slater Steels
			Talley Metals Technology
			United Steelworkers of America
A-533-813	731-TA-778	Preserved Mushrooms/India	LK Bowman
			Modern Mushroom Farms
			Monterey Mushrooms
			Mount Laurel Canning
			Mushroom Canning
			Southwood Farms
			Sunny Dell Foods
			United Canning
A-533-817	731-TA-817	Cut-to-Length Carbon Steel Plate/India	Bethlehem Steel
			CitiSteel USA Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Geneva Steel Gulf States Steel IPSCO Steel National Steel Tuscaloosa Steel US Steel United Steelworkers of America
A-533-820	731-TA-900	Hot-Rolled Steel Products/India	Bethlehem Steel Gallatin Steel Independent Steelworkers IPSCO LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics US Steel United Steelworkers of America WCI Steel Inc Weirton Steel Wheeling-Pittsburgh Steel Corp
A-533-823	731-TA-929	Silicomanganese/ndia	Eramet Marietta Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 5-0639
A-533-824	731-TA-933	Polyethylene Terephthalate Film, Sheet and Strip (PET Film)/India	DuPont Teijin Films Mitsubishi Polyester Film LLC SKC America Inc Toray Plastics (America)
A-533-828	731-TA-1025	Prestressed Concrete Steel Wire Strand/India	American Spring Wire Corp Insteel Wire Products Co Sivaco Georgia LLC Strand Tech Martin Inc Sumiden Wire Products Corp
A-533-838	731-TA-1061	Carbazole Violet Pigment 23/India	Allegheny Color Corp Barker Fine Color Inc Clariant Corp Nation Ford Chemical Co Sun Chemical Co
A-533-843	731-TA-1096	Certain Lined Paper School Supplies/India	Fay Paper Products Inc MeadWestvaco Consumer & Office Products Norcom Inc Pacon Corp Roaring Spring Blank Book Co Top Flight Inc United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW)
A-538-802	731-TA-514	Cotton Shop Towels/Bangladesh	Milliken
A-549-502	731-TA-252	Welded Carbon Steel Pipe and Tube/Thailand	Allied Tube & Conduit American Tube Bernard Epps

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Bock Industries
			Bull Moose Tube
			Central Steel Tube
			Century Tube
			Copperweld Tubing
			Cyclops
			Hughes Steel & Tube
			Kaiser Steel
			Laclede Steel
			Maruichi American
			Maverick Tube
			Merchant Metals
			Phoenix Steel
			Pittsburgh Tube
			Quanex
			Sharon Tube
			Southwestern Pipe
			UNR-Leavitt
			Welded Tube
			Western Tube & Conduit
			Wheatland Tube
A-549-601	731-TA-348	Malleable Cast Iron Pipe Fittings/Thailand	Grinnell
			Stanley G Flagg
			Stockham Valves & Fittings
			U-Brand
			Ward Manufacturing
A-549-807	731-TA-521	Carbon Steel Butt-Weld Pipe Fittings/Thailand	Hackney
			Ladish
			Mills Iron Works
			Steel Forgings
			Tube Forgings of America
A-549-812	731-TA-705	Furfuryl Alcohol/Thailand	QO Chemicals
A-549-813	731-TA-706	Canned Pineapple/Thailand	International Longshoreman's and Warehouseman's Union
			Maui Pineapple
A-549-817	731-TA-907	Hot-Rolled Steel Products/Thailand	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-549-820	731-TA-1028	Prestressed Concrete Steel Wire Strand/Thailand	American Spring Wire Corp
			Insteel Wire Products Co

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Sivaco Georgia LLC Strand Tech Martin Inc Sumiden Wire Products Corp
A-549-821	731-TA-1045	Polyethylene Retail Carrier Bags/Thailand	Aargus Plastics Inc Advance Polybags Inc Advance Polybags (Nevada) Inc Advance Polybags (Northeast) Inc Alpha Industries Inc Alpine Plastics Inc Ampac Packaging LLC API Enterprises Inc Command Packaging Continental Poly Bags Inc Durabag Co Inc Europackaging LLC Genpak LLC (formerly Continental Superbag LLC) Genpak LLC (formerly Strout Plastics) Hilex Poly Co LLC Inteplast Group Ltd PCL Packaging Inc Poly-Pak Industries Inc Roplast Industries Inc Superbag Corp Unistar Plastics LLC Vanguard Plastics Inc VS Plastics LLC
A-552-801	731-TA-1012	Certain Frozen Fish Fillets/Vietnam	America's Catch Inc Aquafarms Catfish Inc Carolina Classics Catfish Inc Catfish Farmers of America Consolidated Catfish Companies Inc Delta Pride Catfish Inc Fish Processors Inc Guidry's Catfish Inc Haring's Pride Catfish Harvest Select Catfish (Alabama Catfish Inc) Heartland Catfish Co (TT&W Farm Products Inc) Prairie Lands Seafood (Illinois Fish Farmers Cooperative) Pride of the Pond Pride of the South Catfish Inc Prime Line Inc Seabrook Seafood Inc Seacat (Arkansas Catfish Growers) Simmons Farm Raised Catfish Inc Southern Pride Catfish LLC Verret Fisheries Inc
A-557-805	731-TA-527	Extruded Rubber Thread/Malaysia	Globe Manufacturing North American Rubber Thread
A-557-809	731-TA-866	Stainless Steel Butt-Weld Pipe Fittings/Malaysia	Flo-Mac Inc Gerlin

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Markovitz Enterprises
			Shaw Alloy Piping Products
			Taylor Forge Stainless
A-557-813	731-TA-1044	Polyethylene Retail Carrier Bags/Malaysia	Aargus Plastics Inc
			Advance Polybags Inc
			Advance Polybags (Nevada) Inc
			Advance Polybags (Northeast) Inc
			Alpha Industries Inc
			Alpine Plastics Inc
			Ampac Packaging LLC
			API Enterprises Inc
			Command Packaging
			Continental Poly Bags Inc
			Durabag Co Inc
			Europackaging LLC
			Genpak LLC (formerly Continental Superbag LLC)
			Genpak LLC (formerly Strout Plastics)
			Hilex Poly Co LLC
			Inteplast Group Ltd
			PCL Packaging Inc
			Poly-Pak Industries Inc
			Roplast Industries Inc
			Superbag Corp
			Unistar Plastics LLC
			Vanguard Plastics Inc
			VS Plastics LLC
A-559-502	731-TA-296	Small Diameter Standard and Rectangular Pipe and Tube/Singapore	Allied Tube & Conduit
			American Tube
			Bull Moose Tube
			Cyclops
			Hannibal Industries
			Laclede Steel
			Pittsburgh Tube
			Sharon Tube
			Western Tube & Conduit
			Wheatland Tube
A-559-601	731-TA-370	Color Picture Tubes/Singapore	Industrial Union Department, AFL-CIO
			International Association of Machinists & Aerospace Workers
			International Brotherhood of Electrical Workers
			International Union of Electronic, Electrical, Technical, Salaried and Machine Workers
			Philips Electronic Components Group
			United Steelworkers of America
			Zenith Electronics
A-559-801	731-TA-396	Ball Bearings/Singapore	Barden Corp
			Emerson Power Transmission
			Kubar Bearings
			McGill Manufacturing Co
			MPB
			Rexnord Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Rollway Bearings
			Torrington
A-559-802	731-TA-415	Industrial Belts/Singapore	The Gates Rubber Company
			The Goodyear Tire and Rubber Company
A-560-801	731-TA-742	Melamine Institutional Dinnerware/Indonesia	Carlisle Food Service Products
			Lexington United
			Plastics Manufacturing
A-560-802	731-TA-779	Preserved Mushrooms/Indonesia	LK Bowman
			Modern Mushroom Farms
			Monterey Mushrooms
			Mount Laurel Canning
			Mushroom Canning
			Southwood Farms
			Sunny Dell Foods
			United Canning
A-560-803	731-TA-787	Extruded Rubber Thread/Indonesia	North American Rubber Thread
A-560-805	731-TA-818	Cut-to-Length Carbon Steel Plate/Indonesia	Bethlehem Steel
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			IPSCO Steel
			National Steel
			Tuscaloosa Steel
			US Steel
			United Steelworkers of America
A-560-811	731-TA-875	Steel Concrete Reinforcing Bar/Indonesia	AB Steel Mill Inc
			AmeriSteel
			Birmingham Steel
			Border Steel
			Cascade Steel Rolling Mills Inc
			CMC Steel Group
			Co-Steel Inc
			Marion Steel
			North Star Steel Co
			Nucor Steel
			Rebar Trade Action Coalition
			Riverview Steel
			Sheffield Steel
			TAMCO
			TXI-Chaparral Steel Co
A-560-812	731-TA-901	Hot-Rolled Steel Products/Indonesia	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-560-815	731-TA-957	Carbon and Certain Alloy Steel Wire Rod/Indonesia	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
A-560-818	731-TA-1097	Certain Lined Paper School Supplies/Indonesia	Fay Paper Products Inc
			MeadWestvaco Consumer & Office Products
			Norcom Inc
			Pacon Corp
			Roaring Spring Blank Book Co
			Top Flight Inc
			United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW)
A-565-801	731-TA-867	Stainless Steel Butt-Weld Pipe Fittings/Philippines	Flo-Mac Inc
			Gerlin
			Markovitz Enterprises
			Shaw Alloy Piping Products
			Taylor Forge Stainless
A-570-001	731-TA-125	Potassium Permanganate/China	Carus Chemical
A-570-002	731-TA-130	Chloropicrin/China	LCP Chemicals & Plastics
			Niklor Chemical
A-570-003	731-TA-103	Cotton Shop Towels/China	Milliken
			Texel Industries
			Wikit
A-570-007	731-TA-149	Barium Chloride/China	Chemical Products
A-570-101	731-TA-101	Greige Polyester Cotton Printcloth/China	Alice Manufacturing
			Clinton Mills
			Dan River
			Greenwood Mills
			Hamrick Mills
			M Lowenstein
			Mayfair Mills
			Mount Vernon Mills
A-570-501	731-TA-244	Natural Bristle Paint Brushes/China	Baltimore Brush
			Bestt Liebco
			Elder & Jenks
			EZ Paintr
			H&G Industries
			Joseph Lieberman & Sons
			Purdy
			Rubberset

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Thomas Paint Applicators Wooster Brush
A-570-502	731-TA-265	Iron Construction Castings/China	Alhambra Foundry Allegheny Foundry Bingham & Taylor Campbell Foundry Charlotte Pipe & Foundry Deeter Foundry East Jordan Foundry Le Baron Foundry Municipal Castings Neenah Foundry Opelika Foundry Pinkerton Foundry Tyler Pipe US Foundry & Manufacturing Vulcan Foundry
A-570-504	731-TA-282	Petroleum Wax Candles/China	The Al Root Company Candle Artisans Inc Candle-Lite Cathedral Candle Colonial Candle of Cape Cod General Wax & Candle Lenox Candles Lumi-Lite Candle Meuch-Kreuzer Candle National Candle Association Will & Baumer WNS
A-570-506	731-TA-298	Porcelain-on-Steel Cooking Ware/China	General Housewares
A-570-601	731-TA-344	Tapered Roller Bearings/China	L&S Bearing Timken Torrington
A-570-802	731-TA-441	Industrial Nitrocellulose/China	Hercules
A-570-803	731-TA-457-A	Axes and Adzes/China	Council Tool Co Inc Warwood Tool Woodings-Verona
A-570-803	731-TA-457-B	Bars and Wedges/China	Council Tool Co Inc Warwood Tool Woodings-Verona
A-570-803	731-TA-457-C	Hammers and Sledges/China	Council Tool Co Inc Warwood Tool Woodings-Verona
A-570-803	731-TA-457-D	Picks and Mattocks/China	Council Tool Co Inc Warwood Tool Woodings-Verona
A-570-804	731-TA-464	Sparklers/China	BJ Alan Diamond Sparkler Elkton Sparkler
A-570-805	731-TA-466	Sodium Thiosulfate/China	Calabrian
A-570-806	731-TA-472	Silicon Metal/China	American Alloys

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Elkem Metals Globe Metallurgical International Union of Electronics, Electrical, Machine and Furniture Workers (Local 693) Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech SiMETCO SKW Alloys Textile Processors, Service Trades, Health Care Professional and Technical Employees (Local 60) United Steelworkers of America (Locals 5171, 8538 and 12646)
A-570-808	731-TA-474	Chrome-Plated Lug Nuts/China	Consolidated International Automotive Key Manufacturing McGard
A-570-811	731-TA-497	Tungsten Ore Concentrates/China	Curtis Tungsten US Tungsten
A-570-814	731-TA-520	Carbon Steel Butt-Weld Pipe Fittings/China	Hackney Ladish Mills Iron Works Steel Forgings Tube Forgings of America
A-570-815	731-TA-538	Sulfanilic Acid/China	R-M Industries
A-570-819	731-TA-567	Ferrosilicon/China	AIMCOR Alabama Silicon American Alloys Globe Metallurgical Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
A-570-822	731-TA-624	Helical Spring Lock Washers/China	Illinois Tool Works
A-570-825	731-TA-653	Sebacic Acid/China	Union Camp
A-570-826	731-TA-663	Paper Clips/China	ACCO USA Labelon/Noesting TRICO Manufacturing
A-570-827	731-TA-669	Cased Pencils/China	Blackfeet Indian Writing Instrument Dixon-Ticonderoga Empire Berol Faber-Castell General Pencil JR Moon Pencil Musgrave Pen & Pencil Panda Writing Instrument Manufacturers Association, Pencil Section
A-570-828	731-TA-672	Silicomanganese/China	Elkem Metals Oil, Chemical and Atomic Workers (Local 3-639)
A-570-830	731-TA-677	Coumarin/China	Rhone-Poulenc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-570-831	731-TA-683	Fresh Garlic/China	A&D Christopher Ranch
			Belridge Packing
			Colusa Produce
			Denice & Filice Packing
			El Camino Packing
			The Garlic Company
			Vessey and Company
A-570-832	731-TA-696	Pure Magnesium/China	Dow Chemical
			International Union of Operating Engineers (Local 564)
			Magnesium Corporation of America
			United Steelworkers of America (Local 8319)
A-570-835	731-TA-703	Furfuryl Alcohol/China	QO Chemicals
A-570-836	731-TA-718	Glycine/China	Chattem
			Hampshire Chemical
A-570-840	731-TA-724	Manganese Metal/China	Elkem Metals
			Kerr-McGee
A-570-842	731-TA-726	Polyvinyl Alcohol/China	Air Products and Chemicals
A-570-844	731-TA-741	Melamine Institutional Dinnerware/China	Carlisle Food Service Products
			Lexington United
			Plastics Manufacturing
A-570-846	731-TA-744	Brake Rotors/China	Brake Parts
			Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers
			Iroquois Tool Systems
			Kelsey Hayes
			Kinetic Parts Manufacturing
			Overseas Auto Parts
			Wagner Brake
A-570-847	731-TA-749	Persulfates/China	FMC
A-570-848	731-TA-752	Crawfish Tail Meat/China	A&S Crawfish
			Acadiana Fisherman's Co-Op
			Arnaudville Seafood
			Atchafalaya Crawfish Processors
			Basin Crawfish Processors
			Bayou Land Seafood
			Becnel's Meat & Seafood
			Bellard's Poultry & Crawfish
			Bonanza Crawfish Farm
			Cajun Seafood Distributors
			Carl's Seafood
			Catahoula Crawfish
			Choplin SFD
			CJ's Seafood & Purged Crawfish
			Clearwater Crawfish
			Crawfish Processors Alliance
			Harvey's Seafood
			Lawtell Crawfish Processors
			Louisiana Premium Seafoods
			Louisiana Seafood
			LT West
			Phillips Seafood

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Prairie Cajun Wholesale Seafood Dist
			Riceland Crawfish
			Schexnider Crawfish
			Seafood International Distributors
			Sylvester's Processors
			Teche Valley Seafood
A-570-849	731-TA-753	Cut-to-Length Carbon Steel Plate/China	Acme Metals Inc
			Bethlehem Steel
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Lukens Inc
			National Steel
			US Steel
			United Steelworkers of America
A-570-850	731-TA-757	Collated Roofing Nails/China	Illinois Tool Works
			International Staple and Machines
			Stanley-Bostitch
A-570-851	731-TA-777	Preserved Mushrooms/China	LK Bowman
			Modern Mushroom Farms
			Monterey Mushrooms
			Mount Laurel Canning
			Mushroom Canning
			Southwood Farms
			Sunny Dell Foods
			United Canning
A-570-852	731-TA-814	Creatine Monohydrate/China	Pfanstiehl Laboratories
A-570-853	731-TA-828	Aspirin/China	Rhodia
A-570-855	731-TA-841	Non-Frozen Apple Juice Concentrate/China	Coloma Frozen Foods
			Green Valley Apples of California
			Knouse Foods Coop
			Mason County Fruit Packers Coop
			Tree Top
A-570-856	731-TA-851	Synthetic Indigo/China	Buffalo Color
			United Steelworkers of America
A-570-860	731-TA-874	Steel Concrete Reinforcing Bar/China	AB Steel Mill Inc
			AmeriSteel
			Auburn Steel
			Birmingham Steel
			Border Steel
			Cascade Steel Rolling Mills Inc
			CMC Steel Group
			Co-Steel Inc
			Marion Steel
			North Star Steel Co
			Nucor Steel
			Rebar Trade Action Coalition
			Riverview Steel
			Sheffield Steel
			TAMCO
			TXI-Chaparral Steel Co

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-570-862	731-TA-891	Foundry Coke/China	ABC Coke
			Citizens Gas and Coke Utility
			Erie Coke
			Sloss Industries Corp
			Tonawanda Coke
			United Steelworkers of America
A-570-863	731-TA-893	Honey/China	AH Meyer & Sons
			Adee Honey Farms
			Althoff Apiaries
			American Beekeeping Federation
			American Honey Producers Association
			Anderson Apiaries
			Arroyo Apiaries
			Artesian Honey Producers
			B Weaver Apiaries
			Bailey Enterprises
			Barkman Honey
			Basler Honey Apiary
			Beals Honey
			Bears Paw Apiaries
			Beaverhead Honey
			Bee Biz
			Bee Haven Honey
			Belliston Brothers Apiaries
			Big Sky Honey
			Bill Rhodes Honey
			Richard E Blake
			Curt Bronnenberg
			Brown's Honey Farms
			Brumley's Bees
			Buhmann Apiaries
			Carys Honey Farms
			Chaparrel Honey
			Charles Apiaries
			Mitchell Charles
			Collins Honey
			Conor Apiaries
			Coy's Honey Farm
			Dave Nelson Apiaries
			Delta Bee
			Eisele's Pollination & Honey
			Ellingsoa's
			Elliott Curtis & Sons
			Charles L Emmons, Sr
			Gause Honey
			Gene Brandi Apiaries
			Griffith Honey
			Haff Apiaries
			Hamilton Bee Farms
			Hamilton Honey
			Happie Bee

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Harvest Honey
			Harvey's Honey
			Hiatt Honey
			Hoffman Honey
			Hollman Apiaries
			Honey House
			Honeybee Apiaries
			Gary M Honl
			Rand William Honl and Sydney Jo Honl
			James R & Joann Smith Trust
			Jaynes Bee Products
			Johnston Honey Farms
			Larry Johnston
			Ke-An Honey
			Kent Honeybees
			Lake-Indianhead Honey Farms
			Lamb's Honey Farm
			Las Flores Apiaries
			Mackrill Honey Farms & Sales
			Raymond Marquette
			Mason & Sons Honey
			McCoy's Sunny South Apiaries
			Merrimack Valley Apiaries & Evergreen Honey
			Met 2 Honey Farm
			Missouri River Honey
			Mitchell Brothers Honey
			Monda Honey Farm
			Montana Dakota Honey
			Northern Bloom Honey
			Noye's Apiaries
			Oakes Honey
			Oakley Honey Farms
			Old Mill Apiaries
			Opp Honey
			Oro Dulce
			Peterson's "Naturally Sweet" Honey
			Potoczak Bee Farms
			Price Apiaries
			Pure Sweet Honey Farms
			Robertson Pollination Service
			Robson Honey
			William Robson
			Rosedale Apiaries
			Ryan Apiaries
			Schmidt Honey Farms
			Simpson Apiaries
			Sioux Honey Association
			Smoot Honey
			Solby Honey
			Stahlman Apiaries
			Steve E Parks Apiaries

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Stroope Bee & Honey
			T&D Honey Bee
			Talbott's Honey
			Terry Apiaries
			Thompson Apiaries
			Triple A Farm
			Tropical Blossom Honey
			Tubbs Apiaries
			Venable Wholesale
			Walter L Wilson Buzz 76 Apiaries
			Wiebersiek Honey Farms
			Wilmer Farms
			Brent J Woodworth
			Wooten's Golden Queens
			Yaddof Apiaries
A-570-864	731-TA-895	Pure Magnesium (Granular)/China	Concerned Employees of Northwest Alloys
			Magnesium Corporation of America
			United Steelworkers of America
			United Steelworkers of America (Local 8319)
A-570-865	731-TA-899	Hot-Rolled Steel Products/China	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-570-866	731-TA-921	Folding Gift Boxes/China	Field Container
			Harvard Folding Box
			Sterling Packaging
			Superior Packaging
A-570-867	731-TA-922	Automotive Replacement Glass Windshields/China	PPG Industries
			Safelite Glass
			Viracon/Curvlite Inc
			Visteon Corporation
A-570-868	731-TA-932	Folding Metal Tables and Chairs/China	Krueger International
			McCourt Manufacturing
			Meco
			Virco Manufacturing
A-570-873	731-TA-986	Ferrovanadium/China	Bear Metallurgical Co
			Shieldalloy Metallurgical Corp
A-570-875	731-TA-990	Non-Malleable Cast Iron Pipe Fittings/China	Anvil International Inc
			Buck Co Inc
			Frazier & Frazier Industries
			Ward Manufacturing Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
A-570-877	731-TA-1010	Lawn and Garden Steel Fence Posts/China	Steel City Corp
A-570-878	731-TA-1013	Saccharin/China	PMC Specialties Group Inc
A-570-879	731-TA-1014	Polyvinyl Alcohol/China	Celanese Ltd E I du Pont de Nemours & Co
A-570-880	731-TA-1020	Barium Carbonate/China	Chemical Products Corp
A-570-881	731-TA-1021	Malleable Iron Pipe Fittings/China	Anvil International Inc Buck Co Inc Ward Manufacturing Inc
A-570-882	731-TA-1022	Refined Brown Aluminum Oxide/China	C-E Minerals Treibacher Schleifmittel North America Inc Washington Mills Co Inc
A-570-884	731-TA-1034	Certain Color Television Receivers/China	Five Rivers Electronic Innovations LLC Industrial Division of the Communications Workers of America (IUECWA) International Brotherhood of Electrical Workers (IBEW)
A-570-886	731-TA-1043	Polyethylene Retail Carrier Bags/China	Aargus Plastics Inc Advance Polybags Inc Advance Polybags (Nevada) Inc Advance Polybags (Northeast) Inc Alpha Industries Inc Alpine Plastics Inc Ampac Packaging LLC API Enterprises Inc Command Packaging Continental Poly Bags Inc Durabag Co Inc Europackaging LLC Genpak LLC (formerly Continental Superbag LLC) Genpak LLC (formerly Strout Plastics) Hilex Poly Co LLC Inteplast Group Ltd PCL Packaging Inc Poly-Pak Industries Inc Roplast Industries Inc Superbag Corp Unistar Plastics LLC Vanguard Plastics Inc VS Plastics LLC
A-570-887	731-TA-1046	Tetrahydrofurfuryl Alcohol/China	Penn Specialty Chemicals Inc
A-570-888	731-TA-1047	Ironing Tables and Certain Parts Thereof/China	Home Products International Inc
A-570-890	731-TA-1058	Wooden Bedroom Furniture/China	American Drew American of Martinsville Bassett Furniture Industries Inc Bebe Furniture Carolina Furniture Works Inc Carpenters Industrial Union Local 2093 Century Furniture Industries Country Craft Furniture Inc Craftique Crawford Furniture Mfg Corp EJ Victor Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Forest Designs
			Harden Furniture Inc
			Hart Furniture
			Higdon Furniture Co
			IUE Industrial Division of CWA Local 82472
			Johnston Tombigbee Furniture Mfg Co
			Kincaid Furniture Co Inc
			L & J G Stickley Inc
			Lea Industries
			Michels & Co
			MJ Wood Products Inc
			Mobel Inc
			Modern Furniture Manufacturers Inc
			Moosehead Mfg Co
			Oakwood Interiors
			O'Sullivan Industries Inc
			Pennsylvania House Inc
			Perdues Inc
			Sandberg Furniture Mfg Co Inc
			Stanley Furniture Co Inc
			Statton Furniture Mfg Assoc
			T Copeland & Sons
			Teamsters, Chauffeurs, Warehousemen and Helpers Local 991
			Tom Seely Furniture
			UBC Southern Council of Industrial Workers Local Union 2305
			United Steelworkers of America Local 193U
			Vaughan Furniture Co Inc
			Vaughan-Bassett Furniture Co Inc
			Vermont Tubbs
			Webb Furniture Enterprises Inc
A-570-891	731-TA-1059	Hand Trucks and Certain Parts Thereof/China	B&P Manufacturing
			Gleason Industrial Products Inc
			Harper Trucks Inc
			Magline Inc
			Precision Products Inc
			Wesco Industrial Products Inc
A-570-892	731-TA-1060	Carbazole Violet Pigment 23/China	Allegheny Color Corp
			Barker Fine Color Inc
			Clariant Corp
			Nation Ford Chemical Co
			Sun Chemical Co
A-570-894	731-TA-1070	Certain Tissue Paper Products/China	American Crepe Corp
			Cindus Corp
			Eagle Tissue LLC
			Flower City Tissue Mills Co and Subsidiary
			Garlock Printing & Converting Corp
			Green Mtn Specialties Inc
			Hallmark Cards Inc
			Pacon Corp

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Paper, Allied-Industrial, Chemical and Energy Workers International Union AFL-CIO ("PACE") Paper Service LTD Putney Paper Seaman Paper Co of MA Inc
A-570-895	731-TA-1069	Certain Crepe Paper Products/China	American Crepe Corp Cindus Corp Paper, Allied-Industrial, Chemical and Energy Workers International Union AFL-CIO ("PACE") Seaman Paper Co of MA Inc
A-570-896	731-TA-1071	Alloy Magnesium/China	Garfield Alloys Inc Glass, Molders, Pottery, Plastics & Allied Workers International Local 374 Halaco Engineering MagReTech Inc United Steelworkers of America Local 8319 US Magnesium LLC
A-570-899	731-TA-1091	Artists' Canvas/China	Duro Art Industries ICG/Holliston Mills Inc Signature World Class Canvas LLC Tara Materials Inc
A-570-898	731-TA-1082	Chlorinated Isocyanurates/China	BioLab Inc Clearon Corp Occidental Chemical Corp
A-570-901	731-TA-1095	Certain Lined Paper School Supplies/China	Fay Paper Products Inc MeadWestvaco Consumer & Office Products Norcom Inc Pacon Corp Roaring Spring Blank Book Co Top Flight Inc United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW)
A-570-904	731-TA-1103	Certain Activated Carbon/China	Calgon Carbon Corp Norit Americas Inc
A-570-905	731-TA-1104	Certain Polyester Staple Fiber/China	DAK Americas LLC Formed Fiber Techmologies LLC Nan Ya Plastics Corp America Palmetto Synthetics LLC United Synthetics Inc (USI) Wellman Inc
A-570-908	731-TA-1110	Soium Hexametaphosphate (SHMP)/China	ICL Performance Products LP Innophos Inc
A-580-008	731-TA-134	Color Television Receivers/Korea	Committee to Preserve American Color Television Independent Radionic Workers of America Industrial Union Department, AFL-CIO International Brotherhood of Electrical Workers International Union of Electrical, Radio and Machine Workers
A-580-507	731-TA-279	Malleable Cast Iron Pipe Fittings/Korea	Grinnell Stanley G Flagg

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Stockham Valves & Fittings U-Brand Ward Manufacturing
A-580-601	731-TA-304	Top-of-the-Stove Stainless Steel Cooking Ware/ Korea	Farberware Regal Ware Revere Copper & Brass WearEver/Proctor Silex
A-580-603	731-TA-315	Brass Sheet and Strip/Korea	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company Olin Revere Copper Products United Steelworkers of America
A-580-605	731-TA-369	Color Picture Tubes/Korea	Industrial Union Department, AFL-CIO International Association of Machinists & Aerospace Workers International Brotherhood of Electrical Workers International Union of Electronic, Electrical, Technical, Salaried and Machine Workers Philips Electronic Components Group United Steelworkers of America Zenith Electronics
A-580-803	731-TA-427	Small Business Telephone Systems/Korea	American Telephone & Telegraph Comdial Eagle Telephonic
A-580-805	731-TA-442	Industrial Nitrocellulose/Korea	Hercules
A-580-807	731-TA-459	Polyethylene Terephthalate Film/Korea	E I du Pont de Nemours Hoechst Celanese ICI Americas
A-580-809	731-TA-533	Circular Welded Nonalloy Steel Pipe/Korea	Allied Tube & Conduit American Tube Bull Moose Tube Century Tube CSI Tubular Products Cyclops Laclede Steel LTV Tubular Products Maruichi American Sharon Tube USX Western Tube & Conduit Wheatland Tube
A-580-810	731-TA-540	Welded ASTM A-312 Stainless Steel Pipe/Korea	Avesta Sandvik Tube Bristol Metals Crucible Materials

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Damascus Tubular Products United Steelworkers of America
A-580-811	731-TA-546	Carbon Steel Wire Rope/Korea	Bridon American Macwhyte Paulsen Wire Rope The Rochester Corporation United Automobile, Aerospace and Agricultural Implement Workers (Local 960) Williamsport Wire-rope Works Wire Rope Corporation of America
A-580-812	731-TA-556	DRAMs of 1 Megabit and Above/Korea	Micron Technology NEC Electronics Texas Instruments
A-580-813	731-TA-563	Stainless Steel Butt-Weld Pipe Fittings/Korea	Flo-Mac Inc Gerlin Markovitz Enterprises Shaw Alloy Piping Products Taylor Forge Stainless
A-580-815	731-TA-607	Cold-Rolled Carbon Steel Flat Products/Korea	Armco Steel Bethlehem Steel California Steel Industries Gulf States Steel Inland Steel Industries LTV Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
A-580-816	731-TA-618	Corrosion-Resistant Carbon Steel Flat Products/ Korea	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries LTV Steel Lukens Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			WCI Steel Weirton Steel
A-580-825	731-TA-715	Oil Country Tubular Goods/Korea	Bellville Tube IPSCO Koppel Steel Lone Star Steel Maverick Tube Newport Steel North Star Steel US Steel USS/Kobe
A-580-829	731-TA-772	Stainless Steel Wire Rod/Korea	AL Tech Specialty Steel Carpenter Technology Republic Engineered Steels Talley Metals Technology United Steelworkers of America
A-580-831	731-TA-791	Stainless Steel Plate in Coils/Korea	Allegheny Ludlum Armco Steel J&L Specialty Steel Lukens Steel North American Stainless United Steelworkers of America
A-580-834	731-TA-801	Stainless Steel Sheet and Strip/Korea	Allegheny Ludlum Armco Steel Bethlehem Steel Butler Armco Independent Union Carpenter Technology Corp J&L Specialty Steel North American Stainless United Steelworkers of America Zanesville Armco Independent Organization
A-580-836	731-TA-821	Cut-to-Length Carbon Steel Plate/Korea	Bethlehem Steel CitiSteel USA Inc Geneva Steel Gulf States Steel IPSCO Steel National Steel Tuscaloosa Steel US Steel United Steelworkers of America
A-580-839	731-TA-825	Polyester Staple Fiber/Korea	Arteva Specialties Sarl E I du Pont de Nemours Intercontinental Polymers Nan Ya Corporation America Wellman
A-580-841	731-TA-854	Structural Steel Beams/Korea	Northwestern Steel and Wire Nucor Nucor-Yamato Steel TXI-Chaparral Steel United Steelworkers of America
A-580-844	731-TA-877	Steel Concrete Reinforcing Bar/Korea	AB Steel Mill Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			AmeriSteel Auburn Steel Birmingham Steel Border Steel Cascade Steel Rolling Mills Inc CMC Steel Group Co-Steel Inc Marion Steel North Star Steel Co Nucor Steel Rebar Trade Action Coalition Riverview Steel Sheffield Steel TAMCO TXI-Chaparral Steel Co
A-580-846	731-TA-889	Stainless Steel Angle/Korea	Slater Steels United Steelworkers of America
A-580-847	731-TA-916	Stainless Steel Bar/Korea	Carpenter Technology Crucible Specialty Metals Electralloy Empire Specialty Steel Republic Technologies International Slater Steels United Steelworkers of America
A-580-850	731-TA-1017	Polyvinyl Alcohol/Korea	Celanese Ltd E I du Pont de Nemours & Co
A-580-852	731-TA-1026	Prestressed Concrete Steel Wire Strand/Korea	American Spring Wire Corp Insteel Wire Products Co Sivaco Georgia LLC Strand Tech Martin Inc Sumiden Wire Products Corp
A-583-008	731-TA-132	Small Diameter Carbon Steel Pipe and Tube/Tawian	Allied Tube & Conduit American Tube Bull Moose Tube Copperweld Tubing J&L Steel Kaiser Steel Merchant Metals Pittsburgh Tube Southwestern Pipe Western Tube & Conduit
A-583-009	731-TA-135	Color Television Receivers/Taiwan	Committee to Preserve American Color Television Independent Radionic Workers of America Industrial Union Department, AFL-CIO International Brotherhood of Electrical Workers International Union of Electrical, Radio and Machine Workers
A-583-080	AA1921-197	Carbon Steel Plate/Taiwan	No Petition (self-initiated by Treasury); Commerce service list identifies: Bethlehem Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			China Steel
			US Steel
A-583-505	731-TA-277	Oil Country Tubular Goods/Taiwan	CF&I Steel
			Copperweld Tubing
			Cyclops
			KPC
			Lone Star Steel
			LTV Steel
			Maverick Tube
			Quanex
			US Steel
A-583-507	731-TA-280	Malleable Cast Iron Pipe Fittings/Taiwan	Grinnell
			Stanley G Flagg
			Stockham Valves & Fittings
			U-Brand
			Ward Manufacturing
A-583-508	731-TA-299	Porcelain-on-Steel Cooking Ware/Taiwan	General Housewares
A-583-603	731-TA-305	Top-of-the-Stove Stainless Steel Cooking Ware/ Taiwan	Farberware
			Regal Ware
			Revere Copper & Brass
			WearEver/Proctor Silex
A-583-605	731-TA-310	Carbon Steel Butt-Weld Pipe Fittings/Taiwan	Ladish
			Mills Iron Works
			Steel Forgings
			Tube Forgings of America
			Weldbend
A-583-803	731-TA-410	Light-Walled Rectangular Tube/Taiwan	Bull Moose Tube
			Hannibal Industries
			Harris Tube
			Maruichi American
			Searing Industries
			Southwestern Pipe
			Western Tube & Conduit
A-583-806	731-TA-428	Small Business Telephone Systems/Taiwan	American Telephone & Telegraph
			Comdial
			Eagle Telephonic
A-583-810	731-TA-475	Chrome-Plated Lug Nuts/Taiwan	Consolidated International Automotive
			Key Manufacturing
			McGard
A-583-814	731-TA-536	Circular Welded Nonalloy Steel Pipe/Taiwan	Allied Tube & Conduit
			American Tube
			Bull Moose Tube
			Century Tube
			CSI Tubular Products
			Cyclops
			Laclede Steel
			LTV Tubular Products
			Maruichi American
			Sharon Tube
			USX
			Western Tube & Conduit

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Wheatland Tube
A-583-815	731-TA-541	Welded ASTM A-312 Stainless Steel Pipe/Taiwan	Avesta Sandvik Tube Bristol Metals Crucible Materials Damascus Tubular Products United Steelworkers of America
A-583-816	731-TA-564	Stainless Steel Butt-Weld Pipe Fittings/Taiwan	Flo-Mac Inc Gerlin Markovitz Enterprises Shaw Alloy Piping Products Taylor Forge Stainless
A-583-820	731-TA-625	Helical Spring Lock Washers/Taiwan	Illinois Tool Works
A-583-821	731-TA-640	Forged Stainless Steel Flanges/Taiwan	Gerlin Ideal Forging Maass Flange Markovitz Enterprises
A-583-824	731-TA-729	Polyvinyl Alcohol/Taiwan	Air Products and Chemicals
A-583-825	731-TA-743	Melamine Institutional Dinnerware/Taiwan	Carlisle Food Service Products Lexington United Plastics Manufacturing
A-583-826	731-TA-759	Collated Roofing Nails/Taiwan	Illinois Tool Works International Staple and Machines Stanley-Bostitch
A-583-827	731-TA-762	SRAMs/Taiwan	Micron Technology
A-583-828	731-TA-775	Stainless Steel Wire Rod/Taiwan	AL Tech Specialty Steel Carpenter Technology Republic Engineered Steels Talley Metals Technology United Steelworkers of America
A-583-830	731-TA-793	Stainless Steel Plate in Coils/Taiwan	Allegheny Ludlum Armco Steel J&L Specialty Steel Lukens Steel North American Stainless United Steelworkers of America
A-583-831	731-TA-803	Stainless Steel Sheet and Strip/Taiwan	Allegheny Ludlum Armco Steel Bethlehem Steel Butler Armco Independent Union Carpenter Technology Corp J&L Specialty Steel North American Stainless United Steelworkers of America Zanesville Armco Independent Organization
A-583-833	731-TA-826	Polyester Staple Fiber/Taiwan	Arteva Specialties Sarl Intercontinental Polymers Nan Ya Plastics Corporation America Wellman
A-583-835	731-TA-906	Hot-Rolled Steel Products/Taiwan	Bethlehem Steel Gallatin Steel Independent Steelworkers

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-583-837	731-TA-934	Polyethylene Terephthalate Film, Sheet and Strip (PET Film)/Taiwan	DuPont Teijin Films
			Mitsubishi Polyester Film LLC
			SKC America Inc
			Toray Plastics (America)
A-588-005	731-TA-48	High Power Microwave Amplifiers/Japan	Aydin
			MCL
A-588-015	AA1921-66	Television Receivers/Japan	AGIV (USA)
			Casio Computer
			CBM America
			Citizen Watch
			Funai Electric
			Hitachi
			Industrial Union Department
			JC Penny
			Matsushita
			Mitsubishi Electric
			Montgomery Ward
			NEC
			Orion Electric
			PT Imports
			Philips Electronics
			Philips Magnavox
			Sanyo
			Sharp
			Toshiba
			Toshiba America Consumer Products
			Victor Company of Japan
			Zenith Electronics
A-588-028	AA1921-111	Roller Chain/Japan	Acme Chain Division, North American Rockwell
			American Chain Association
			Atlas Chain & Precision Products
			Diamond Chain
			Link-Belt Chain Division, FMC
			Morse Chain Division, Borg Warner
			Rex Chainbelt
A-588-029	AA1921-85	Fish Netting of Man-Made Fiber/Japan	Jovanovich Supply
			LFSI
			Trans-Pacific Trading
A-588-038	AA1921-98	Bicycle Speedometers/Japan	Avocet
			Cat Eye

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Diversified Products NS International Sanyo Electric Stewart-Warner
A-588-041	AA1921-115	Synthetic Methionine/Japan	Monsanto
A-588-045	AA1921-124	Steel Wire Rope/Japan	AMSTED Industries
A-588-046	AA1921-129	Polychloroprene Rubber/Japan	E I du Pont de Nemours
A-588-054	AA1921-143	Tapered Roller Bearings 4 Inches and Under/Japan	No companies identified as petitioners at the Commission; Commerce service list identifies: American Honda Motor Federal Mogul Ford Motor General Motors Honda Hoover-NSK Bearing Isuzu Itocho ITOCHU International Kanematsu-Goshu USA Kawasaki Heavy Duty Industries Komatsu America Koyo Seiko Kubota Tractor Mitsubishi Motorambar Nachi America Nachi Western Nachi-Fujikoshi Nippon Seiko Nissan Motor Nissan Motor USA NSK NTN Subaru of America Sumitomo Suzuki Motor Timken Toyota Motor Sales Yamaha Motors
A-588-055	AA1921-154	Acrylic Sheet/Japan	Polycast Technology
A-588-056	AA1921-162	Melamine/Japan	Melamine Chemical
A-588-068	AA1921-188	Prestressed Concrete Steel Wire Strand/Japan	American Spring Wire Armco Steel Bethlehem Steel CF&I Steel Florida Wire & Cable
A-588-405	731-TA-207	Cellular Mobile Telephones/Japan	EF Johnson Motorola
A-588-602	731-TA-309	Carbon Steel Butt-Weld Pipe Fittings/Japan	Ladish Mills Iron Works

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Steel Forgings Tube Forgings of America Weldbend
A-588-604	731-TA-343	Tapered Roller Bearings Over 4 Inches/Japan	L&S Bearing Timken Torrington
A-588-605	731-TA-347	Malleable Cast Iron Pipe Fittings/Japan	Grinnell Stanley G Flagg Stockham Valves & Fittings U-Brand Ward Manufacturing
A-588-609	731-TA-368	Color Picture Tubes/Japan	Industrial Union Department, AFL-CIO International Association of Machinists & Aerospace Workers International Brotherhood of Electrical Workers International Union of Electronic, Electrical, Technical, Salaried and Machine Workers Philips Electronic Components Group United Steelworkers of America Zenith Electronics
A-588-702	731-TA-376	Stainless Steel Butt-Weld Pipe Fittings/Japan	Flo-Mac Inc Flowline Shaw Alloy Piping Products Taylor Forge Stainless
A-588-703	731-TA-377	Internal Combustion Industrial Forklift Trucks/Japan	Ad-Hoc Group of Workers from Hyster's Berea, Kentucky and Sulligent, Alabama Facilities Allied Industrial Workers of America Hyster Independent Lift Truck Builders Union International Association of Machinists & Aerospace Workers United Shop & Service Employees
A-588-704	731-TA-379	Brass Sheet and Strip/Japan	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company North Coast Brass & Copper Olin Pegg Metals Revere Copper Products United Steelworkers of America
A-588-706	731-TA-384	Nitrile Rubber/Japan	Uniroyal Chemical
A-588-707	731-TA-386	Granular Polytetrafluoroethylene/Japan	E I du Pont de Nemours ICI Americas
A-588-802	731-TA-389	3.5" Microdisks/Japan	Verbatim
A-588-804	731-TA-394-A	Ball Bearings/Japan	Barden Corp

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Emerson Power Transmission Kubar Bearings McGill Manufacturing Co MPB Rexnord Inc Rollway Bearings Torrington
A-588-804	731-TA-394-B	Cylindrical Roller Bearings/Japan	Barden Corp Emerson Power Transmission Kubar Bearings MPB Rollway Bearings Torrington
A-588-804	731-TA-394-C	Spherical Plain Bearings/Japan	Barden Corp Emerson Power Transmission Kubar Bearings Rollway Bearings Torrington
A-588-806	731-TA-408	Electrolytic Manganese Dioxide/Japan	Chemetals Kerr-McGee Rayovac
A-588-807	731-TA-414	Industrial Belts/Japan	The Gates Rubber Company The Goodyear Tire and Rubber Company
A-588-809	731-TA-426	Small Business Telephone Systems/Japan	American Telephone & Telegraph Comdial Eagle Telephonic
A-588-810	731-TA-429	Mechanical Transfer Presses/Japan	Allied Products United Autoworkers of America United Steelworkers of America
A-588-811	731-TA-432	Drafting Machines/Japan	Vemco
A-588-812	731-TA-440	Industrial Nitrocellulose/Japan	Hercules
A-588-815	731-TA-461	Gray Portland Cement and Clinker/Japan	Calaveras Cement Hanson Permanente Cement Independent Workers of North America (Locals 49, 52, 89, 192 and 471) International Union of Operating Engineers (Local 12) National Cement Co Inc National Cement Company of California Southdown
A-588-817	731-TA-469	Electroluminescent Flat-Panel Displays/Japan	The Cherry Corporation Electro Plasma Magnascreen OIS Optical Imaging Systems Photonics Technology Planar Systems Plasmaco
A-588-823	731-TA-571	Professional Electric Cutting Tools/Japan	Black & Decker
A-588-826	731-TA-617	Corrosion-Resistant Carbon Steel Flat Products/Japan	Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Lukens Steel
			Nextech
			Rouge Steel Co
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
A-588-831	731-TA-660	Grain-Oriented Silicon Electrical Steel/Japan	Allegheny Ludlum
			Armco Steel
			United Steelworkers of America
A-588-833	731-TA-681	Stainless Steel Bar/Japan	AL Tech Specialty Steel
			Carpenter Technology
			Crucible Specialty Metals
			Electralloy
			Republic Engineered Steels
			Slater Steels
			Talley Metals Technology
			United Steelworkers of America
A-588-835	731-TA-714	Oil Country Tubular Goods/Japan	IPSCO
			Koppel Steel
			Lone Star Steel Co
			Maverick Tube
			Newport Steel
			North Star Steel
			US Steel
A-588-836	731-TA-727	Polyvinyl Alcohol/Japan	Air Products and Chemicals
A-588-837	731-TA-737	Large Newspaper Printing Presses/Japan	Rockwell Graphics Systems
A-588-838	731-TA-739	Clad Steel Plate/Japan	Lukens Steel
A-588-839	731-TA-740	Sodium Azide/Japan	American Azide
A-588-840	731-TA-748	Gas Turbo-Compressor Systems/Japan	Demag Delaval
			Dresser-Rand
			United Steelworkers of America
A-588-841	731-TA-750	Vector Supercomputers/Japan	Cray Research
A-588-843	731-TA-771	Stainless Steel Wire Rod/Japan	AL Tech Specialty Steel
			Carpenter Technology
			Republic Engineered Steels
			Talley Metals Technology
			United Steelworkers of America
A-588-845	731-TA-800	Stainless Steel Sheet and Strip/Japan	Allegheny Ludlum
			Armco Steel
			Bethlehem Steel
			Butler Armco Independent Union
			Carpenter Technology Corp
			J&L Specialty Steel
			North American Stainless
			United Steelworkers of America
			Zanesville Armco Independent Organization
A-588-846	731-TA-807	Hot-Rolled Carbon Steel Flat Products/Japan	Acme Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Bethlehem Steel
			California Steel Industries
			Gallatin Steel
			Geneva Steel
			Gulf States Steel
			Independent Steelworkers
			IPSCO
			Ispat/Inland
			LTV Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-588-847	731-TA-820	Cut-to-Length Carbon Steel Plate/Japan	Bethlehem Steel
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			IPSCO Steel
			Tuscaloosa Steel
			US Steel
			United Steelworkers of America
A-588-850	731-TA-847	Large-Diameter Carbon Steel Seamless Pipe/Japan	North Star Steel
			Timken
			US Steel
			United Steelworkers of America
			USS/Kobe
A-588-851	731-TA-847	Small-Diameter Carbon Steel Seamless Pipe/Japan	Koppel Steel
			North Star Steel
			Sharon Tube
			Timken
			US Steel
			United Steelworkers of America
			USS/Kobe
			Vision Metals' Gulf States Tube
A-588-852	731-TA-853	Structural Steel Beams/Japan	Northwestern Steel and Wire
			Nucor
			Nucor-Yamato Steel
			TXI-Chaparral Steel
			United Steelworkers of America
A-588-854	731-TA-860	Tin-Mill Products/Japan	Independent Steelworkers
			United Steelworkers of America
			Weirton Steel
A-588-856	731-TA-888	Stainless Steel Angle/Japan	Slater Steels
			United Steelworkers of America
A-588-857	731-TA-919	Welded Large Diameter Line Pipe/Japan	American Cast Iron Pipe
			Berg Steel Pipe
			Bethlehem Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Napa Pipe/Oregon Steel Mills Saw Pipes USA Stupp US Steel
A-588-861	731-TA-1016	Polyvinyl Alcohol/Japan	Celenex Ltd E I du Pont de Nemours & Co
A-588-862	731-TA-1023	Certain Ceramic Station Post Insulators/Japan	Lapp Insulator Co LLC Newell Porcelain Co Inc Victor Insulators Inc
A-588-866	731-TA-1090	Superalloy Degassed Chromium/Japan	Eramet Marietta Inc
A-602-803	731-TA-612	Corrosion-Resistant Carbon Steel Flat Products/ Australia	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries LTV Steel Lukens Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
A-791-805	731-TA-792	Stainless Steel Plate in Coils/South Africa	Allegheny Ludlum Armco Steel J&L Specialty Steel Lukens Steel North American Stainless United Steelworkers of America
A-791-808	731-TA-850	Small-Diameter Carbon Steel Seamless Pipe/South Africa	Koppel Steel North Star Steel Sharon Tube Timken US Steel United Steelworkers of America USS/Kobe Vision Metals' Gulf States Tube
A-791-809	731-TA-905	Hot-Rolled Steel Products/South Africa	Bethlehem Steel Gallatin Steel Independent Steelworkers IPSCO LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			US Steel United Steelworkers of America WCI Steel Inc Weirton Steel Wheeling-Pittsburgh Steel Corp
A-791-815	731-TA-987	Ferrovanadium/South Africa	Bear Metallurgical Co Shieldalloy Metallurgical Corp
A-821-801	731-TA-340E	Solid Urea/Russia	Agrico Chemical American Cyanamid CF Industries First Mississippi Mississippi Chemical Terra International WR Grace
A-821-802	731-TA-539-C	Uranium/Russia	Ferret Exploration First Holding Geomex Minerals IMC Fertilizer Malapai Resources Oil, Chemical and Atomic Workers Pathfinder Mines Power Resources Rio Algom Mining Solution Mining Total Minerals Umetco Minerals Uranium Resources
A-821-804	731-TA-568	Ferrosilicon/Russia	AIMCOR Alabama Silicon American Alloys Globe Metallurgical Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
A-821-805	731-TA-697	Pure Magnesium/Russia	Dow Chemical International Union of Operating Engineers (Local 564) Magnesium Corporation of America United Steelworkers of America (Local 8319)
A-821-807	731-TA-702	Ferrovanadium and Nitrided Vanadium/Russia	Shieldalloy Metallurgical
A-821-809	731-TA-808	Hot-Rolled Carbon Steel Flat Products/Russia	Acme Steel Bethlehem Steel California Steel Industries Gallatin Steel Geneva Steel Gulf States Steel Independent Steelworkers IPSCO Ispat/Inland LTV Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-821-811	731-TA-856	Ammonium Nitrate/Russia	Agrium
			Air Products and Chemicals
			El Dorado Chemical
			LaRoche
			Mississippi Chemical
			Nitram
			Wil-Gro Fertilizer
A-821-817	731-TA-991	Silicon Metal/Russia	Globe Metallurgical Inc
			SIMCALA Inc
A-821-819	731-TA1072	Pure and Alloy Magnesium/Russia	Garfield Alloys Inc
			Glass, Molders, Pottery, Plastics & Allied Workers International Local 374
			Halaco Engineering
			MagReTech Inc
			United Steelworkers of America Local 8319
			US Magnesium LLC
A-822-801	731-TA-340B	Solid Urea/Belarus	Agrico Chemical
			American Cyanamid
			CF Industries
			First Mississippi
			Mississippi Chemical
			Terra International
			WR Grace
A-822-804	731-TA-873	Steel Concrete Reinforcing Bar/Belarus	AB Steel Mill Inc
			AmeriSteel
			Auburn Steel
			Birmingham Steel
			Border Steel
			Cascade Steel Rolling Mills Inc
			CMC Steel Group
			Co-Steel Inc
			Marion Steel
			North Star Steel Co
			Nucor Steel
			Rebar Trade Action Coalition
			Riverview Steel
			Sheffield Steel
			TAMCO
			TXI-Chaparral Steel Co
A-823-801	731-TA-340H	Solid Urea/Ukraine	Agrico Chemical
			American Cyanamid
			CF Industries

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			First Mississippi Mississippi Chemical Terra International WR Grace
A-823-802	731-TA-539-E	Uranium/Ukraine	Ferret Exploration First Holding Geomex Minerals IMC Fertilizer Malapai Resources Oil, Chemical and Atomic Workers Pathfinder Mines Power Resources Rio Algom Mining Solution Mining Total Minerals Umetco Minerals Uranium Resources
A-823-804	731-TA-569	Ferrosilicon/Ukraine	AIMCOR Alabama Silicon American Alloys Globe Metallurgical Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
A-823-805	731-TA-673	Silicomanganese/Ukraine	Elkem Metals Oil, Chemical and Atomic Workers (Local 3-639)
A-823-809	731-TA-882	Steel Concrete Reinforcing Bar/Ukraine	AB Steel Mill Inc AmeriSteel Auburn Steel Birmingham Steel Border Steel Cascade Steel Rolling Mills Inc CMC Steel Group Co-Steel Inc Marion Steel North Star Steel Co Nucor Steel Rebar Trade Action Coalition Riverview Steel Sheffield Steel TAMCO TXI-Chaparral Steel Co
A-823-810	731-TA-894	Ammonium Nitrate/Ukraine	Agrium Air Products and Chemicals Committee for Fair Ammonium Nitrate Trade El Dorado Chemical LaRoche Industries Mississippi Chemical Nitram

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Prodica
A-823-811	731-TA-908	Hot-Rolled Steel Products/Ukraine	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-823-812	731-TA-962	Carbon and Certain Alloy Steel Wire Rod/Ukraine	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
A-831-801	731-TA-340A	Solid Urea/Armenia	Agrico Chemical
			American Cyanamid
			CF Industries
			First Mississippi
			Mississippi Chemical
			Terra International
			WR Grace
A-834-806	731-TA-902	Hot-Rolled Steel Products/Kazakhstan	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dymanics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
A-834-807	731-TA-930	Silicomanganese/Kazakhstan	Eramet Marietta
			Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 5-0639
A-841-804	731-TA-879	Steel Concrete Reinforcing Bar/Moldova	AB Steel Mill Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			AmeriSteel
			Auburn Steel
			Birmingham Steel
			Border Steel
			Cascade Steel Rolling Mills Inc
			CMC Steel Group
			Co-Steel Inc
			Marion Steel
			North Star Steel Co
			Nucor Steel
			Rebar Trade Action Coalition
			Riverview Steel
			Sheffield Steel
			TAMCO
			TXI-Chaparral Steel Co
A-841-805	731-TA-959	Carbon and Certain Alloy Steel Wire Rod/Moldova	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
A-842-801	731-TA-340F	Solid Urea/Tajikistan	Agrico Chemical
			American Cyanamid
			CF Industries
			First Mississippi
			Mississippi Chemical
			Terra International
			WR Grace
A-843-801	731-TA-340G	Solid Urea/Turkmenistan	Agrico Chemical
			American Cyanamid
			CF Industries
			First Mississippi
			Mississippi Chemical
			Terra International
			WR Grace
A-843-802	731-TA-539	Uranium/Kazakhstan	Ferret Exploration
			First Holding
			Geomex Minerals
			IMC Fertilizer
			Malapai Resources
			Oil, Chemical and Atomic Workers
			Pathfinder Mines
			Power Resources
			Rio Algom Mining
			Solution Mining
			Total Minerals

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Umetco Minerals Uranium Resources
A-843-804	731-TA-566	Ferrosilicon/Kazakhstan	AIMCOR Alabama Silicon American Alloys Globe Metallurgical Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
A-844-801	731-TA-340I	Solid Urea/Uzbekistan	Agrico Chemical American Cyanamid CF Industries First Mississippi Mississippi Chemical Terra International WR Grace
A-844-802	731-TA-539-F	Uranium/Uzbekistan	Ferret Exploration First Holding Geomex Minerals IMC Fertilizer Malapai Resources Oil, Chemical and Atomic Workers Pathfinder Mines Power Resources Rio Algom Mining Solution Mining Total Minerals Umetco Minerals Uranium Resources
A-851-802	731-TA-846	Small-Diameter Carbon Steel Seamless Pipe/Czech Republic	Koppel Steel North Star Steel Sharon Tube Timken US Steel United Steelworkers of America USS/Kobe Vision Metals' Gulf States Tube
C-122-404	701-TA-224	Live Swine/Canada	National Pork Producers Council Wilson Foods
C-122-805	701-TA-297	Steel Rails/Canada	Bethlehem Steel CF&I Steel
C-122-815	701-TA-309-A	Alloy Magnesium/Canada	Magnesium Corporation of America
C-122-815	701-TA-309-B	Pure Magnesium/Canada	Magnesium Corporation of America
C-122-839	701-TA-414	Softwood Lumber/Canada	71 Lumber Co Almond Bros Lbr Co Anthony Timberlands Balfour Lbr Co Ball Lumber Banks Lumber Company

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Barge Forest Products Co
			Beadles Lumber Co
			Bearden Lumber
			Bennett Lumber
			Big Valley Band Mill
			Bighorn Lumber Co Inc
			Blue Mountain Lumber
			Buddy Bean Lumber
			Burgin Lumber Co Ltd
			Burt Lumber Company
			C&D Lumber Co
			Ceda-Pine Veneer
			Cersosimo Lumber Co Inc
			Charles Ingram Lumber Co Inc
			Charleston Heart Pine
			Chesterfield Lumber
			Chips
			Chocorua Valley Lumber Co
			Claude Howard Lumber
			Clearwater Forest Industries
			CLW Inc
			CM Tucker Lumber Corp
			Coalition for Fair Lumber Imports Executive Committee
			Cody Lumber Co
			Collins Pine Co
			Collums Lumber
			Columbus Lumber Co
			Contoocook River Lumber
			Conway Guiteau Lumber
			Cornwright Lumber Co
			Crown Pacific
			Daniels Lumber Inc
			Dean Lumber Co Inc
			Deltic Timber Corporation
			Devils Tower Forest Products
			DiPrizio Pine Sales
			Dorchester Lumber Co
			DR Johnson Lumber
			East Brainerd Lumber Co
			East Coast Lumber Company
			Eas-Tex Lumber
			ECK Wood Products
			Ellingson Lumber Co
			Elliott Sawmilling
			Empire Lumber Co
			Evergreen Forest Products
			Excalibur Shelving Systems Inc
			Exley Lumber Co
			FH Stoltze Land & Lumber Co
			FL Turlington Lbr Co Inc
			Fleming Lumber

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Flippo Lumber
			Floragen Forest Products
			Frank Lumber Co
			Franklin Timber Co
			Fred Tebb & Sons
			Fremont Sawmill
			Frontier Resources
			Garrison Brothers Lumber Co and Subsidiaries
			Georgia Lumber
			Gilman Building Products
			Godfrey Lumber
			Granite State Forest Prod Inc
			Great Western Lumber Co
			Greenville Molding Inc
			Griffin Lumber Company
			Guess Brothers Lumber
			Gulf Lumber
			Gulf States Paper
			Guy Bennett Lumber
			Hampton Resources
			Hancock Lumber
			Hankins Inc
			Hankins Lumber Co
			Harrigan Lumber
			Harwood Products
			Haskell Lumber Inc
			Hatfield Lumber
			Hedstrom Lumber
			Herrick Millwork Inc
			HG Toler & Son Lumber Co Inc
			HG Wood Industries LLC
			Hogan & Storey Wood Prod
			Hogan Lumber Co
			Hood Industries
			HS Hofler & Sons Lumber Co Inc
			Hubbard Forest Ind Inc
			HW Culp Lumber Co
			Idaho Veneer Co
			Industrial Wood Products
			Intermountain Res LLC
			International Paper
			J Franklin Jones Lumber Co Inc
			Jack Batte & Sons Inc
			Jasper Lumber Company
			JD Martin Lumber Co
			JE Jones Lumber Co
			Jerry G Williams & Sons
			JH Knighton Lumber Co
			Johnson Lumber Company
			Jordan Lumber & Supply
			Joseph Timber Co

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			JP Haynes Lbr Co Inc
			JV Wells Inc
			JW Jones Lumber
			Keadle Lumber Enterprises
			Keller Lumber
			King Lumber Co
			Konkolville Lumber
			Langdale Forest Products
			Laurel Lumber Company
			Leavitt Lumber Co
			Leesville Lumber Co
			Limington Lumber Co
			Longview Fibre Co
			Lovell Lumber Co Inc
			M Kendall Lumber Co
			Manke Lumber Co
			Marriner Lumber Co
			Mason Lumber
			MB Heath & Sons Lumber Co
			MC Dixon Lumber Co Inc
			Mebane Lumber Co Inc
			Metcalf Lumber Co Inc
			Millry Mill Co Inc
			Moose Creek Lumber Co
			Moose River Lumber
			Morgan Lumber Co Inc
			Mount Yonah Lumber Co
			Nagel Lumber
			New Kearsarge Corp
			New South
			Nicolet Hardwoods
			Nieman Sawmills SD
			Nieman Sawmills WY
			North Florida
			Northern Lights Timber & Lumber
			Northern Neck Lumber Co
			Ochoco Lumber Co
			Olon Belcher Lumber Co
			Owens and Hurst Lumber
			Packaging Corp of America
			Page & Hill Forest Products
			Paper, Allied-Industrial, Chemical and Energy Workers International Union
			Parker Lumber
			Pate Lumber Co Inc
			PBS Lumber
			Pedigo Lumber Co
			Piedmont Hardwood Lumber Co
			Pine River Lumber Co
			Pinecrest Lumber Co
			Pleasant River Lumber Co

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Pleasant Western Lumber Inc
			Plum Creek Timber
			Pollard Lumber
			Portac
			Potlatch
			Potomac Supply
			Precision Lumber Inc
			Pruitt Lumber Inc
			R Leon Williams Lumber Co
			RA Yancey Lumber
			Rajala Timber Co
			Ralph Hamel Forest Products
			Randy D Miller Lumber
			Rappahannock Lumber Co
			Regulus Stud Mills Inc
			Riley Creek Lumber
			Roanoke Lumber Co
			Robbins Lumber
			Robertson Lumber
			Roseburg Forest Products Co
			Rough & Ready
			RSG Forest Products
			Rushmore Forest Products
			RY Timber Inc
			Sam Mabry Lumber Co
			Scotch Lumber
			SDS Lumber Co
			Seacoast Mills Inc
			Seago Lumber
			Seattle-Snohomish
			Seneca Sawmill
			Shaver Wood Products
			Shearer Lumber Products
			Shuqualak Lumber
			SI Storey Lumber
			Sierra Forest Products
			Sierra Pacific Industries
			Sigfridson Wood Products
			Silver City Lumber Inc
			Somers Lbr & Mfg Inc
			South & Jones
			South Coast
			Southern Forest Industries Inc
			Southern Lumber
			St Laurent Forest Products
			Starfire Lumber Co
			Steely Lumber Co Inc
			Stimson Lumber
			Summit Timber Co
			Sundance Lumber
			Superior Lumber

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Swanson Superior Forest Products Inc
			Swift Lumber
			Tamarack Mill
			Taylor Lumber & Treating Inc
			Temple-Inland Forest Products
			Thompson River Lumber
			Three Rivers Timber
			Thrift Brothers Lumber Co Inc
			Timco Inc
			Tolleson Lumber
			Toney Lumber
			TR Miller Mill Co
			Tradewinds of Virginia Ltd
			Travis Lumber Co
			Tree Source Industries Inc
			Tri-State Lumber
			TTT Studs
			United Brotherhood of Carpenters and Joiners
			Viking Lumber Co
			VP Kiser Lumber Co
			Walton Lumber Co Inc
			Warm Springs Forest Products
			Westvaco Corp
			Wilkins, Kaiser & Olsen Inc
			WM Shepherd Lumber Co
			WR Robinson Lumber Co Inc
			Wrenn Brothers Inc
			Wyoming Sawmills
			Yakama Forest Products
			Younce & Ralph Lumber Co Inc
			Zip-O-Log Mills Inc
C-122-841	701-TA-418	Carbon and Certain Alloy Steel Wire Rod/Canada	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
C-122-848	701-TA-430B	Hard Red Spring Wheat/Canada	North Dakota Wheat Commission
C-201-505	701-TA-265	Porcelain-on-Steel Cooking Ware/Mexico	General Housewares
C-201-810	701-TA-325	Cut-to-Length Carbon Steel Plate/Mexico	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			National Steel Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
C-307-804	303-TA-21	Gray Portland Cement and Clinker/Venezuela	Florida Crushed Stone Southdown Tarmac America
C-307-808	303-TA-23	Ferrosilicon/Venezuela	AIMCOR Alabama Silicon American Alloys Globe Metallurgical Oil, Chemical and Atomic Workers (Local 389) Silicon Metaltech United Autoworkers of America (Local 523) United Steelworkers of America (Locals 2528, 3081, 5171 and 12646)
C-333-401	701-TA-E	Cotton Shop Towels/Peru	No case at the Commission; Commerce service list identifies: Durafab Kleen-Tex Industries Lewis Eckert Robb Milliken Pavis & Harcourt
C-351-037	104-TAA-21	Cotton Yarn/Brazil	American Yarn Spinners Association Harriet & Henderson Yarns LaFar Industries
C-351-504	701-TA-249	Heavy Iron Construction Castings/Brazil	Alhambra Foundry Allegheny Foundry Bingham & Taylor Campbell Foundry Charlotte Pipe & Foundry Deeter Foundry East Jordan Foundry Le Baron Foundry Municipal Castings Neenah Foundry Opelika Foundry Pinkerton Foundry Tyler Pipe US Foundry & Manufacturing Vulcan Foundry
C-351-604	701-TA-269	Brass Sheet and Strip/Brazil	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Workers
			Mechanics Educational Society of America (Local 56)
			The Miller Company
			Olin
			Revere Copper Products
			United Steelworkers of America
C-351-818	701-TA-320	Cut-to-Length Carbon Steel Plate/Brazil	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
C-351-829	701-TA-384	Hot-Rolled Carbon Steel Flat Products/Brazil	Acme Steel
			Bethlehem Steel
			California Steel Industries
			Gallatin Steel
			Geneva Steel
			Gulf States Steel
			Independent Steelworkers
			IPSCO
			Ispat/Inland
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
C-351-833	701-TA-417	Carbon and Certain Alloy Steel Wire Rod/Brazil	AmeriSteel
			Birmingham Steel
			Cascade Steel Rolling Mills
			Connecticut Steel Corp
			Co-Steel Raritan
			GS Industries
			Keystone Consolidated Industries
			North Star Steel Texas
			Nucor Steel-Nebraska (a division of Nucor Corp)
			Republic Technologies International
			Rocky Mountain Steel Mills
C-357-004	701-TA-A	Carbon Steel Wire Rod/Argentina	Atlantic Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Continental Steel
			Georgetown Steel
			North Star Steel
			Raritan River Steel
C-357-813	701-TA-402	Honey/Argentina	AH Meyer & Sons
			Adee Honey Farms
			Althoff Apiaries
			American Beekeeping Federation
			American Honey Producers Association
			Anderson Apiaries
			Arroyo Apiaries
			Artesian Honey Producers
			B Weaver Apiaries
			Bailey Enterprises
			Barkman Honey
			Basler Honey Apiary
			Beals Honey
			Bears Paw Apiaries
			Beaverhead Honey
			Bee Biz
			Bee Haven Honey
			Belliston Brothers Apiaries
			Big Sky Honey
			Bill Rhodes Honey
			Richard E Blake
			Curt Bronnenberg
			Brown's Honey Farms
			Brumley's Bees
			Buhmann Apiaries
			Carys Honey Farms
			Chaparrel Honey
			Charles Apiaries
			Mitchell Charles
			Collins Honey
			Conor Apiaries
			Coy's Honey Farm
			Dave Nelson Apiaries
			Delta Bee
			Eisele's Pollination & Honey
			Ellingsoa's
			Elliott Curtis & Sons
			Charles L Emmons, Sr
			Gause Honey
			Gene Brandi Apiaries
			Griffith Honey
			Haff Apiaries
			Hamilton Bee Farms
			Hamilton Honey
			Happie Bee
			Harvest Honey
			Harvey's Honey

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hiatt Honey
			Hoffman Honey
			Hollman Apiaries
			Honey House
			Honeybee Apiaries
			Gary M Honl
			Rand William Honl and Sydney Jo Honl
			James R & Joann Smith Trust
			Jaynes Bee Products
			Johnston Honey Farms
			Larry Johnston
			Ke-An Honey
			Kent Honeybees
			Lake-Indianhead Honey Farms
			Lamb's Honey Farm
			Las Flores Apiaries
			Mackrill Honey Farms & Sales
			Raymond Marquette
			Mason & Sons Honey
			McCoy's Sunny South Apiaries
			Merrimack Valley Apiaries & Evergreen Honey
			Met 2 Honey Farm
			Missouri River Honey
			Mitchell Brothers Honey
			Monda Honey Farm
			Montana Dakota Honey
			Northern Bloom Honey
			Noye's Apiaries
			Oakes Honey
			Oakley Honey Farms
			Old Mill Apiaries
			Opp Honey
			Oro Dulce
			Peterson's "Naturally Sweet" Honey
			Potoczak Bee Farms
			Price Apiaries
			Pure Sweet Honey Farms
			Robertson Pollination Service
			Robson Honey
			William Robson
			Rosedale Apiaries
			Ryan Apiaries
			Schmidt Honey Farms
			Simpson Apiaries
			Sioux Honey Association
			Smoot Honey
			Solby Honey
			Stahlman Apiaries
			Steve E Parks Apiaries
			Stroope Bee & Honey
			T&D Honey Bee

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Talbott's Honey
			Terry Apiaries
			Thompson Apiaries
			Triple A Farm
			Tropical Blossom Honey
			Tubbs Apiaries
			Venable Wholesale
			Walter L Wilson Buzz 76 Apiaries
			Wiebersiek Honey Farms
			Wilmer Farms
			Brent J Woodworth
			Wooten's Golden Queens
			Yaddof Apiaries
C-357-815	701-TA-404	Hot-Rolled Steel Products/Argentina	Bethlehem Steel
			Gallatin Steel
			Independent Steelworkers
			IPSCO
			LTV Steel
			National Steel
			Nucor
			Rouge Steel Co
			Steel Dynamics
			US Steel
			United Steelworkers of America
			WCI Steel Inc
			Weirton Steel
			Wheeling-Pittsburgh Steel Corp
C-401-401	701-TA-231	Cold-Rolled Carbon Steel Flat Products/Sweden	Bethlehem Steel
			Chaparral
			US Steel
C-401-804	701-TA-327	Cut-to-Length Carbon Steel Plate/Sweden	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
C-403-802	701-TA-302	Fresh and Chilled Atlantic Salmon/Norway	Heritage Salmon
			The Coalition for Fair Atlantic Salmon Trade
C-408-046	104-TAA-7	Sugar/EU	No petition at the Commission; Commerce service list identifies:
			AJ Yates
			Alexander & Baldwin

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			American Farm Bureau Federation
			American Sugar Cane League
			American Sugarbeet Growers Association
			Amstar Sugar
			Florida Sugar Cane League
			Florida Sugar Marketing and Terminal Association
			H&R Brokerage
			Hawaiian Agricultural Research Center
			Leach Farms
			Michigan Farm Bureau
			Michigan Sugar
			Rio Grande Valley Sugar Growers Association
			Sugar Cane Growers Cooperative of Florida
			Talisman Sugar
			US Beet Sugar Association
			United States Beet Sugar Association
			United States Cane Sugar Refiners' Association
C-412-815	701-TA-328	Cut-to-Length Carbon Steel Plate/United Kingdom	Bethlehem Steel
			California Steel Industries
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
C-412-821	701-TA-412	Low Enriched Uranium/United Kingdom	United States Enrichment Corp
			USEC Inc
C-421-601	701-TA-278	Fresh Cut Flowers/Netherlands	Burdette Coward
			California Floral Council
			Floral Trade Council
			Florida Flower Association
			Gold Coast Uanko Nursery
			Hollandia Wholesale Florist
			Manatee Fruit
			Monterey Flower Farms
			Topstar Nursery
C-421-809	701-TA-411	Low Enriched Uranium/Netherlands	United States Enrichment Corp
			USEC Inc
C-423-806	701-TA-319	Cut-to-Length Carbon Steel Plate/Belgium	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nextech Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America
C-423-809	701-TA-376	Stainless Steel Plate in Coils/Belgium	Allegheny Ludlum Armco Steel Lukens Steel North American Stainless United Steelworkers of America
C-427-603	701-TA-270	Brass Sheet and Strip/France	Allied Industrial Workers of America American Brass Bridgeport Brass Chase Brass & Copper Hussey Copper International Association of Machinists & Aerospace Workers Mechanics Educational Society of America (Local 56) The Miller Company Olin Revere Copper Products United Steelworkers of America
C-427-805	701-TA-315	Hot-Rolled Lead and Bismuth Carbon Steel Products/France	Bethlehem Steel Inland Steel Industries USS/Kobe Steel
C-427-810	701-TA-348	Corrosion-Resistant Carbon Steel Flat Products/ France	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries LTV Steel Lukens Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
C-427-815	701-TA-380	Stainless Steel Sheet and Strip/France	Allegheny Ludlum Armco Steel Bethlehem Steel Butler Armco Independent Union Carpenter Technology Corp North American Stainless United Steelworkers of America

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Zanesville Armco Independent Organization
C-427-817	701-TA-387	Cut-to-Length Carbon Steel Plate/France	Bethlehem Steel Geneva Steel IPSCO Steel National Steel US Steel United Steelworkers of America
C-427-819	701-TA-409	Low Enriched Uranium/France	United States Enrichment Corp USEC Inc
C-428-817	701-TA-340	Cold-Rolled Carbon Steel Flat Products/Germany	Armco Steel Bethlehem Steel California Steel Industries Gulf States Steel Inland Steel Industries LTV Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
C-428-817	701-TA-349	Corrosion-Resistant Carbon Steel Flat Products/ Germany	Armco Steel Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries LTV Steel Lukens Steel National Steel Nextech Rouge Steel Co Sharon Steel Theis Precision Steel Thompson Steel US Steel United Steelworkers of America WCI Steel Weirton Steel
C-428-817	701-TA-322	Cut-to-Length Carbon Steel Plate/Germany	Bethlehem Steel California Steel Industries Geneva Steel Gulf States Steel Inland Steel Industries Lukens Steel National Steel Nextech

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
C-428-829	701-TA-410	Low Enriched Uranium/Germany	United States Enrichment Corp
			USEC Inc
C-437-805	701-TA-426	Sulfanilic Acid/Hungary	Nation Ford Chemical
C-469-004	701-TA-178	Stainless Steel Wire Rod/Spain	AL Tech Specialty Steel
			Armco Steel
			Carpenter Technology
			Colt Industries
			Cyclops
			Guterl Special Steel
			Joslyn Stainless Steels
			Republic Steel
C-469-804	701-TA-326	Cut-to-Length Carbon Steel Plate/Spain	Bethlehem Steel
			California Steel Industries
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			Lukens Steel
			National Steel
			Nextech
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
C-475-812	701-TA-355	Grain-Oriented Silicon Electrical Steel/Italy	Allegheny Ludlum
			Armco Steel
			Butler Armco Independent Union
			United Steelworkers of America
			Zanesville Armco Independent Union
C-475-815	701-TA-362	Seamless Pipe/Italy	Koppel Steel
			Quanex
			Timken
			United States Steel
C-475-817	701-TA-364	Oil Country Tubular Goods/Italy	IPSCO
			Koppel Steel
			Lone Star Steel
			Maverick Tube
			Newport Steel
			North Star Steel
			US Steel
			USS/Kobe
C-475-819	701-TA-365	Pasta/Italy	A Zerega's Sons
			American Italian Pasta
			Borden
			D Merlino & Sons

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Dakota Growers Pasta Foulds Gilster-Mary Lee Gooch Foods Hershey Foods LaRinascente Macaroni Co Pasta USA Philadelphia Macaroni ST Specialty Foods
C-475-821	701-TA-373	Stainless Steel Wire Rod/Italy	AL Tech Specialty Steel Carpenter Technology Republic Engineered Steels Talley Metals Technology United Steelworkers of America
C-475-823	701-TA-377	Stainless Steel Plate in Coils/Italy	Allegheny Ludlum Armco Steel J&L Specialty Steel Lukens Steel North American Stainless United Steelworkers of America
C-475-825	701-TA-381	Stainless Steel Sheet and Strip/Italy	Allegheny Ludlum Armco Steel Bethlehem Steel Butler Armco Independent Union Carpenter Technology Corp J&L Specialty Steel North American Stainless United Steelworkers of America Zanesville Armco Independent Organization
C-475-827	701-TA-390	Cut-to-Length Carbon Steel Plate/Italy	Bethlehem Steel CitiSteel USA Inc Geneva Steel Gulf States Steel IPSCO Steel National Steel US Steel United Steelworkers of America
C-475-830	701-TA-413	Stainless Steel Bar/Italy	Carpenter Technology Crucible Specialty Metals Electralloy Empire Specialty Steel Republic Technologies International Slater Steels United Steelworkers of America
C-489-502	701-TA-253	Welded Carbon Steel Pipe and Tube/Turkey	Allied Tube & Conduit American Tube Bernard Epps Bock Industries Bull Moose Tube Central Steel Tube Century Tube

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Copperweld Tubing Cyclops Hughes Steel & Tube Kaiser Steel Laclede Steel Maruichi American Maverick Tube Merchant Metals Phoenix Steel Pittsburgh Tube Quanex Sharon Tube Southwestern Pipe UNR-Leavitt Welded Tube Western Tube & Conduit Wheatland Tube
C-489-806	701-TA-366	Pasta/Turkey	A Zerega's Sons American Italian Pasta Borden D Merlino & Sons Dakota Growers Pasta Foulds Gilster-Mary Lee Gooch Foods Hershey Foods LaRinascente Macaroni Co Pasta USA Philadelphia Macaroni ST Specialty Foods
C-507-501	N/A	Raw In-Shell Pistachios/Iran	Blackwell Land Co Cal Pure Pistachios Inc California Pistachio Commission California Pistachio Orchards Keenan Farms Inc Kern Pistachio Hulling & Drying Co-Op Los Rancheros de Poco Pedro Pistachio Producers of California TM Duche Nut Co Inc
C-507-601	N/A	Roasted In-Shell Pistachios/Iran	Cal Pure Pistachios Inc California Pistachio Commission Keenan Farms Inc Kern Pistachio Hulling & Drying Co-Op Pistachio Producers of California TM Duche Nut Co Inc
C-508-605	701-TA-286	Industrial Phosphoric Acid/Israel	Albright & Wilson FMC Hydrite Chemical Monsanto Stauffer Chemical
C-533-063	303-TA-13	Iron Metal Castings/India	Campbell Foundry

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Le Baron Foundry Municipal Castings Neenah Foundry Pinkerton Foundry US Foundry & Manufacturing Vulcan Foundry
C-533-807	701-TA-318	Sulfanilic Acid/India	R-M Industries
C-533-818	701-TA-388	Cut-to-Length Carbon Steel Plate/India	Bethlehem Steel CitiSteel USA Inc Geneva Steel Gulf States Steel IPSCO Steel National Steel Tuscaloosa Steel US Steel United Steelworkers of America
C-533-821	701-TA-405	Hot-Rolled Steel Products/India	Bethlehem Steel Gallatin Steel Independent Steelworkers IPSCO LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics US Steel United Steelworkers of America WCI Steel Inc Weirton Steel Wheeling-Pittsburgh Steel Corp
C-533-825	701-TA-415	Polyethylene Terephthalate Film, Sheet and Strip (PET Film)/India	DuPont Teijin Films Mitsubishi Polyester Film LLC SKC America Inc Toray Plastics (America)
C-533-829	701-TA-432	Prestressed Concrete Steel Wire Strand/India	American Spring Wire Corp Insteel Wire Products Co Sivaco Georgia LLC Strand Tech Martin Inc Sumiden Wire Products Corp
C-533-839	701-TA-437	Carbazole Violet Pigment 23/India	Allegheny Color Corp Barker Fine Color Inc Clariant Corp Nation Ford Chemical Co Sun Chemical Co
C-533-844	701-TA-442	Certain Lined Paper School Supplies/India	Fay Paper Products Inc MeadWestvaco Consumer & Office Products Norcom Inc Pacon Corp Roaring Spring Blank Book Co Top Flight Inc United Steel, Paper and Forestry, Rubber,

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW)
C-535-001	701-TA-202	Cotton Shop Towels/Pakistan	Milliken
C-549-818	701-TA-408	Hot-Rolled Steel Products/Thailand	Bethlehem Steel Gallatin Steel Independent Steelworkers IPSCO LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics US Steel United Steelworkers of America WCI Steel Inc Weirton Steel Wheeling-Pittsburgh Steel Corp
C-560-806	701-TA-389	Cut-to-Length Carbon Steel Plate/Indonesia	Bethlehem Steel CitiSteel USA Inc Geneva Steel Gulf States Steel IPSCO Steel National Steel Tuscaloosa Steel US Steel United Steelworkers of America
C-560-813	701-TA-406	Hot-Rolled Steel Products/Indonesia	Bethlehem Steel Gallatin Steel Independent Steelworkers IPSCO LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics US Steel United Steelworkers of America WCI Steel Inc Weirton Steel Wheeling-Pittsburgh Steel Corp
C-560-819	701-TA-443	Certain Lined Paper School Supplies/Indonesia	Fay Paper Products Inc MeadWestvaco Consumer & Office Products Norcom Inc Pacon Corp Roaring Spring Blank Book Co Top Flight Inc United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (USW)
C-580-602	701-TA-267	Top-of-the-Stove Stainless Steel Cooking Ware/ Korea	Farberware Regal Ware

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Revere Copper & Brass
			WearEver/Proctor Silex
C-580-818	701-TA-342	Cold-Rolled Carbon Steel Flat Products/Korea	Armco Steel
			Bethlehem Steel
			California Steel Industries
			Gulf States Steel
			Inland Steel Industries
			LTV Steel
			National Steel
			Nextech
			Rouge Steel Co
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
C-580-818	701-TA-350	Corrosion-Resistant Carbon Steel Flat Products/ Korea	Armco Steel
			Bethlehem Steel
			California Steel Industries
			Geneva Steel
			Gulf States Steel
			Inland Steel Industries
			LTV Steel
			Lukens Steel
			National Steel
			Nextech
			Rouge Steel Co
			Sharon Steel
			Theis Precision Steel
			Thompson Steel
			US Steel
			United Steelworkers of America
			WCI Steel
			Weirton Steel
C-580-835	701-TA-382	Stainless Steel Sheet and Strip/Korea	Allegheny Ludlum
			Armco Steel
			Bethlehem Steel
			Butler Armco Independent Union
			Carpenter Technology Corp
			J&L Specialty Steel
			North American Stainless
			United Steelworkers of America
			Zanesville Armco Independent Organization
C-580-837	701-TA-391	Cut-to-Length Carbon Steel Plate/Korea	Bethlehem Steel
			CitiSteel USA Inc
			Geneva Steel
			Gulf States Steel
			IPSCO Steel
			National Steel

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Tuscaloosa Steel US Steel United Steelworkers of America
C-580-842	701-TA-401	Structural Steel Beams/Korea	Northwestern Steel and Wire Nucor Nucor-Yamato Steel TXI-Chaparral Steel United Steelworkers of America
C-580-851	701-TA-431	DRAMs and DRAM Modules/Korea	Dominion Semiconductor LLC/Micron Technology Inc Infineon Technologies Richmond LP Micron Technology Inc
C-583-604	701-TA-268	Top-of-the-Stove Stainless Steel Cooking Ware/ Taiwan	Farberware Regal Ware Revere Copper & Brass WearEver/Proctor Silex
C-791-806	701-TA-379	Stainless Steel Plate in Coils/South Africa	Allegheny Ludlum Armco Steel J&L Specialty Steel Lukens Steel North American Stainless United Steelworkers of America
C-791-810	701-TA-407	Hot-Rolled Steel Products/South Africa	Bethlehem Steel Gallatin Steel Independent Steelworkers IPSCO LTV Steel National Steel Nucor Rouge Steel Co Steel Dynamics US Steel United Steelworkers of America WCI Steel Inc Weirton Steel Wheeling-Pittsburgh Steel Corp
A-331-802	731-TA-1065	Certain Frozen Warmwater Shrimp and Prawns/ Ecuador	
A-351-838	731-TA-1063	Certain Frozen Warmwater Shrimp and Prawns/ Brazil	
A-533-840	731-TA-1066	Certain Frozen Warmwater Shrimp and Prawns/ India	
A-549-822	731-TA-1067	Certain Frozen Warmwater Shrimp and Prawns/ Thailand	
A-552-802	731-TA-1068	Certain Frozen Warmwater Shrimp and Prawns/ Vietnam	
A-570-893	731-TA-1064	Certain Frozen Warmwater Shrimp and Prawns/ China	Petitioners/Supporters for all six cases listed: Abadie, Al J Abadie, Anthony Abner, Charles

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Abraham, Steven
			Abshire, Gabriel J
			Ackerman, Dale J
			Acosta, Darryl L
			Acosta, Jerry J Sr
			Acosta, Leonard C
			Acosta, Wilson Pula Sr
			Adam, Denise T
			Adam, Michael A
			Adam, Richard B Jr
			Adam, Sherry P
			Adam, William E
			Adam, Alcide J Jr
			Adams, Dudley
			Adams, Elizabeth L
			Adams, Ervin
			Adams, Ervin
			Adams, George E
			Adams, Hursy J
			Adams, James Arthur
			Adams, Kelly
			Adams, Lawrence J Jr
			Adams, Randy
			Adams, Ritchie
			Adams, Steven A
			Adams, Ted J
			Adams, Tim
			Adams, Whitney P Jr
			Agoff, Ralph J
			Aguilar, Rikardo
			Aguillard, Roddy G
			Alario, Don Ray
			Alario, Nat
			Alario, Pete J
			Alario, Timmy
			Albert, Craig J
			Albert, Junior J
			Alexander, Everett O
			Alexander, Robert F Jr
			Alexie, Benny J
			Alexie, Corkey A
			Alexie, Dolphy
			Alexie, Felix Jr
			Alexie, Gwendolyn
			Alexie, John J
			Alexie, John V
			Alexie, Larry J Sr
			Alexie, Larry Jr
			Alexie, Vincent L Jr
			Alexis, Barry S

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Alexis, Craig W
			Alexis, Micheal
			Alexis, Monique
			Alfonso, Anthony E Jr
			Alfonso, Jesse
			Alfonso, Nicholas
			Alfonso, Paul Anthony
			Alfonso, Randy
			Alfonso, Terry S Jr
			Alfonso, Vernon Jr
			Alfonso, Yvette
			Alimia, Angelo A Jr
			Allemand, Dean J
			Allen, Annie
			Allen, Carolyn Sue
			Allen, Jackie
			Allen, Robin
			Allen, Wayne
			Allen, Wilbur L
			Allen, Willie J III
			Allen, Willie Sr
			Alphonso, John
			Ancalade, Leo J
			Ancar, Claudene
			Ancar, Jerry T
			Ancar, Joe C
			Ancar, Merlin Sr
			Ancar, William Sr
			Ancelet, Gerald Ray
			Anderson, Andrew David
			Anderson, Ernest W
			Anderson, Jerry
			Anderson, John
			Anderson, Lynwood
			Anderson, Melinda Rene
			Anderson, Michael Brian
			Anderson, Ronald L Sr
			Anderson, Ronald Louis Jr
			Andonie, Miguel
			Andrews, Anthony R
			Andry, Janice M
			Andry, Rondey S
			Angelle, Louis
			Anglada, Eugene Sr
			Ansardi, Lester
			Anselmi, Darren
			Aparicio, Alfred
			Aparicio, David
			Aparicio, Ernest
			Arabie, Georgia P
			Arabie, Joseph

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Arcement, Craig J
			Arcement, Lester C
			Arcemont, Donald Sr
			Arceneaux, Matthew J
			Arceneaux, Michael K
			Areas, Christopher J
			Armbruster, John III
			Armbruster, Paula D
			Armstrong, Jude Jr
			Arnesen, George
			Arnold, Lonnie L Jr
			Arnona, Joseph T
			Arnondin, Robert
			Arthur, Brenda J
			Assavedo, Floyd
			Atwood, Gregory Kenneth
			Au, Chow D
			Au, Robert
			Aucoin, Dewey F
			Aucoin, Earl
			Aucoin, Laine A
			Aucoin, Perry J
			Austin, Dennis
			Austin, Dennis J
			Authement, Brice
			Authement, Craig L
			Authement, Dion J
			Authement, Gordon
			Authement, Lance M
			Authement, Larry
			Authement, Larry Sr
			Authement, Roger J
			Authement, Sterling P
			Autin, Bobby
			Autin, Bruce J
			Autin, Kenneth D
			Autin, Marvin J
			Autin, Paul F Jr
			Autin, Roy
			Avenel, Albert J Jr
			Ba Wells, Tran Thi
			Babb, Conny
			Babin, Brad
			Babin, Joey L
			Babin, Klint
			Babin, Molly
			Babin, Norman J
			Babineaux, Kirby
			Babineaux, Vicki
			Bach, Ke Van
			Bach, Reo Long

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Backman, Benny
			Badeaux, Todd
			Baham, Dewayne
			Bailey, Albert
			Bailey, Antoine III
			Bailey, David B Sr
			Bailey, Don
			Baker, Clarence
			Baker, Donald Earl
			Baker, James
			Baker, Kenneth
			Baker, Ronald J
			Balderas, Antonio
			Baldwin, Richard Prentiss
			Ballard, Albert
			Ballas, Barbara A
			Ballas, Charles J
			Baltz, John F
			Ban, John
			Bang, Bruce K
			Barbaree, Joe W
			Barbe, Mark A and Cindy
			Barber, Louie W Jr
			Barber, Louie W Sr
			Barbier, Percy T
			Barbour, Raymond A
			Bargainear, James E
			Barisich, George A
			Barisich, Joseph J
			Barnette, Earl
			Barnhill, Nathan
			Barrios, Clarence
			Barrios, Corbert J
			Barrios, Corbert M
			Barrios, David
			Barrios, John
			Barrios, Shane James
			Barrois, Angela Gail
			Barrois, Dana A
			Barrois, Tracy James
			Barrois, Wendell Jude Jr
			Barthe, Keith Sr
			Barthelemy, Allen M
			Barthelemy, John A
			Barthelemy, Rene T Sr
			Barthelemy, Walter A Jr
			Bartholomew, Mitchell
			Bartholomew, Neil W
			Bartholomew, Thomas E
			Bartholomew, Wanda C
			Basse, Donald J Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Bates, Mark
			Bates, Ted Jr
			Bates, Vernon Jr
			Battle, Louis
			Baudoin, Drake J
			Baudoin, Murphy A
			Baudouin, Stephen
			Bauer, Gary
			Baye, Glen P
			Bean, Charles A
			Beazley, William E
			Becnel, Glenn J
			Becnel, Kent
			Beecher, Carold F
			Beechler, Ronald
			Bell, James E
			Bell, Ronald A
			Bellanger, Arnold
			Bellanger, Clifton
			Bellanger, Scott J
			Belsome, Derrell M
			Belsome, Karl M
			Bennett, Cecil A Jr
			Bennett, Gary Lynn
			Bennett, Irin Jr
			Bennett, James W Jr
			Bennett, Louis
			Benoit, Francis J
			Benoit, Nicholas L
			Benoit, Paula T
			Benoit, Tenna J Jr
			Benton, Walter T
			Berger, Ray W
			Bergeron, Alfred Scott
			Bergeron, Jeff
			Bergeron, Nolan A
			Bergeron, Ulysses J
			Bernard, Lamont L
			Berner, Mark J
			Berthelot, Gerard J Sr
			Berthelot, James A
			Berthelot, Myron J
			Bertrand, Jerl C
			Beverung, Keith J
			Bianchini, Raymond W
			Bickham, Leo E
			Bienvenu, Charles
			Biggs, Jerry W Sr
			Bigler, Delbert
			Billington, Richard
			Billiot, Alfredia

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Billiot, Arthur
			Billiot, Aubrey
			Billiot, Barell J
			Billiot, Betty
			Billiot, Bobby J
			Billiot, Brian K
			Billiot, Cassidy
			Billiot, Charles Sr
			Billiot, Chris J Sr
			Billiot, E J E
			Billiot, Earl W Sr
			Billiot, Ecton L
			Billiot, Emary
			Billiot, Forest Jr
			Billiot, Gerald
			Billiot, Harold J
			Billiot, Jacco A
			Billiot, Jake A
			Billiot, James Jr
			Billiot, Joseph S Jr
			Billiot, Laurence V
			Billiot, Leonard F Jr
			Billiot, Lisa
			Billiot, Mary L
			Billiot, Paul J Sr
			Billiot, Shirley L
			Billiot, Steve M
			Billiot, Thomas Adam
			Billiot, Thomas Sr
			Billiot, Wenceslaus Jr
			Billiott, Alexander J
			Biron, Yale
			Black, William C
			Blackston, Larry E
			Blackwell, Wade H III
			Blackwell, Wade H Jr
			Blanchard, Albert
			Blanchard, Andrew J
			Blanchard, Billy J
			Blanchard, Cyrus
			Blanchard, Daniel A
			Blanchard, Dean
			Blanchard, Douglas Jr
			Blanchard, Dwayne
			Blanchard, Elgin
			Blanchard, Gilbert
			Blanchard, Jade
			Blanchard, James
			Blanchard, John F Jr
			Blanchard, Katie
			Blanchard, Kelly

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Blanchard, Matt Joseph
			Blanchard, Michael
			Blanchard, Quentin Timothy
			Blanchard, Roger Sr
			Blanchard, Walton H Jr
			Bland, Quyen T
			Blouin, Roy A
			Blume, Jack Jr
			Bodden, Arturo
			Bodden, Jasper
			Bollinger, Donald E
			Bolotte, Darren W
			Bolton, Larry F
			Bondi, Paul J
			Bonvillain, Jimmy J
			Bonvillian, Donna M
			Boone, Clifton Felix
			Boone, Donald F II
			Boone, Donald F III (Ricky)
			Boone, Gregory T
			Boquet, Noriss P Jr
			Boquet, Wilfred Jr
			Bordelon, Glenn Sr
			Bordelon, James P
			Bordelon, Shelby P
			Borden, Benny
			Borne, Crystal
			Borne, Dina L
			Borne, Edward Joseph Jr
			Borne, Edward Sr
			Bosarge, Hubert Lawrence
			Bosarge, Robert
			Bosarge, Sandra
			Bosarge, Steve
			Boudlauch, Durel A Jr
			Boudoin, Larry Terrell
			Boudoin, Nathan
			Boudreaux, Brent J
			Boudreaux, Elvin J III
			Boudreaux, James C Jr
			Boudreaux, James N
			Boudreaux, Jessie
			Boudreaux, Leroy A
			Boudreaux, Mark
			Boudreaux, Paul Sr
			Boudreaux, Richard D
			Boudreaux, Ronald Sr
			Boudreaux, Sally
			Boudreaux, Veronica
			Boudwin, Dwayne
			Boudwin, Jewel James Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Boudwin, Wayne
			Bouise, Norman
			Boulet, Irwin J Jr
			Boullion, Debra
			Bourg, Allen T
			Bourg, Benny
			Bourg, Chad J
			Bourg, Channon
			Bourg, Chris
			Bourg, Douglas
			Bourg, Glenn A
			Bourg, Jearmie Sr
			Bourg, Kent A
			Bourg, Mark
			Bourg, Nolan P
			Bourg, Ricky J
			Bourgeois, Albert P
			Bourgeois, Brian J Jr
			Bourgeois, Daniel
			Bourgeois, Dwayne
			Bourgeois, Jake
			Bourgeois, Johnny M
			Bourgeois, Johnny M Jr
			Bourgeois, Leon A
			Bourgeois, Louis A
			Bourgeois, Merrie E
			Bourgeois, Randy P
			Bourgeois, Reed
			Bourgeois, Webley
			Bourn, Chris
			Bourque, Murphy Paul
			Bourque, Ray
			Bousegard, Duvic Jr
			Boutte, Manuel J Jr
			Bouvier, Colbert A II
			Bouzigard, Dale J
			Bouzigard, Edgar J III
			Bouzigard, Eeris
			Bowers, Harold
			Bowers, Tommy
			Boyd, David E Sr
			Boyd, Elbert
			Boykin, Darren L
			Boykin, Thomas Carol
			Bradley, James
			Brady, Brian
			Brandhurst, Kay
			Brandhurst, Ray E Sr
			Brandhurst, Raymond J
			Braneff, David G
			Brannan, William P

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Branom, Donald James Jr
			Braud, James M
			Brazan, Frank J
			Breaud, Irvin F Jr
			Breaux, Barbara
			Breaux, Brian J
			Breaux, Charlie M
			Breaux, Clifford
			Breaux, Colin E
			Breaux, Daniel Jr
			Breaux, Larry J
			Breaux, Robert J Jr
			Breaux, Shelby
			Briscoe, Robert F Jr
			Britsch, L D Jr
			Broussard, Dwayne E
			Broussard, Eric
			Broussard, Keith
			Broussard, Larry
			Broussard, Mark A
			Broussard, Roger David
			Broussard, Roger R
			Broussard, Steve P
			Brown, Cindy B
			Brown, Colleen
			Brown, Donald G
			Brown, John W
			Brown, Paul R
			Brown, Ricky
			Brown, Toby H
			Bruce, Adam J
			Bruce, Adam J Jr
			Bruce, Bob R
			Bruce, Daniel M Sr
			Bruce, Eli T Sr
			Bruce, Emelda L
			Bruce, Gary J Sr
			Bruce, James P
			Bruce, Lester J Jr
			Bruce, Margie L
			Bruce, Mary P
			Bruce, Nathan
			Bruce, Robert
			Bruce, Russell
			Brudnock, Peter Sr
			Brunet, Elton J
			Brunet, Joseph A
			Brunet, Joseph A
			Brunet, Levy J Jr
			Brunet, Raymond Sr
			Bryan, David N

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Bryant, Ina Fay V
			Bryant, Jack D Sr
			Bryant, James Larry
			Buford, Ernest
			Bui, Ben
			Bui, Dich
			Bui, Dung Thi
			Bui, Huong T
			Bui, Ngan
			Bui, Nhuan
			Bui, Nuoi Van
			Bui, Tai
			Bui, Tien
			Bui, Tommy
			Bui, Xuan and De Nguyen
			Bui, Xuanmai
			Bull, Delbert E
			Bundy, Belvina (Kenneth)
			Bundy, Kenneth Sr
			Bundy, Nicky
			Bundy, Ronald J
			Bundy, Ronnie J
			Buquet, John Jr
			Buras, Clayton M
			Buras, Leander
			Buras, Robert M Jr
			Buras, Waylon J
			Burlett, Elliott C
			Burlett, John C Jr
			Burnell, Charles B
			Burnell, Charles R
			Burnham, Deanna Lea
			Burns, Stuart E
			Burroughs, Lindsey Hilton Jr
			Burton, Ronnie
			Busby, Hardy E
			Busby, Tex H
			Busch, RC
			Bush, Robert A
			Bussey, Tyler
			Butcher, Dorothy
			Butcher, Rocky J
			Butler, Albert A
			Butler, Aline M
			Bychurch, Johnny
			Bychurch, Johnny Jr
			Cabanilla, Alex
			Caboz, Jose Santos
			Cacioppo, Anthony Jr
			Caddell, David
			Cadiere, Mae Quick

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Cadiere, Ronald J
			Cahill, Jack
			Caillouet, Stanford Jr
			Caison, Jerry Lane Jr
			Calcagno, Stephen Paul Sr
			Calderone, John S
			Callahan, Gene P Sr
			Callahan, Michael J
			Callahan, Russell
			Callais, Ann
			Callais, Franklin D
			Callais, Gary D
			Callais, Michael
			Callais, Michael
			Callais, Sandy
			Callais, Terrence
			Camardelle, Anna M
			Camardelle, Chris J
			Camardelle, David
			Camardelle, Edward J III
			Camardelle, Edward J Jr
			Camardelle, Harris A
			Camardelle, Knowles
			Camardelle, Noel T
			Camardelle, Tilman J
			Caminita, John A III
			Campo, Donald Paul
			Campo, Kevin
			Campo, Nicholas J
			Campo, Roy
			Campo, Roy Sr
			Camus, Ernest M Jr
			Canova, Carl
			Cantrelle, Alvin
			Cantrelle, Eugene J
			Cantrelle, Otis A Sr
			Cantrelle, Otis Jr (Buddy)
			Cantrelle, Philip A
			Cantrelle, Tate Joseph
			Canty, Robert Jamies
			Cao, Anna
			Cao, Billy
			Cao, Billy Viet
			Cao, Binh Quang
			Cao, Chau
			Cao, Dan Dien
			Cao, Dung Van
			Cao, Gio Van
			Cao, Hiep A
			Cao, Linh Huyen
			Cao, Nghia Thi

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Cao, Nhieu V
			Cao, Si-Van
			Cao, Thanh Kim
			Cao, Tuong Van
			Carinhas, Jack G Jr
			Carl, Joseph Allen
			Carlos, Gregory
			Carlos, Irvin
			Carmadelle, David J
			Carmadelle, Larry G
			Carmadelle, Rudy J
			Carrere, Anthony T Jr
			Carrier, Larry J
			Caruso, Michael
			Casanova, David W Sr
			Cassagne, Alphonse G III
			Cassagne, Alphonse G IV
			Cassidy, Mark
			Casso, Joseph
			Castelin, Gilbert
			Castelin, Sharon
			Castellanos, Raul L
			Castelluccio, John A Jr
			Castille, Joshua
			Caulfield, Adolph Jr
			Caulfield, Hope
			Caulfield, James M Jr
			Caulfield, Jean
			Cepriano, Salvador
			Cerdes, Julius W Jr
			Cerise, Marla
			Chabert, John
			Chaisson, Dean J
			Chaisson, Henry
			Chaisson, Vincent A
			Chaix, Thomas B III
			Champagne, Brian
			Champagne, Harold P
			Champagne, Kenton
			Champagne, Leon J
			Champagne, Leroy A
			Champagne, Lori
			Champagne, Timmy D
			Champagne, Willard
			Champlin, Kim J
			Chance, Jason R
			Chancey, Jeff
			Chapa, Arturo
			Chaplin Robert G Sr
			Chaplin, Saxby Stowe
			Charles, Christopher

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Charpentier, Allen J
			Charpentier, Alvin J
			Charpentier, Daniel J
			Charpentier, Lawrence
			Charpentier, Linton
			Charpentier, Melanie
			Charpentier, Murphy Jr
			Charpentier, Robert J
			Chartier, Michelle
			Chau, Minh Huu
			Chauvin, Anthony
			Chauvin, Anthony P Jr
			Chauvin, Carey M
			Chauvin, David James
			Chauvin, James E
			Chauvin, Kimberly Kay
			Cheeks, Alton Bruce
			Cheers, Elwood
			Chenier, Ricky
			Cheramie, Alan
			Cheramie, Alan J Jr
			Cheramie, Alton J
			Cheramie, Berwick Jr
			Cheramie, Berwick Sr
			Cheramie, Daniel James Sr
			Cheramie, Danny
			Cheramie, David J
			Cheramie, David P
			Cheramie, Dickey J
			Cheramie, Donald
			Cheramie, Enola
			Cheramie, Flint
			Cheramie, Harold L
			Cheramie, Harry J Sr
			Cheramie, Harry Jr
			Cheramie, Harvey Jr
			Cheramie, Harvey Sr
			Cheramie, Henry J Sr
			Cheramie, James A
			Cheramie, James P
			Cheramie, Jody P
			Cheramie, Joey J
			Cheramie, Johnny
			Cheramie, Joseph A
			Cheramie, Lee Allen
			Cheramie, Linton J
			Cheramie, Mark A
			Cheramie, Murphy J
			Cheramie, Nathan A Sr
			Cheramie, Neddy P
			Cheramie, Nicky J

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Cheramie, Ojess M
			Cheramie, Paris P
			Cheramie, Robbie
			Cheramie, Rodney E Jr
			Cheramie, Ronald
			Cheramie, Roy
			Cheramie, Roy A
			Cheramie, Sally K
			Cheramie, Terry J
			Cheramie, Terry Jr
			Cheramie, Timmy
			Cheramie, Tina
			Cheramie, Todd M
			Cheramie, Tommy
			Cheramie, Wayne A
			Cheramie, Wayne A Jr
			Cheramie, Wayne F Sr
			Cheramie, Wayne J
			Cheramie, Webb Jr
			Chevalier, Mitch
			Chew, Thomas J
			Chhun, Samantha
			Chiasson, Jody J
			Chiasson, Manton P Jr
			Chiasson, Michael P
			Childress, Gordon
			Chisholm, Arthur
			Chisholm, Henry Jr
			Christen, David Jr
			Christen, Vernon
			Christmas, John T Jr
			Chung, Long V
			Ciaccio, Vance
			Cibilic, Bozidar
			Cieutat, John
			Cisneros, Albino
			Ciuffi, Michael L
			Clark, James M
			Clark, Jennings
			Clark, Mark A
			Clark, Ricky L
			Cobb, Michael A
			Cochran, Jimmy
			Coleman, Ernest
			Coleman, Freddie Jr
			Colletti, Rodney A
			Collier, Ervin J
			Collier, Wade
			Collins, Bernard J
			Collins, Bruce J Jr
			Collins, Donald

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Collins, Earline
			Collins, Eddie F Jr
			Collins, Jack
			Collins, Jack
			Collins, Julius
			Collins, Lawson Bruce Sr
			Collins, Lindy S Jr
			Collins, Logan A Jr
			Collins, Robert
			Collins, Timmy P
			Collins, Vendon Jr
			Collins, Wilbert Jr
			Collins, Woodrow
			Colson, Chris and Michelle
			Comardelle, Michael J
			Comeaux, Allen J
			Compeaux, Curtis J
			Compeaux, Gary P
			Compeaux, Harris
			Cone, Jody
			Contreras, Mario
			Cook, Edwin A Jr
			Cook, Edwin A Sr
			Cook, Joshua
			Cook, Larry R Sr
			Cook, Scott
			Cook, Theodore D
			Cooksey, Ernest Neal
			Cooper, Acy J III
			Cooper, Acy J Jr
			Cooper, Acy Sr
			Cooper, Christopher W
			Cooper, Jon C
			Cooper, Marla F
			Cooper, Vincent J
			Copeman, John R
			Corley, Ronald E
			Cornett, Eddie
			Cornwall, Roger
			Cortez, Brenda M
			Cortez, Cathy
			Cortez, Curtis
			Cortez, Daniel P
			Cortez, Edgar
			Cortez, Keith J
			Cortez, Leslie J
			Cosse, Robert K
			Coston, Clayton
			Cotsovolos, John Gordon
			Coulon, Allen J Jr
			Coulon, Allen J Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Coulon, Amy M
			Coulon, Cleveland F
			Coulon, Darrin M
			Coulon, Don
			Coulon, Earline N
			Coulon, Ellis Jr
			Coursey, John W
			Courville, Ronnie P
			Cover, Darryl L
			Cowdrey, Michael Dudley
			Cowdrey, Michael Nelson
			Crain, Michael T
			Crawford, Bryan D
			Crawford, Steven J
			Creamer, Quention
			Credeur, Todd A Sr
			Credeur, Tony J
			Creppel, Carlton
			Creppel, Catherine
			Creppel, Craig Anthony
			Creppel, Freddy
			Creppel, Isadore Jr
			Creppel, Julinne G III
			Creppel, Kenneth
			Creppel, Kenneth
			Creppel, Nathan J Jr
			Creppell, Michel P
			Cristina, Charles J
			Crochet, Sterling James
			Crochet, Tony J
			Crosby, Benjy J
			Crosby, Darlene
			Crosby, Leonard W Jr
			Crosby, Ted J
			Crosby, Thomas
			Crum, Lonnie
			Crum, Tommy Lloyd
			Cruz, Jesus
			Cubbage, Melinda T
			Cuccia, Anthony J
			Cuccia, Anthony J Jr
			Cuccia, Kevin
			Cumbie, Bryan E
			Cure, Mike
			Curole, Keith J
			Curole, Kevin P
			Curole, Margaret B
			Curole, Willie P Jr
			Cutrer, Jason C
			Cvitanovich, T
			Daigle, Alfred

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Daigle, Cleve and Nona
			Daigle, David John
			Daigle, EJ
			Daigle, Glenn
			Daigle, Jamie J
			Daigle, Jason
			Daigle, Kirk
			Daigle, Leonard P
			Daigle, Lloyd
			Daigle, Louis J
			Daigle, Melanie
			Daigle, Michael J
			Daigle, Michael Wayne and JoAnn
			Daisy, Jeff
			Dale, Cleveland L
			Dang, Ba
			Dang, Dap
			Dang, David
			Dang, Duong
			Dang, Khang
			Dang, Khang and Tam Phan
			Dang, Loan Thi
			Dang, Minh
			Dang, Minh Van
			Dang, Son
			Dang, Tao Kevin
			Dang, Thang Duc
			Dang, Thien Van
			Dang, Thuong
			Dang, Thuy
			Dang, Van D
			Daniels, David
			Daniels, Henry
			Daniels, Leslie
			Danos, Albert Sr
			Danos, James A
			Danos, Jared
			Danos, Oliver J
			Danos, Ricky P
			Danos, Rodney
			Danos, Timothy A
			d'Antignac, Debi
			d'Antignac, Jack
			Dantin, Archie A
			Dantin, Mark S Sr
			Dantin, Stephen Jr
			Dao, Paul
			Dao, Vang
			Dao-Nguyen, Chrysti
			Darda, Albert L Jr
			Darda, Gertrude

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Darda, Herbert
			Darda, J C
			Darda, Jeremy
			Darda, Tammy
			Darda, Trudy
			Dardar, Alvin
			Dardar, Basile J
			Dardar, Basile Sr
			Dardar, Cindy
			Dardar, David
			Dardar, Donald S
			Dardar, Edison J Sr
			Dardar, Gayle Picou
			Dardar, Gilbert B
			Dardar, Gilbert Sr
			Dardar, Isadore J Jr
			Dardar, Jacqueline
			Dardar, Jonathan M
			Dardar, Lanny
			Dardar, Larry J
			Dardar, Many
			Dardar, Neal A
			Dardar, Norbert
			Dardar, Patti V
			Dardar, Percy B Sr
			Dardar, Rose
			Dardar, Rusty J
			Dardar, Samuel
			Dardar, Summersgill
			Dardar, Terry P
			Dardar, Toney M Jr
			Dardar, Toney Sr
			Dargis, Stephen M
			Dassau, Louis
			David, Philip J Jr
			Davis, Cliff
			Davis, Daniel A
			Davis, Danny A
			Davis, James
			Davis, John W
			Davis, Joseph D
			Davis, Michael Steven
			Davis, Ronald B
			Davis, William T Jr
			Davis, William Theron
			Dawson, JT
			de la Cruz, Avery T
			Dean, Ilene L
			Dean, John N
			Dean, Stephen
			DeBarge, Brian K

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			DeBarge, Sherry
			DeBarge, Thomas W
			Decoursey, John
			Dedon, Walter
			Deere, Daryl
			Deere, David E
			Deere, Dennis H
			Defelice, Robin
			Defelice, Tracie L
			DeHart, Ashton J Sr
			Dehart, Bernard J
			Dehart, Blair
			Dehart, Clevis
			Dehart, Clevis Jr
			DeHart, Curtis P Sr
			Dehart, Eura Sr
			Dehart, Ferrell John
			Dehart, Leonard M
			DeHart, Troy
			DeJean, Chris N Jr
			DeJean, Chris N Sr
			Dekemel, Bonnie D
			Dekemel, Wm J Jr
			Delande, Paul
			Delande, Ten Chie
			Delatte, Michael J Sr
			Delaune, Kip M
			Delaune, Thomas J
			Delaune, Todd J
			Delcambre, Carroll A
			Delgado, Jesse
			Delino, Carlton
			Delino, Lorene
			Deloach, Stephen W Jr
			DeMoll, Herman J Jr
			DeMoll, Herman J Sr
			DeMoll, James C Jr
			DeMoll, Ralph
			DeMoll, Robert C
			DeMoll, Terry R
			DeMolle, Freddy
			DeMolle, Otis
			Dennis, Fred
			Denty, Steve
			Deroche, Barbara H
			Derouen, Caghe
			Deshotel, Rodney
			DeSilvey, David
			Despaux, Byron J
			Despaux, Byron J Jr
			Despaux, Glen A

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Despaux, Ken
			Despaux, Kerry
			Despaux, Suzanna
			Detillier, David E
			DeVaney, Bobby C Jr
			Dickey, Wesley Frank
			Diep, Vu
			Dinger, Anita
			Dinger, Corbert Sr
			Dinger, Eric
			Dingler, Mark H
			Dinh, Chau Thanh
			Dinh, Khai Duc
			Dinh, Lien
			Dinh, Toan
			Dinh, Vincent
			Dion, Ernest
			Dion, Paul A
			Dion, Thomas Autry
			Disalvo, Paul A
			Dismuke, Robert E Sr
			Ditcharo, Dominick III
			Dixon, David
			Do, Cuong V
			Do, Dan C
			Do, Dung V
			Do, Hai Van
			Do, Hieu
			Do, Hung V
			Do, Hung V
			Do, Johnny
			Do, Kiet Van
			Do, Ky Hong
			Do, Ky Quoc
			Do, Lam
			Do, Liet Van
			Do, Luong Van
			Do, Minh Van
			Do, Nghiep Van
			Do, Ta
			Do, Ta Phon
			Do, Than Viet
			Do, Thanh V
			Do, Theo Van
			Do, Thien Van
			Do, Tinh A
			Do, Tri
			Do, Vi V
			Doan, Anh Thi
			Doan, Joseph
			Doan, Mai

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Doan, Minh
			Doan, Ngoc
			Doan, Tran Van
			Domangue, Darryl
			Domangue, Emile
			Domangue, Mary
			Domangue, Michael
			Domangue, Paul
			Domangue, Ranzell Sr
			Domangue, Stephen
			Domangue, Westley
			Domingo, Carolyn
			Dominique, Amy R
			Dominque, Gerald R
			Donini, Ernest N
			Donnelly, David C
			Donohue, Holly M
			Dooley, Denise F
			Dopson, Craig B
			Dore, Presley J
			Dore, Preston J Jr
			Dorr, Janthan C Jr
			Doucet, Paul J Sr
			Downey, Colleen
			Doxey, Robert Lee Sr
			Doxey, Ruben A
			Doxey, William L
			Doyle, John T
			Drawdy, John Joseph
			Drury, Bruce W Jr
			Drury, Bruce W Sr
			Drury, Bryant J
			Drury, Eric S
			Drury, Helen M
			Drury, Jeff III
			Drury, Kevin
			Drury, Kevin S Sr
			Drury, Steve R
			Drury, Steven J
			Dubberly, James F
			Dubberly, James Michael
			Dubberly, James Michael Jr
			Dubberly, John J
			Dubois, Euris A
			Dubois, John D Jr
			Dubois, Lonnie J
			Duck, Kermit Paul
			Dudenhefer, Anthony
			Dudenhefer, Connie S
			Dudenhefer, Eugene A
			Dudenhefer, Milton J Jr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Duet, Brad J
			Duet, Darrel A
			Duet, Guy J
			Duet, Jace J
			Duet, Jay
			Duet, John P
			Duet, Larson
			Duet, Ramie
			Duet, Raymond J
			Duet, Tammy B
			Duet, Tyrone
			Dufrene, Archie
			Dufrene, Charles
			Dufrene, Curt F
			Dufrene, Elson A
			Dufrene, Eric F
			Dufrene, Eric F Jr
			Dufrene, Eric John
			Dufrene, Golden J
			Dufrene, Jeremy M
			Dufrene, Juliette B
			Dufrene, Leroy J
			Dufrene, Milton J
			Dufrene, Ronald A Jr
			Dufrene, Ronald A Sr
			Dufrene, Scottie M
			Dufrene, Toby
			Dugar, Edward A II
			Dugas, Donald John
			Dugas, Henri J IV
			Duhe, Greta
			Duhe, Robert
			Duhon, Charles
			Duhon, Douglas P
			Duncan, Faye E
			Duncan, Gary
			Duncan, Loyde C
			Dunn, Bob
			Duong, Billy
			Duong, Chamroeun
			Duong, EM
			Duong, Ho Tan Phi
			Duong, Kong
			Duong, Mau
			Duplantis, Blair P
			Duplantis, David
			Duplantis, Frankie J
			Duplantis, Maria
			Duplantis, Teddy W
			Duplantis, Wedgir J Jr
			Duplessis, Anthony James Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Duplessis, Bonnie S
			Duplessis, Clarence R
			Dupre, Brandon P
			Dupre, Cecile
			Dupre, David A
			Dupre, Davis J Jr
			Dupre, Easton J
			Dupre, Jimmie Sr
			Dupre, Linward P
			Dupre, Mary L
			Dupre, Michael J
			Dupre, Michael J Jr
			Dupre, Randall P
			Dupre, Richard A
			Dupre, Rudy P
			Dupre, Ryan A
			Dupre, Tony J
			Dupre, Troy A
			Dupree, Bryan
			Dupree, Derrick
			Dupree, Malcolm J Sr
			Dupuis, Clayton J
			Durand, Walter Y
			Dusang, Melvin A
			Duval, Denval H Sr
			Duval, Wayne
			Dyer, Nadine D
			Dyer, Tony
			Dykes, Bert L
			Dyson, Adley L Jr
			Dyson, Adley L Sr
			Dyson, Amy
			Dyson, Casandra
			Dyson, Clarence III
			Dyson, Jimmy Jr
			Dyson, Jimmy L Sr
			Dyson, Kathleen
			Dyson, Maricela
			Dyson, Phillip II
			Dyson, Phillip Sr
			Dyson, William
			Eckerd, Bill
			Edens, Angela Blake
			Edens, Donnie
			Edens, Jeremy Donald
			Edens, Nancy M
			Edens, Steven L
			Edens, Timothy Dale
			Edgar, Daniel
			Edgar, Joey
			Edgerson, Roosevelt

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Edwards,Tommy W III
			Ellerbee, Jody Duane
			Ellison, David Jr
			Encalade, Alfred Jr
			Encalade, Anthony T
			Encalade, Cary
			Encalade, Joshua C
			Encalade, Stanley A
			Enclade, Joseph L
			Enclade, Michael Sr and Jeannie Pitre
			Enclade, Rodney J
			Englade, Alfred
			Ennis, A L Jr
			Erickson, Grant G
			Erlinger, Carroll
			Erlinger, Gary R
			Eschete, Keith A
			Esfeller, Benny A
			Eskine, Kenneth
			Esponge, Ernest J
			Estaves, David Sr
			Estaves, Ricky Joseph
			Estay, Allen J
			Estay, Wayne
			Esteves, Anthony E Jr
			Estrada, Orestes
			Evans, Emile J Jr
			Evans, Kevin J
			Evans, Lester
			Evans, Lester J Jr
			Evans, Tracey J Sr
			Everson, George C
			Eymard, Brian P Sr
			Eymard, Jervis J and Carolyn B
			Fabiano, Morris C
			Fabra, Mark
			Fabre, Alton Jr
			Fabre, Ernest J
			Fabre, Kelly V
			Fabre, Peggy B
			Fabre, Sheron
			Fabre, Terry A
			Fabre, Wayne M
			Falcon, Mitchell J
			Falgout, Barney
			Falgout, Jerry P
			Falgout, Leroy J
			Falgout, Timothy J
			Fanguy, Barry G
			Fanning, Paul Jr
			Farris, Thomas J

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Fasone, Christopher J
			Fasone, William J
			Faulk, Lester J
			Favaloro, Thomas J
			Favre, Michael Jr
			Fazende, Jeffery
			Fazende, Thomas
			Fazende, Thomas G
			Fazzio, Anthony
			Fazzio, Douglas P
			Fazzio, Maxine J
			Fazzio, Steve
			Felarise, EJ
			Felarise, Wayne A Sr
			Fernandez, John
			Fernandez, Laudelino
			Ferrara, Audrey B
			Ficarino, Dominick Jr
			Fields, Bryan
			Fillinich, Anthony
			Fillinich, Anthony Sr
			Fillinich, Jack
			Fincher, Penny
			Fincher, William
			Fisch, Burton E
			Fisher, Kelly
			Fisher, Kirk
			Fisher, Kirk A
			Fitch, Adam
			Fitch, Clarence J Jr
			Fitch, Hanson
			Fitzgerald, Burnell
			Fitzgerald, Kirk
			Fitzgerald, Kirk D
			Fitzgerald, Ricky J Jr
			Fleming, John M
			Fleming, Meigs F
			Fleming, Mike
			Flick, Dana
			Flores, Helena D
			Flores, Thomas
			Flowers, Steve W
			Flowers, Vincent F
			Folse, David M
			Folse, Heath
			Folse, Mary L
			Folse, Ronald B
			Fonseca, Francis Sr
			Fontaine, William S
			Fontenot, Peggy D
			Ford, Judy

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ford, Warren Wayne
			Foreman, Ralph Jr
			Foret, Alva J
			Foret, Billy J
			Foret, Brent J
			Foret, Glenn
			Foret, Houston
			Foret, Jackie P
			Foret, Kurt J Sr
			Foret, Lovelace A Sr
			Foret, Loveless A Jr
			Foret, Mark M
			Foret, Patricia C
			Forrest, David P
			Forsyth, Hunter
			Forsythe, John
			Fortune, Michael A
			France, George J
			Francis, Albert
			Franklin, James K
			Frankovich, Anthony
			Franks, Michael
			Frauenberger, Richard Wayne
			Frazier, David J
			Frazier, David M
			Frazier, James
			Frazier, Michael
			Frederick, Davis
			Frederick, Johnnie and Jeannie
			Fredrick, Michael
			Freeman, Arthur D
			Freeman, Darrel P Sr
			Freeman, Kenneth F
			Freeman, Larry Scott
			Frelich, Charles P
			Frelich, Floyd J
			Frelich, Kent
			Frerics, Doug
			Frerks, Albert R Jr
			Frickey, Darell
			Frickey, Darren
			Frickey, Dirk I
			Frickey, Eric J
			Frickey, Harry J Jr
			Frickey, Jimmy
			Frickey, Rickey J
			Frickey, Westley J
			Friloux, Brad
			Frisella, Jeanette M
			Frisella, Jerome A Jr
			Frost, Michael R

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Fruge, Wade P
			Gadson, James
			Gaines, Dwayne
			Gala, Christine
			Galjour, Jess J
			Galjour, Reed
			Gallardo, John W
			Gallardo, Johnny M
			Galliano, Anthony
			Galliano, Horace J
			Galliano, Joseph Sr
			Galliano, Logan J
			Galliano, Lynne L
			Galliano, Moise Jr
			Galloway, AT Jr
			Galloway, Jimmy D
			Galloway, Judy L
			Galloway, Mark D
			Galt, Giles F
			Gambarella, Luvencie J
			Ganoi, Kristine
			Garcia, Ana Maria
			Garcia, Anthony
			Garcia, Edward
			Garcia, Kenneth
			Garner, Larry S
			Gary, Dalton J
			Gary, Ernest J
			Gary, Leonce Jr
			Garza, Andres
			Garza, Jose H
			Gaskill, Elbert Clinton and Sandra
			Gaspar, Timothy
			Gaspard, Aaron and Hazel C
			Gaspard, Dudley A Jr
			Gaspard, Leonard J
			Gaspard, Michael A
			Gaspard, Michael Sr
			Gaspard, Murry
			Gaspard, Murry A Jr
			Gaspard, Murry Sr
			Gaspard, Murvin
			Gaspard, Ronald Sr
			Gaspard, Ronald Wayne Jr
			Gaubert, Elizabeth
			Gaubert, Gregory M
			Gaubert, Melvin
			Gaudet, Allen J IV
			Gaudet, Ricky Jr
			Gauthier, Hewitt J Sr
			Gautreaux, William A

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Gay, Norman F
			Gay, Robert G
			Gazzier, Daryl G
			Gazzier, Emanuel A
			Gazzier, Wilfred E
			Gegenheimer, William F
			Geiling, James
			Geisman, Tony
			Gentry, Robert
			Gentry, Samuel W Jr
			George, James J Jr
			Gerica, Clara
			Gerica, Peter
			Giambrone, Corey P
			Gibson, Eddie E
			Gibson, Joseph
			Gibson, Ronald F
			Gilden, Eddie Jr
			Gilden, Eddie Sr
			Gilden, Inez W
			Gilden, Wayne
			Gillikin, James D
			Girard, Chad Paul
			Giroir, Mark S
			Gisclair, Anthony J
			Gisclair, Anthony Joseph Sr
			Gisclair, August
			Gisclair, Dallas J Sr
			Gisclair, Doyle A
			Gisclair, Kip J
			Gisclair, Ramona D
			Gisclair, Wade
			Gisclair, Walter
			Glover, Charles D
			Glynn, Larry
			Goetz, George
			Goings, Robert Eugene
			Golden, George T
			Golden, William L
			Gollot, Brian
			Gollot, Edgar R
			Gonzales, Arnold Jr
			Gonzales, Mrs Cyril E Jr
			Gonzales, Rene R
			Gonzales, Rudolph S Jr
			Gonzales, Rudolph S Sr
			Gonzales, Sylvia A
			Gonzales, Tim J
			Gonzalez, Jorge Jr
			Gonzalez, Julio
			Gordon, Donald E

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Gordon, Patrick Alvin
			Gore, Henry H
			Gore, Isabel
			Gore, Pam
			Gore, Thomas L
			Gore, Timothy Ansel
			Gottschalk, Gregory
			Gourgues, Harold C Jr
			Goutierrez, Tony C
			Govea, Joaquin
			Graham, Darrell
			Graham, Steven H
			Granger, Albert J Sr
			Granich, James
			Granier, Stephen J
			Grass, Michael
			Graves, Robert N Sr
			Gray, Jeannette
			Gray, Monroe
			Gray, Shirley E
			Gray, Wayne A Sr
			Graybill, Ruston
			Green, Craig X
			Green, James W
			Green, James W Jr
			Green, Shaun
			Greenlaw, W C Jr
			Gregoire, Ernest L
			Gregoire, Rita M
			Gregory, Curtis B
			Gregory, Mercedes E
			Grice, Raymond L Jr
			Griffin, Alden J Sr
			Griffin, Craig
			Griffin, David D
			Griffin, Elvis Joseph Jr
			Griffin, Faye
			Griffin, Faye Ann
			Griffin, Jimmie J
			Griffin, Nolty J
			Griffin, Rickey
			Griffin, Sharon
			Griffin, Timothy
			Griffin, Troy D
			Groff, Alfred A
			Groff, John A
			Groover, Hank
			Gros, Brent J Sr
			Gros, Craig J
			Gros, Danny A
			Gros, Gary Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Gros, Junius A Jr
			Gros, Keven
			Gros, Michael A
			Gross, Homer
			Grossie, Janet M
			Grossie, Shane A
			Grossie, Tate
			Grow, Jimmie C
			Guenther, John J
			Guenther, Raphael
			Guerra, Bruce
			Guerra, Chad L
			Guerra, Fabian C
			Guerra, Guy A
			Guerra, Jerry V Sr
			Guerra, Kurt P Sr
			Guerra, Ricky J Sr
			Guerra, Robert
			Guerra, Ryan
			Guerra, Troy A
			Guerra, William Jr
			Guidroz, Warren J
			Guidry, Alvin A
			Guidry, Andy J
			Guidry, Arthur
			Guidry, Bud
			Guidry, Calvin P
			Guidry, Carl J
			Guidry, Charles J
			Guidry, Chris J
			Guidry, Clarence P
			Guidry, Clark
			Guidry, Clint
			Guidry, Clinton P Jr
			Guidry, Clyde A
			Guidry, David
			Guidry, Dobie
			Guidry, Douglas J Sr
			Guidry, Elgy III
			Guidry, Elgy Jr
			Guidry, Elwin A Jr
			Guidry, Gerald A
			Guidry, Gordon Jr
			Guidry, Guillaume A
			Guidry, Harold
			Guidry, Jason
			Guidry, Jessie J
			Guidry, Jessie Joseph
			Guidry, Jonathan B
			Guidry, Joseph T Jr
			Guidry, Keith M

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Guidry, Kenneth J
			Guidry, Kerry A
			Guidry, Marco
			Guidry, Maurin T and Tamika
			Guidry, Michael J
			Guidry, Nolan J Sr
			Guidry, Randy Peter Sr
			Guidry, Rhonda S
			Guidry, Robert C
			Guidry, Robert Joseph
			Guidry, Robert Wayne
			Guidry, Roger
			Guidry, Ronald
			Guidry, Roy Anthony
			Guidry, Roy J
			Guidry, Tammy
			Guidry, Ted
			Guidry, Thomas P
			Guidry, Timothy
			Guidry, Troy
			Guidry, Troy
			Guidry, Ulysses
			Guidry, Vicki
			Guidry, Wayne J
			Guidry, Wyatt
			Guidry, Yvonne
			Guidry-Calva, Holly A
			Guilbeaux, Donald J
			Guilbeaux, Lou
			Guillie, Shirley
			Guillory, Horace H
			Guillot, Benjamin J Jr
			Guillot, Rickey A
			Gulledge, Lee
			Gutierrez, Anita
			Guy, Jody
			Guy, Kimothy Paul
			Guy, Wilson
			Ha, Cherie Lan
			Ha, Co Dong
			Ha, Lai Thuy Thi
			Ha, Lyanna
			Hadwall, John R
			Hafford, Johnny
			Hagan, Jules
			Hagan, Marianna
			Haiglea, Robbin Richard
			Hales, William E
			Halili, Rhonda L
			Hall, Byron S
			Hall, Darrel T Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hall, Lorrie A
			Hammer, Michael P
			Hammock, Julius Michael
			Hancock, Jimmy L
			Handlin, William Sr
			Hang, Cam T
			Hansen, Chris
			Hansen, Eric P
			Hanson, Edmond A
			Harbison, Louis
			Hardee, William P
			Hardison, Louis
			Hardy John C
			Hardy, Sharon
			Harmon, Michelle
			Harrington, George J
			Harrington, Jay
			Harris, Bobby D
			Harris, Buster
			Harris, Jimmy Wayne Sr
			Harris, Johnny Ray
			Harris, Kenneth A
			Harris, Ronnie
			Harris, Susan D
			Harris, William
			Harrison, Daniel L
			Hartmann, Leon M Jr
			Hartmann, Walter Jr
			Hattaway, Errol Henry
			Haycock, Kenneth
			Haydel, Gregory
			Hayes, Clinton
			Hayes, Katherine F
			Hayes, Lod Jr
			Hean, Hong
			Heathcock, Walter Jr
			Hebert, Albert Joseph
			Hebert, Bernie
			Hebert, Betty Jo
			Hebert, Chris
			Hebert, Craig J
			Hebert, David
			Hebert, David Jr
			Hebert, Earl J
			Hebert, Eric J
			Hebert, Jack M
			Hebert, Johnny Paul
			Hebert, Jonathan
			Hebert, Jules J
			Hebert, Kim M
			Hebert, Lloyd S III

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hebert, Michael J
			Hebert, Myron A
			Hebert, Norman
			Hebert, Patrick
			Hebert, Patrick A
			Hebert, Pennington Jr
			Hebert, Philip
			Hebert, Robert A
			Hebert, Terry W
			Hedrick, Gerald J Jr
			Helmer, Claudia A
			Helmer, Gerry J
			Helmer, Herman C Jr
			Helmer, Kenneth
			Helmer, Larry J Sr
			Helmer, Michael A Sr
			Helmer, Rusty L
			Helmer, Windy
			Hemmenway, Jack
			Henderson, Brad
			Henderson, Curtis
			Henderson, David A Jr
			Henderson, David A Sr
			Henderson, Johnny
			Henderson, Olen
			Henderson, P Loam
			Henry, Joanne
			Henry, Rodney
			Herbert, Patrick and Terry
			Hereford, Rodney O Jr
			Hereford, Rodney O Sr
			Hernandez, Corey
			Herndon, Mark
			Hertel, Charles W
			Hertz, Edward C Sr
			Hess, Allen L Sr
			Hess, Henry D Jr
			Hess, Jessica R
			Hess, Wayne B
			Hewett, Emma
			Hewett, James
			Hickman, John
			Hickman, Marvin
			Hicks, Billy M
			Hicks, James W
			Hicks, Larry W
			Hicks, Walter R
			Hien, Nguyen
			Higgins, Joseph J III
			Hill, Darren S
			Hill, Joseph R

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hill, Sharon
			Hill, Willie E Jr
			Hills, Herman W
			Hingle, Barbara E
			Hingle, Rick A
			Hingle, Roland T Jr
			Hingle, Roland T Sr
			Hingle, Ronald J
			Hinojosa, R
			Hinojosa, Randy
			Hinojosa, Ricky A
			Hipps, Nicole Marie
			Ho, Dung Tan
			Ho, Hung
			Ho, Jennifer
			Ho, Jimmy
			Ho, Lam
			Ho, Nam
			Ho, Nga T
			Ho, O
			Ho, Sang N
			Ho, Thanh Quoc
			Ho, Thien Dang
			Ho, Tien Van
			Ho, Tri Tran
			Hoang, Dung T
			Hoang, Hoa T and Tam Hoang
			Hoang, Huy Van
			Hoang, Jennifer Vu
			Hoang, John
			Hoang, Julie
			Hoang, Kimberly
			Hoang, Linda
			Hoang, Loan
			Hoang, San Ngoc
			Hoang, Tro Van
			Hoang, Trung Kim
			Hoang, Trung Tuan
			Hoang, Vincent Huynh
			Hodges, Ralph W
			Hoffpaviiz, Harry K
			Holland, Vidal
			Holler, Boyce Dwight Jr
			Hollier, Dennis J
			Holloway, Carl D
			Hong, Tai Van
			Hood, Malcolm
			Hopton, Douglas
			Horaist, Shawn P
			Hostetler, Warren L II
			Hotard, Claude

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Hotard, Emile J Jr
			Howard, Jeff
			Howerin, Billy Sr
			Howerin, Wendell Sr
			Hubbard, Keith
			Hubbard, Perry III
			Huber, Berry T
			Huber, Charles A
			Huck, Irma Elaine
			Huck, Steven R
			Huckabee, Harold
			Hue, Patrick A
			Hughes, Brad J
			Hults, Thomas
			Hutcherson, Daniel J
			Hutchinson, Douglas
			Hutchinson, George D
			Hutchinson, William H
			Hutto, Cynthia E
			Hutto, Henry G Jr
			Huynh, Chien Thi
			Huynh, Dong Xuan
			Huynh, Dung
			Huynh, Dung V
			Huynh, Hai
			Huynh, Hai
			Huynh, Hai Van
			Huynh, Hoang D
			Huynh, Hoang Van
			Huynh, Hung
			Huynh, James N
			Huynh, Johhny Hiep
			Huynh, Johnnie
			Huynh, Kim
			Huynh, Lay
			Huynh, Long
			Huynh, Mack Van
			Huynh, Mau Van
			Huynh, Minh
			Huynh, Minh Van
			Huynh, Nam Van
			Huynh, Thai
			Huynh, Tham Thi
			Huynh, Thanh
			Huynh, Thanh
			Huynh, The V
			Huynh, Tri
			Huynh, Truc
			Huynh, Tu
			Huynh, Tu
			Huynh, Tung Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Huynh, Van X
			Huynh, Viet Van
			Huynh, Vuong Van
			Hymel, Joseph Jr
			Hymel, Michael D
			Hymel, Nolan J Sr
			Ingham, Herbert W
			Inglis, Richard M
			Ingraham, Joseph S
			Ingraham, Joyce
			Ipock, Billy
			Ipock, William B
			Ireland, Arthur Allen
			Iver, George Jr
			Jackson, Alfred M
			Jackson, Carl John
			Jackson, David
			Jackson, Eugene O
			Jackson, Glenn C Jr
			Jackson, Glenn C Sr
			Jackson, James Jerome
			Jackson, John D
			Jackson, John Elton Sr
			Jackson, Levi
			Jackson, Nancy L
			Jackson, Robert W
			Jackson, Shannon
			Jackson, Shaun C
			Jackson, Steven A
			Jacob, Ronald R
			Jacob, Warren J Jr
			Jacobs, L Anthony
			Jacobs, Lawrence F
			Jarreau, Billy and Marilyn
			Jarvis, James D
			Jaye, Emma
			Jeanfreau, Vincent R
			Jefferies, William
			Jemison, Timothy Michael Sr
			Jennings, Jacob
			Joffrion, Harold J Jr
			Johnson, Albert F
			Johnson, Ashley Lamar
			Johnson, Bernard Jr
			Johnson, Brent W
			Johnson, Bruce Warem
			Johnson, Carl S
			Johnson, Carolyn
			Johnson, Clyde Sr
			Johnson, David G
			Johnson, David Paul

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Johnson, Gary Allen Sr
			Johnson, George D
			Johnson, Michael A
			Johnson, Randy J
			Johnson, Regenia
			Johnson, Robert
			Johnson, Ronald Ray Sr
			Johnson, Steve
			Johnson, Thomas Allen Jr
			Johnston, Ronald
			Joly, Nicholas J Jr
			Jones, Charles
			Jones, Clinton
			Jones, Daisy Mae
			Jones, Jeffery E
			Jones, Jerome N Sr
			Jones, John W
			Jones, Larry
			Jones, Len
			Jones, Michael G Sr
			Jones, Paul E
			Jones, Perry T Sr
			Jones, Ralph William
			Jones, Richard G Sr
			Jones, Stephen K
			Jones, Wayne
			Joost, Donald F
			Jordan, Dean
			Jordan, Hubert William III (Bert)
			Jordan, Hurbert W Jr
			Judalet, Ramon G
			Judy, William Roger
			Julian, Ida
			Julian, John I Sr
			Juneau, Anthony Sr
			Juneau, Bruce
			Juneau, Robert A Jr and Laura K
			Jurjevich, Leander J
			Kain, Jules B Sr
			Kain, Martin A
			Kalliainen, Dale
			Kalliainen, Richard
			Kang, Chamroeun
			Kang, Sambo
			Kap, Brenda
			Keen, Robert Steven
			Keenan, Robert M
			Kellum, Kenneth Sr
			Kellum, Larry Gray Sr
			Kellum, Roxanne
			Kelly, Roger B

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Kelly, Thomas E
			Kendrick, Chuck J
			Kennair, Michael S
			Kennedy, Dothan
			Kenney, David Jr
			Kenney, Robert W
			Kent, Michael A
			Keo, Bunly
			Kerchner, Steve
			Kern, Thurmond
			Khin, Sochenda
			Khui, Lep and Nga Ho
			Kidd, Frank
			Kiesel, Edward C and Lorraine T
			Kiff, Hank J
			Kiff, Melvin
			Kiffe, Horace
			Kim, Puch
			Kimbrough, Carson
			Kim-Tun, Soeun
			King, Andy A
			King, Donald Jr
			King, James B
			King, Thornell
			King, Wesley
			Kit, An
			Kizer, Anthony J
			Kleimann, Robert
			Knapp, Alton P Jr
			Knapp, Alton P Sr
			Knapp, Ellis L Jr
			Knapp, Melvin L
			Knapp, Theresa
			Knecht, Frederick Jr
			Knezek, Lee
			Knight, George
			Knight, Keith B
			Knight, Robert E
			Koch, Howard J
			Kong, Seng
			Konitz, Bobby
			Koo, Herman
			Koonce, Curtis S
			Koonce, Howard N
			Kopszywa, Mark L
			Kopszywa, Stanley J
			Kotulja, Stejepan
			Kraemer, Bridget
			Kraemer, Wilbert J
			Kraemer, Wilbert Jr
			Kramer, David

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Krantz, Arthur Jr
			Krantz, Lori
			Kraver, C W
			Kreger, Ronald A Sr
			Kreger, Roy J Sr
			Kreger, Ryan A
			Krennerich, Raymond A
			Kroke, Stephen E
			Kruth, Frank D
			Kuchler, Alphonse L III
			Kuhn, Bruce A Sr
			Kuhn, Gerard R Jr
			Kuhn, Gerard R Sr
			Kuhns, Deborah
			LaBauve, Kerry
			LaBauve, Sabrina
			LaBauve, Terry
			LaBiche, Todd A
			LaBove, Carroll
			LaBove, Frederick P
			Lachica, Jacqueline
			Lachico, Douglas
			Lacobon, Tommy W Jr
			Lacobon, Tony C
			LaCoste, Broddie
			LaCoste, Carl
			LaCoste, Dennis E
			LaCoste, Grayland J
			LaCoste, Malcolm Jr
			LaCoste, Melvin
			LaCoste, Melvin W Jr
			LaCoste, Ravin J Jr
			LaCoste, Ravin Sr
			Ladner, Clarence J III
			Ladson, Earlene G
			LaFont, Douglas A Sr
			LaFont, Edna S
			LaFont, Jackin
			LaFont, Noces J Jr
			LaFont, Weyland J Sr
			LaFrance, Joseph T
			Lagarde, Frank N
			Lagarde, Gary Paul
			Lagasse, Michael F
			Lai, Hen K
			Lai, Then
			Lam, Cang Van
			Lam, Cui
			Lam, Dong Van
			Lam, Hiep Tan
			Lam, Lan Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Lam, Lee Phenh
			Lam, Phan
			Lam, Qui
			Lam, Sochen
			Lam, Tai
			Lam, Tinh Huu
			Lambas, Jessie J Sr
			Lanclos, Paul
			Landry, David A
			Landry, Dennis J
			Landry, Edward N Jr
			Landry, George
			Landry, George M
			Landry, James F
			Landry, Jude C
			Landry, Robert E
			Landry, Ronald J
			Landry, Samuel J Jr
			Landry, Tracy
			Lane, Daniel E
			Lapeyrouse, Lance M
			Lapeyrouse, Rosalie
			Lapeyrouse, Tillman Joseph
			LaRive, James L Jr
			LaRoche, Daniel S
			Lasseigne, Betty
			Lasseigne, Blake
			Lasseigne, Floyd
			Lasseigne, Frank
			Lasseigne, Harris Jr
			Lasseigne, Ivy Jr
			Lasseigne, Jefferson
			Lasseigne, Jefferson P Jr
			Lasseigne, Johnny J
			Lasseigne, Marlene
			Lasseigne, Nolan J
			Lasseigne, Trent
			Lat, Chhiet
			Latapie, Charlotte A
			Latapie, Crystal
			Latapie, Jerry
			Latapie, Joey G
			Latapie, Joseph
			Latapie, Joseph F Sr
			Latapie, Travis
			Latiolais, Craig J
			Latiolais, Joel
			Lau, Ho Thanh
			Laughlin, James G
			Laughlin, James Mitchell
			Laurent, Yvonne M

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Lavergne, Roger
			Lawdros, Terrance Jr
			Layrisson, Michael A III
			Le, Amanda
			Le, An Van
			Le, Ben
			Le, Binh T
			Le, Cheo Van
			Le, Chinh Thanh
			Le, Chinh Thanh and Yen Vo
			Le, Cu Thi
			Le, Dai M
			Le, Dale
			Le, David Rung
			Le, Du M
			Le, Duc V
			Le, Duoc M
			Le, Hien V
			Le, Houston T
			Le, Hung
			Le, Jimmy
			Le, Jimmy and Hoang
			Le, Khoa
			Le, Kim
			Le, Ky Van
			Le, Lang Van
			Le, Lily
			Le, Lisa Tuyet Thi
			Le, Loi
			Le, Minh Van
			Le, Muoi Van
			Le, My
			Le, My V
			Le, Nam and Xhan-Minh Le
			Le, Nam Van
			Le, Nhieu T
			Le, Nhut Hoang
			Le, Nu Thi
			Le, Phuc Van
			Le, Que V
			Le, Quy
			Le, Robert
			Le, Sam Van
			Le, Sau V
			Le, Son
			Le, Son
			Le, Son H
			Le, Son Quoc
			Le, Son Van
			Le, Su
			Le, Tam V

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Le, Thanh Huong
			Le, Tong Minh
			Le, Tony
			Le, Tracy Lan Chi
			Le, Tuan Nhu
			Le, Viet Hoang
			Le, Vui
			Leaf, Andrew Scott
			Leary, Roland
			LeBeauf, Thomas
			LeBlanc, Donnie
			LeBlanc, Edwin J
			LeBlanc, Enoch P
			LeBlanc, Gareth R III
			LeBlanc, Gareth R Jr
			LeBlanc, Gerald E
			LeBlanc, Hubert C
			LeBlanc, Jerald
			LeBlanc, Jesse Jr
			LeBlanc, Keenon Anthony
			LeBlanc, Lanvin J
			LeBlanc, Luke A
			LeBlanc, Marty J
			LeBlanc, Marty J Jr
			LeBlanc, Mickel J
			LeBlanc, Robert Patrick
			LeBlanc, Scotty M
			LeBlanc, Shelton
			LeBlanc, Terry J
			LeBoeuf, Brent J
			LeBoeuf, Emery J
			LeBoeuf, Joseph R
			LeBoeuf, Tammy Y
			LeBouef, Dale
			LeBouef, Edward J
			LeBouef, Ellis J Jr
			LeBouef, Gillis
			LeBouef, Jimmie
			LeBouef, Leslie
			LeBouef, Lindy J
			LeBouef, Micheal J
			LeBouef, Raymond
			LeBouef, Tommy J
			LeBouef, Wiley Sr
			LeBourgeois, Stephen A
			LeCompte, Alena
			LeCompte, Aubrey J
			LeCompte, Etha
			LeCompte, Jesse C Jr
			LeCompte, Jesse Jr
			LeCompte, Jesse Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			LeCompte, Lyle
			LeCompte, Patricia F
			LeCompte, Todd
			LeCompte, Troy A Sr
			Ledet, Brad
			Ledet, Bryan
			Ledet, Carlton
			Ledet, Charles J
			Ledet, Jack A
			Ledet, Kenneth A
			Ledet, Mark
			Ledet, Maxine B
			Ledet, Mervin
			Ledet, Phillip John
			Ledoux, Dennis
			Ledwig, Joe J
			Lee, Carl
			Lee, James K
			Lee, Marilyn
			Lee, Otis M Jr
			Lee, Raymond C
			Lee, Robert E
			Lee, Steven J
			Leek, Mark A
			LeGaux, Roy J Jr
			Legendre, Kerry
			Legendre, Paul
			Leger, Andre
			LeGros, Alex M
			LeJeune, Philip Jr
			LeJeune, Philip Sr
			LeJeune, Ramona V
			LeJeunee, Debbie
			LeJuine, Eddie R
			LeLand, Allston Bochet
			Leland, Rutledge B III
			Leland, Rutledge B Jr
			LeLeaux, David
			Leleux, Kevin J
			Lemoine, Jeffery Jr
			Leonard, Dan
			Leonard, Dexter J Jr
			Leonard, Micheal A
			Lepine, Leroy L
			Lesso, Rudy Jr
			Lester, Shawn
			Levron, Dale T
			Levy, Patrick T
			Lewis, Kenneth
			Lewis, Mark Steven
			Libersat, Anthony R

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Libersat, Kim
			Licatino, Daniel Jr
			Lichenstein, Donald L
			Lilley, Douglas P
			Lim, Chhay
			Lim, Koung
			Lim, Tav Seng
			Linden, Eric L
			Liner, Claude J Jr
			Liner, Harold
			Liner, Jerry
			Liner, Kevin
			Liner, Michael B Sr
			Liner, Morris T Jr
			Liner, Morris T Sr
			Liner, Tandy M
			Linh, Pham
			Linwood, Dolby
			Lirette, Alex J Sr
			Lirette, Bobby and Sheri
			Lirette, Chester Patrick
			Lirette, Daniel J
			Lirette, Dean J
			Lirette, Delvin J Jr
			Lirette, Delvin Jr
			Lirette, Desaire J
			Lirette, Eugis P Sr
			Lirette, Guy A
			Lirette, Jeannie
			Lirette, Kern A
			Lirette, Ron C
			Lirette, Russell (Chico) Jr
			Lirette, Shaun Patrick
			Lirette, Terry J Sr
			Little, William A
			Little, William Boyd
			Liv, Niem S
			Livaudais, Ernest J
			Liverman, Harry R
			LoBue, Michael Anthony Sr
			Locascio, Dustin
			Lockhart, William T
			Lodrigue, Jimmy A
			Lodrigue, Kerry
			Lombardo, Joseph P
			Lombas, James A Jr
			Lombas, Kim D
			Londrie, Harley
			Long, Cao Thanh
			Long, Dinh
			Long, Robert

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Longo, Ronald S Jr
			Longwater, Ryan Heath
			Loomer, Rhonda
			Lopez, Celestino
			Lopez, Evelio
			Lopez, Harry N
			Lopez, Ron
			Lopez, Scott
			Lopez, Stephen R Jr
			Lord, Michael E Sr
			Loupe, George Jr
			Loupe, Ted
			Lovell, Billy
			Lovell, Bobby Jason
			Lovell, Bradford John
			Lovell, Charles J Jr
			Lovell, Clayton
			Lovell, Douglas P
			Lovell, Jacob G
			Lovell, Lois
			Lovell, Slade M
			Luke, Bernadette C
			Luke, David
			Luke, Dustan
			Luke, Henry
			Luke, Jeremy Paul
			Luke, Keith J
			Luke, Patrick A
			Luke, Patrick J
			Luke, Paul Leroy
			Luke, Rudolph J
			Luke, Samantha
			Luke, Sidney Jr
			Luke, Terry Patrick Jr
			Luke, Terry Patrick Sr
			Luke, Timothy
			Luke, Wiltz J
			Lund, Ora G
			Luneau, Ferrell J
			Luong, Kevin
			Luong, Thu X
			Luscy, Lydia
			Luscy, Richard
			Lutz, William A
			Luu, Binh
			Luu, Vinh
			Luu, Vinh V
			Ly, Bui
			Ly, Hen
			Ly, Hoc
			Ly, Kelly D

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ly, Nu
			Ly, Sa
			Ly, Ven
			Lyall, Rosalie
			Lycett, James A
			Lyons, Berton J
			Lyons, Berton J Sr
			Lyons, Jack
			Lyons, Jerome M
			Mackey, Marvin Sr
			Mackie, Kevin L
			Maggio, Wayne A
			Magwood, Edwin Wayne
			Mai, Danny V
			Mai, Lang V
			Mai, Tai
			Mai, Trach Xuan
			Maise, Rubin J
			Maise, Todd
			Majoue, Ernest J
			Majoue, Nathan L
			Malcombe, David
			Mallett, Irvin Ray
			Mallett, Jimmie
			Mallett, Lawrence J
			Mallett, Mervin B
			Mallett, Rainbow
			Mallett, Stephney
			Malley, Ned F Jr
			Mamolo, Charles H Sr
			Mamolo, Romeo C Jr
			Mamolo, Terry A
			Mancera, Jesus
			Manuel, Joseph R
			Manuel, Shon
			Mao, Chandarasy
			Mao, Kim
			Marcel, Michelle
			Marchese, Joe Jr
			Mareno, Ansley
			Mareno, Brent J
			Mareno, Kenneth L
			Marie, Allen J
			Marie, Marty
			Marmande, Al
			Marmande, Alidore
			Marmande, Denise
			Marquize, Heather
			Marquize, Kip
			Marris, Roy C Jr
			Martin, Darren

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Martin, Dean J
			Martin, Dennis
			Martin, Jody W
			Martin, John F III
			Martin, Michael A
			Martin, Nora S
			Martin, Rod J
			Martin, Roland J Jr
			Martin, Russel J Sr
			Martin, Sharon J
			Martin, Tanna G
			Martin, Wendy
			Martinez, Carl R
			Martinez, Henry
			Martinez, Henry Joseph
			Martinez, Lupe
			Martinez, Michael
			Martinez, Rene J
			Mason, James F Jr
			Mason, Johnnie W
			Mason, Luther
			Mason, Mary Lois
			Mason, Percy D Jr
			Mason, Walter
			Matherne, Anthony
			Matherne, Blakland Sr
			Matherne, Bradley J
			Matherne, Claude I Jr
			Matherne, Clifford P
			Matherne, Curlis J
			Matherne, Forest J
			Matherne, George J
			Matherne, Glenn A
			Matherne, Grace L
			Matherne, James C
			Matherne, James J Jr
			Matherne, James J Sr
			Matherne, Joey A
			Matherne, Keith
			Matherne, Larry Jr
			Matherne, Louis M Sr
			Matherne, Louis Michael
			Matherne, Nelson
			Matherne, Thomas G
			Matherne, Thomas G Jr
			Matherne, Thomas Jr
			Matherne, Thomas M Sr
			Matherne, Wesley J
			Mathews, Patrick
			Mathurne, Barry
			Matte, Martin J Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Mauldin, Johnny
			Mauldin, Mary
			Mauldin, Shannon
			Mavar, Mark D
			Mayeux, Lonies A Jr
			Mayeux, Roselyn P
			Mayfield, Gary
			Mayfield, Henry A Jr
			Mayfield, James J III
			Mayon, Allen J
			Mayon, Wayne Sr
			McAnespy, Henry
			McAnespy, Louis
			McCall, Marcus H
			McCall, R Terry Sr
			McCarthy, Carliss
			McCarthy, Michael
			McCauley, Byron Keith
			McCauley, Katrina
			McClantoc, Robert R and Debra
			McClellan, Eugene Gardner
			McCormick, Len
			McCuiston, Denny Carlton
			McDonald, Allan
			McElroy, Harry J
			McFarlain, Merlin J Jr
			McGuinn, Dennis
			McIntosh, James Richard
			McIntyre, Michael D
			McIver, John H Jr
			McKendree, Roy
			McKenzie, George B
			McKinzie, Bobby E
			McKoin, Robert
			McKoin, Robert F Jr
			McLendon, Jonathon S
			McNab, Robert Jr
			McQuaig, Don W
			McQuaig, Oliver J
			Medine, David P
			Mehaffey, John P
			Melancon, Brent K
			Melancon, Neva
			Melancon, Rickey
			Melancon, Roland Jr
			Melancon, Roland T Jr
			Melancon, Sean P
			Melancon, Terral J
			Melancon, Timmy J
			Melanson, Ozimea J III
			Melerine, Angela

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Melerine, Brandon T
			Melerine, Claude A
			Melerine, Claude A Jr
			Melerine, Dean J
			Melerine, Eric W Jr
			Melerine, John D Sr
			Melerine, Linda C
			Melerine, Raymond Joseph
			Melford, Daniel W Sr
			Mello, Nelvin
			Men, Sophin
			Menendez, Wade E
			Menesses, Dennis
			Menesses, James H
			Menesses, Jimmy
			Menesses, Louis
			Menge, Lionel A
			Menge, Vincent J
			Mercy, Dempsey
			Merrick, Harold A
			Merrick, Kevin Sr
			Merritt, Darren Sr
			Messer, Chase
			Meyers, Otis J
			Miarm, Soeum
			Michel, Steven D
			Middleton, Dan Sr
			Migues, Henry
			Migues, Kevin L Sr
			Milam, Ricky
			Miles, Ricky David
			Miley, Donna J
			Militello, Joseph
			Miller, David W
			Miller, Fletcher N
			Miller, James A
			Miller, Larry B
			Miller, Mabry Allen Jr
			Miller, Michael E
			Miller, Michele K
			Miller, Randy A
			Miller, Rhonda E
			Miller, Wayne
			Millet, Leon B
			Millington, Donnie
			Millington, Ronnie
			Millis, Moses
			Millis, Raeford
			Millis, Timmie Lee
			Mine, Derrick
			Miner, Peter G

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Minh, Kha
			Minh, Phuc-Truong
			Mitchell, Ricky Allen
			Mitchell, Todd
			Mitchum, Francis Craig
			Mixon, G C
			Mobley, Bryan A
			Mobley, Jimmy Sr
			Mobley, Robertson
			Mock, Frank Sr
			Mock, Frankie E Jr
			Mock, Jesse R II
			Mock, Terry Lyn
			Molero, Louis F III
			Molero, Louis Frank
			Molinere, Al L
			Molinere, Floyd
			Molinere, Roland Jr
			Molinere, Stacey
			Moll, Angela
			Moll, Jerry J Jr
			Moll, Jonathan P
			Moll, Julius J
			Moll, Randall Jr
			Mollere, Randall
			Mones, Philip J Jr
			Mones, Tino
			Moody, Guy D
			Moore, Carl Stephen
			Moore, Curtis L
			Moore, Kenneth
			Moore, Richard
			Moore, Willis
			Morales, Anthony
			Morales, Clinton A
			Morales, Daniel Jr
			Morales, Daniel Sr
			Morales, David
			Morales, Elwood J Jr
			Morales, Eugene J Jr
			Morales, Eugene J Sr
			Morales, Kimberly
			Morales, Leonard L
			Morales, Phil J Jr
			Morales, Raul
			Moran, Scott
			Moreau, Allen Joseph
			Moreau, Berlin J Sr
			Moreau, Daniel R
			Moreau, Hubert J
			Moreau, Mary

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Moreau, Rickey J Sr
			Morehead, Arthur B Jr
			Moreno, Ansley
			Morgan, Harold R
			Morici, John
			Morris, Herbert Eugene
			Morris, Jesse A
			Morris, Jesse A Sr
			Morris, Preston
			Morrison, Stephen D Jr
			Morton, Robert A
			Morvant, Keith M
			Morvant, Patsy Lishman
			Moschettieri, Chalam
			Moseley, Kevin R
			Motley, Michele
			Mouille, William L
			Mouton, Ashton J
			Moveront, Timothy
			Mund, Mark
			Murphy, Denis R
			Muth, Gary J Sr
			Myers, Joseph E Jr
			Na, Tran Van
			Naccio, Andrew
			Nacio, Lance M
			Nacio, Noel
			Nacio, Philocles J Sr
			Naquin, Alton J
			Naquin, Andrew J Sr
			Naquin, Antoine Jr
			Naquin, Autry James
			Naquin, Bobby J and Sheila
			Naquin, Bobby Jr
			Naquin, Christine
			Naquin, Dean J
			Naquin, Donna P
			Naquin, Earl
			Naquin, Earl L
			Naquin, Freddie
			Naquin, Gerald
			Naquin, Henry
			Naquin, Irvin J
			Naquin, Jerry Joseph Jr
			Naquin, Kenneth J Jr
			Naquin, Kenneth J Sr
			Naquin, Linda L
			Naquin, Lionel A Jr
			Naquin, Mark D Jr
			Naquin, Marty J Sr
			Naquin, Milton H IV

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Naquin, Oliver A
			Naquin, Robert
			Naquin, Roy A
			Naquin, Vernon
			Navarre, Curtis J
			Navero, Floyd G Jr
			Neal, Craig A
			Neal, Roy J Jr
			Neely, Bobby H
			Nehlig, Raymond E Sr
			Neil, Dean
			Neil, Jacob
			Neil, Julius
			Neil, Robert J Jr
			Neil, Tommy Sr
			Nelson, Billy J Sr
			Nelson, Deborah
			Nelson, Elisha W
			Nelson, Ernest R
			Nelson, Faye
			Nelson, Fred H Sr
			Nelson, Gordon Kent Sr
			Nelson, Gordon W III
			Nelson, Gordon W Jr
			Nelson, John Andrew
			Nelson, William Owen Jr
			Nelton, Aaron J Jr
			Nelton, Steven J
			Nettleton, Cody
			Newell, Ronald B
			Newsome, Thomas E
			Newton, Paul J
			Nghiem, Billy
			Ngo, Chuong Van
			Ngo, Duc
			Ngo, Hung V
			Ngo, Liem Thanh
			Ngo, Maxie
			Ngo, The T
			Ngo, Truong Dinh
			Ngo, Van Lo
			Ngo, Vu Hoang
			Ngoc, Lam Lam
			Ngu,Thoi
			Nguyen, Amy
			Nguyen, An Hoang
			Nguyen, Andy Dung
			Nguyen, Andy T
			Nguyen, Anh and Thanh D Tiet
			Nguyen, Ba
			Nguyen, Ba Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Bac Van
			Nguyen, Bao Q
			Nguyen, Bay Van
			Nguyen, Be
			Nguyen, Be
			Nguyen, Be
			Nguyen, Be Em
			Nguyen, Bich Thao
			Nguyen, Bien V
			Nguyen, Binh
			Nguyen, Binh Cong
			Nguyen, Binh V
			Nguyen, Binh Van
			Nguyen, Binh Van
			Nguyen, Binh Van
			Nguyen, Bui Van
			Nguyen, Ca Em
			Nguyen, Can
			Nguyen, Can Van
			Nguyen, Canh V
			Nguyen, Charlie
			Nguyen, Chien
			Nguyen, Chien Van
			Nguyen, Chin
			Nguyen, Chinh Van
			Nguyen, Christian
			Nguyen, Chuc
			Nguyen, Chung
			Nguyen, Chung Van
			Nguyen, Chuong Hoang
			Nguyen, Chuong V
			Nguyen, Chuyen
			Nguyen, Coolly Dinh
			Nguyen, Cuong
			Nguyen, Dai
			Nguyen, Dan T
			Nguyen, Dan Van
			Nguyen, Dan Van
			Nguyen, Dang
			Nguyen, Danny
			Nguyen, David
			Nguyen, Day Van
			Nguyen, De Van
			Nguyen, Den
			Nguyen, Diem
			Nguyen, Dien
			Nguyen, Diep
			Nguyen, Dinh
			Nguyen, Dinh V
			Nguyen, Dong T
			Nguyen, Dong Thi

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Dong X
			Nguyen, Duc
			Nguyen, Duc Van
			Nguyen, Dung
			Nguyen, Dung Anh and Xuan Duong
			Nguyen, Dung Ngoc
			Nguyen, Dung Van
			Nguyen, Dung Van
			Nguyen, Duoc
			Nguyen, Duong V
			Nguyen, Duong Van
			Nguyen, Duong Xuan
			Nguyen, Francis N
			Nguyen, Frank
			Nguyen, Gary
			Nguyen, Giang T
			Nguyen, Giang Truong
			Nguyen, Giau Van
			Nguyen, Ha T
			Nguyen, Ha Van
			Nguyen, Hai Van
			Nguyen, Hai Van
			Nguyen, Han Van
			Nguyen, Han Van
			Nguyen, Hang
			Nguyen, Hanh T
			Nguyen, Hao Van
			Nguyen, Harry H
			Nguyen, Henri Hiep
			Nguyen, Henry-Trang
			Nguyen, Hien
			Nguyen, Hien V
			Nguyen, Hiep
			Nguyen, Ho
			Nguyen, Ho V
			Nguyen, Hoa
			Nguyen, Hoa
			Nguyen, Hoa N
			Nguyen, Hoa Van
			Nguyen, Hoang
			Nguyen, Hoang
			Nguyen, Hoang T
			Nguyen, Hoi
			Nguyen, Hon Xuong
			Nguyen, Huan
			Nguyen, Hung
			Nguyen, Hung
			Nguyen, Hung
			Nguyen, Hung M
			Nguyen, Hung Manh
			Nguyen, Hung Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Hung-Joseph
			Nguyen, Huu Nghia
			Nguyen, Hy Don N
			Nguyen, Jackie Tin
			Nguyen, James
			Nguyen, James N
			Nguyen, Jefferson
			Nguyen, Jennifer
			Nguyen, Jimmy
			Nguyen, Jimmy
			Nguyen, Joachim
			Nguyen, Joe
			Nguyen, John R
			Nguyen, John Van
			Nguyen, Johnny
			Nguyen, Joseph Minh
			Nguyen, Kenny Hung Mong
			Nguyen, Kevin
			Nguyen, Khai
			Nguyen, Khanh
			Nguyen, Khanh and Viet Dinh
			Nguyen, Khanh Q
			Nguyen, Khiem
			Nguyen, Kien Phan
			Nguyen, Kim
			Nguyen, Kim Mai
			Nguyen, Kim Thoa
			Nguyen, Kinh V
			Nguyen, Lai
			Nguyen, Lai
			Nguyen, Lai Tan
			Nguyen, Lam
			Nguyen, Lam Van
			Nguyen, Lam Van
			Nguyen, Lam Van
			Nguyen, Lan
			Nguyen, Lang
			Nguyen, Lang
			Nguyen, Lanh
			Nguyen, Lap Van
			Nguyen, Lap Van
			Nguyen, Le
			Nguyen, Lien and Hang Luong
			Nguyen, Lien Thi
			Nguyen, Linda Oan
			Nguyen, Linh Thi
			Nguyen, Linh Van
			Nguyen, Lintt Danny
			Nguyen, Lluu
			Nguyen, Loc
			Nguyen, Loi

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Loi
			Nguyen, Long Phi
			Nguyen, Long T
			Nguyen, Long Viet
			Nguyen, Luom T
			Nguyen, Mai Van
			Nguyen, Man
			Nguyen, Mao-Van
			Nguyen, Mary
			Nguyen, Mary
			Nguyen, Melissa
			Nguyen, Minh
			Nguyen, Minh
			Nguyen, Minh
			Nguyen, Minh
			Nguyen, Minh
			Nguyen, Minh Ngoc
			Nguyen, Minh Van
			Nguyen, Moot
			Nguyen, Mui Van
			Nguyen, Mung T
			Nguyen, Muoi
			Nguyen, My Le Thi
			Nguyen, My Tan
			Nguyen, My V
			Nguyen, Nam Van
			Nguyen, Nam Van
			Nguyen, Nam Van
			Nguyen, Nam Van
			Nguyen, Nancy
			Nguyen, Nancy
			Nguyen, Nghi
			Nguyen, Nghi Q
			Nguyen, Nghia
			Nguyen, Nghiep
			Nguyen, Ngoc Tim
			Nguyen, Ngoc Van
			Nguyen, Nguyet
			Nguyen, Nhi
			Nguyen, Nho Van
			Nguyen, Nina
			Nguyen, Nuong
			Nguyen, Peter
			Nguyen, Peter Thang
			Nguyen, Peter V
			Nguyen, Phe
			Nguyen, Phong
			Nguyen, Phong Ngoc
			Nguyen, Phong T
			Nguyen, Phong Xuan
			Nguyen, Phu Huu

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Phuc
			Nguyen, Phuoc H
			Nguyen, Phuoc Van
			Nguyen, Phuong
			Nguyen, Phuong
			Nguyen, Quang
			Nguyen, Quang
			Nguyen, Quang Dang
			Nguyen, Quang Dinh
			Nguyen, Quang Van
			Nguyen, Quoc Van
			Nguyen, Quyen Minh
			Nguyen, Quyen T
			Nguyen, Quyen-Van
			Nguyen, Ran T
			Nguyen, Randon
			Nguyen, Richard
			Nguyen, Richard Nghia
			Nguyen, Rick Van
			Nguyen, Ricky Tinh
			Nguyen, Roe Van
			Nguyen, Rose
			Nguyen, Sam
			Nguyen, Sandy Ha
			Nguyen, Sang Van
			Nguyen, Sau V
			Nguyen, Si Ngoc
			Nguyen, Son
			Nguyen, Son Thanh
			Nguyen, Son Van
			Nguyen, Song V
			Nguyen, Steve
			Nguyen, Steve Q
			Nguyen, Steven Giap
			Nguyen, Sung
			Nguyen, Tai
			Nguyen, Tai The
			Nguyen, Tai Thi
			Nguyen, Tam
			Nguyen, Tam Minh
			Nguyen, Tam Thanh
			Nguyen, Tam V
			Nguyen, Tam Van
			Nguyen, Tan
			Nguyen, Ten Tan
			Nguyen, Thach
			Nguyen, Thang
			Nguyen, Thanh
			Nguyen, Thanh
			Nguyen, Thanh
			Nguyen, Thanh Phuc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Thanh V
			Nguyen, Thanh Van
			Nguyen, Thanh Van
			Nguyen, Thanh Van
			Nguyen, Thanh Van
			Nguyen, Thao
			Nguyen, Thi Bich Hang
			Nguyen, Thiet
			Nguyen, Thiet
			Nguyen, Tho Duke
			Nguyen, Thoa D
			Nguyen, Thoa Thi
			Nguyen, Thomas
			Nguyen, Thu
			Nguyen, Thu and Rose
			Nguyen, Thu Duc
			Nguyen, Thu Van
			Nguyen, Thuan
			Nguyen, Thuan
			Nguyen, Thuong
			Nguyen, Thuong Van
			Nguyen, Thuy
			Nguyen, Thuyen
			Nguyen, Thuyen
			Nguyen, Tinh
			Nguyen, Tinh Van
			Nguyen, Toan
			Nguyen, Toan Van
			Nguyen, Tommy
			Nguyen, Tony
			Nguyen, Tony
			Nguyen, Tony
			Nguyen, Tony D
			Nguyen, Tony Hong
			Nguyen, Tony Si
			Nguyen, Tra
			Nguyen, Tra
			Nguyen, Tracy T
			Nguyen, Tri D
			Nguyen, Trich Van
			Nguyen, Trung Van
			Nguyen, Tu Van
			Nguyen, Tuan
			Nguyen, Tuan A
			Nguyen, Tuan H
			Nguyen, Tuan Ngoc
			Nguyen, Tuan Q
			Nguyen, Tuan Van
			Nguyen, Tung
			Nguyen, Tuyen Duc
			Nguyen, Tuyen Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Nguyen, Ty and Ngoc Ngo
			Nguyen, Van H
			Nguyen, Van Loi
			Nguyen, Vang Van
			Nguyen, Viet
			Nguyen, Viet
			Nguyen, Viet V
			Nguyen, Viet Van
			Nguyen, Vinh Van
			Nguyen, Vinh Van
			Nguyen, Vinh Van
			Nguyen, VT
			Nguyen, Vu Minh
			Nguyen, Vu T
			Nguyen, Vu Xuan
			Nguyen, Vui
			Nguyen, Vuong V
			Nguyen, Xuong Kim
			Nhan, Tran Quoc
			Nhon, Seri
			Nichols, Steve Anna
			Nicholson, Gary
			Nixon, Leonard
			Noble, Earl
			Noland, Terrel W
			Normand, Timothy
			Norris, Candace P
			Norris, John A
			Norris, Kenneth L
			Norris, Kevin J
			Nowell, James E
			Noy, Phen
			Nunez, Conrad
			Nunez, Jody
			Nunez, Joseph Paul
			Nunez, Randy
			Nunez, Wade Joseph
			Nyuyen, Toan
			Oberling, Darryl
			O'Blance, Adam
			O'Brien, Gary S
			O'Brien, Mark
			O'Brien, Michele
			Ogden, John M
			Oglesby, Henry
			Oglesby, Phyllis
			O'Gwynn, Michael P Sr
			Ohmer, Eva G
			Ohmer, George J
			Olander, Hazel
			Olander, Rodney

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Olander, Roland J
			Olander, Russell J
			Olander, Thomas
			Olano, Kevin
			Olano, Owen J
			Olano, Shelby F
			Olds, Malcolm D Jr
			Olinde, Wilfred J Jr
			Oliver, Charles
			O'Neil, Carey
			Oracoy, Brad R
			Orage, Eugene
			Orlando, Het
			Oteri, Robert F
			Oubre, Faron P
			Oubre, Thomas W
			Ourks, SokHoms K
			Owens, Larry E
			Owens, Sheppard
			Owens, Timothy
			Pacaccio, Thomas Jr
			Padgett, Kenneth J
			Palmer, Gay Ann P
			Palmer, John W
			Palmer, Mack
			Palmisano, Daniel P
			Palmisano, Dwayne Jr
			Palmisano, Kim
			Palmisano, Larry J
			Palmisano, Leroy J
			Palmisano, Robin G
			Pam, Phuong Bui
			Parfait, Antoine C Jr
			Parfait, Jerry Jr
			Parfait, John C
			Parfait, Joshua K
			Parfait, Mary F
			Parfait, Mary S
			Parfait, Olden G Jr
			Parfait, Robert C Jr
			Parfait, Robert C Sr
			Parfait, Rodney
			Parfait, Shane A
			Parfait, Shelton J
			Parfait, Timmy J
			Parker, Clyde A
			Parker, Franklin L
			Parker, Paul A
			Parker, Percy Todd
			Parks, Daniel Duane
			Parks, Ellery Doyle Jr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Parrett, Joseph D Jr
			Parria, Danny
			Parria, Gavin C Sr
			Parria, Gillis F Jr
			Parria, Gillis F Sr
			Parria, Jerry D
			Parria, Kip G
			Parria, Lionel J Sr
			Parria, Louis III
			Parria, Louis J Sr
			Parria, Louis Jr
			Parria, Michael
			Parria, Ronald
			Parria, Ross
			Parria, Troy M
			Parrish, Charles
			Parrish, Walter L
			Passmore, Penny
			Pate, Shane
			Paterbaugh, Richard
			Patingo, Roger D
			Paul, Robert Emmett
			Payne, John Francis
			Payne, Stuart
			Peatross, David A
			Pelas, James Curtis
			Pelas, Jeffery
			Pellegrin, Corey P
			Pellegrin, Curlynn
			Pellegrin, James A Jr
			Pellegrin, Jordey
			Pellegrin, Karl
			Pellegrin, Karl J
			Pellegrin, Randy
			Pellegrin, Randy Sr
			Pellegrin, Rodney J Sr
			Pellegrin, Samuel
			Pellegrin, Troy Sr
			Peltier, Clyde
			Peltier, Rodney J
			Pena, Bartolo Jr
			Pena, Israel
			Pendarvis, Gracie
			Pennison, Elaine
			Pennison, Milton G
			Pequeno, Julius
			Percle, David P
			Perez, Allen M
			Perez, David J
			Perez, David P
			Perez, Derek

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Perez, Edward Jr
			Perez, Henry Jr
			Perez, Joe B
			Perez, Tilden A Jr
			Perez, Warren A Jr
			Perez, Warren A Sr
			Perez, Wesley
			Perrin, Dale
			Perrin, David M
			Perrin, Edward G Sr
			Perrin, Errol Joseph Jr
			Perrin, Jerry J
			Perrin, Kenneth V
			Perrin, Kevin
			Perrin, Kline J Sr
			Perrin, Kurt M
			Perrin, Michael
			Perrin, Michael A
			Perrin, Murphy P
			Perrin, Nelson C Jr
			Perrin, Pershing J Jr
			Perrin, Robert
			Perrin, Tim J
			Perrin, Tony
			Persohn, William T
			Peshoff, Kirk Lynn
			Pete, Alfred F Jr
			Pete, Alfred F Sr
			Pfleeger, William A
			Pham, An V
			Pham, Anh My
			Pham, Bob
			Pham, Cho
			Pham, Cindy
			Pham, David
			Pham, Dung
			Pham, Dung Phuoc
			Pham, Dung Phuoc
			Pham, Duong Van
			Pham, Gai
			Pham, Hai
			Pham, Hai Hong
			Pham, Hien
			Pham, Hien C
			Pham, Hiep
			Pham, Hieu
			Pham, Huan Van
			Pham, Hung
			Pham, Hung V
			Pham, Hung V
			Pham, Huynh

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Pham, John
			Pham, Johnny
			Pham, Joseph S
			Pham, Kannin
			Pham, Nga T
			Pham, Nhung T
			Pham, Osmond
			Pham, Paul P
			Pham, Phong-Thanh
			Pham, Phung
			Pham, Quoc V
			Pham, Steve Ban
			Pham, Steve V
			Pham, Thai Van
			Pham, Thai Van
			Pham, Thanh
			Pham, Thanh
			Pham, Thanh V
			Pham, Thinh
			Pham, Thinh V
			Pham, Tommy V
			Pham, Tran and Thu Quang
			Pham, Ut Van
			Phan, Anh Thi
			Phan, Banh Van
			Phan, Cong Van
			Phan, Dan T
			Phan, Hoang
			Phan, Hung Thanh
			Phan, Johnny
			Phan, Lam
			Phan, Luyen Van
			Phan, Nam V
			Phan, Thong
			Phan, Tien V
			Phan, Toan
			Phan, Tu Van
			Phat, Lam Mau
			Phelps, John D
			Phillips, Bruce A
			Phillips, Danny D
			Phillips, Gary
			Phillips, Harry Louis
			Phillips, James C Jr
			Phillips, Kristrina W
			Phipps, AW
			Phonthaasa, Khaolop
			Phorn, Phen
			Pickett, Kathy
			Picou, Calvin Jr
			Picou, Gary M

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Picou, Jennifer
			Picou, Jerome J
			Picou, Jordan J
			Picou, Randy John
			Picou, Ricky Sr
			Picou, Terry
			Pierce, Aaron
			Pierce, Dean
			Pierce, Elwood
			Pierce, Imogene
			Pierce, Stanley
			Pierce, Taffie Boone
			Pierre, Ivy
			Pierre, Joseph
			Pierre, Joseph C Jr
			Pierre, Paul J
			Pierre, Ronald J
			Pierron, Jake
			Pierron, Patsy H
			Pierron, Roger D
			Pinell, Ernie A
			Pinell, Harry J Jr
			Pinell, Jody J
			Pinell, Randall James
			Pinnell, Richard J
			Pinnell, Robert
			Pitre, Benton J
			Pitre, Carol
			Pitre, Claude A Sr
			Pitre, Elrod
			Pitre, Emily B
			Pitre, Glenn P
			Pitre, Herbert
			Pitre, Jeannie
			Pitre, Leo P
			Pitre, Robert Jr
			Pitre, Robin
			Pitre, Ryan P
			Pitre, Ted J
			Pittman, Roger
			Pizani, Bonnie
			Pizani, Craig
			Pizani, Jane
			Pizani, Terrill J
			Pizani, Terry M
			Pizani, Terry M Jr
			Plaisance, Arthur E
			Plaisance, Burgess
			Plaisance, Darren
			Plaisance, Dean J Sr
			Plaisance, Dorothy B

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Plaisance, Dwayne
			Plaisance, Earl J Jr
			Plaisance, Errance H
			Plaisance, Evans P
			Plaisance, Eves A III
			Plaisance, Gideons
			Plaisance, Gillis S
			Plaisance, Henry A Jr
			Plaisance, Jacob
			Plaisance, Jimmie J
			Plaisance, Joyce
			Plaisance, Keith
			Plaisance, Ken G
			Plaisance, Lawrence J
			Plaisance, Lucien Jr
			Plaisance, Peter A Sr
			Plaisance, Peter Jr
			Plaisance, Richard J
			Plaisance, Russel P
			Plaisance, Russell P Sr
			Plaisance, Thomas
			Plaisance, Thomas J
			Plaisance, Wayne P
			Plaisance, Whitney III
			Plork, Phan
			Poche, Glenn J Jr
			Poche, Glenn J Sr
			Pockrus, Gerald
			Poiencot, Russell Jr
			Poillion, Charles A
			Polito, Gerald
			Polkey, Gary J
			Polkey, Richard R Jr
			Polkey, Ronald
			Polkey, Shawn Michael
			Pollet, Lionel J Sr
			Pomgoria, Mario
			Ponce, Ben
			Ponce, Lewis B
			Poon, Raymond
			Pope, Robert
			Popham, Winford A
			Poppell, David M
			Porche, Ricky J
			Portier, Bobby
			Portier, Chad
			Portier, Corinne L
			Portier, Penelope J
			Portier, Robbie
			Portier, Russel A Sr
			Portier, Russell

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Potter, Hubert Edward Jr
			Potter, Robert D
			Potter, Robert J
			Pounds, Terry Wayne
			Powers, Clyde T
			Prejean, Dennis J
			Price, Carl
			Price, Curtis
			Price, Edwin J
			Price, Franklin J
			Price, George J Sr
			Price, Norris J Sr
			Price, Steve J Jr
			Price, Timmy T
			Price, Wade J
			Price, Warren J
			Prihoda, Steve
			Primeaux, Scott
			Pritchard, Dixie J
			Pritchard, James Ross Jr
			Prosperie, Claude J Jr
			Prosperie, Myron
			Prout, Rollen
			Prout, Sharonski K
			Prum, Thou
			Pugh, Charles D Jr
			Pugh, Charles Sr
			Pugh, Cody
			Pugh, Deanna
			Pugh, Donald
			Pugh, Nickolas
			Punch, Alvin Jr
			Punch, Donald J
			Punch, Todd M
			Punch, Travis J
			Purata, Maria
			Purse, Emil
			Purvis, George
			Quach, Duc
			Quach, James D
			Quach, Joe
			Quach, Si Tan
			Quinn, Dora M
			Racca, Charles
			Racine, Sylvan P Jr
			Radulic, Igor
			Ragas, Albert G
			Ragas, Gene
			Ragas, John D
			Ragas, Jonathan
			Ragas, Richard A

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ragas, Ronda S
			Ralph, Lester B
			Ramirez, Alfred J Jr
			Randazzo, John A Jr
			Randazzo, Rick A
			Rando, Stanley D
			Ranko, Ellis Gerald
			Rapp, Dwayne
			Rapp, Leroy and Sedonia
			Rawlings, John H Sr
			Rawlings, Ralph E
			Rawls, Norman E
			Ray, Leo
			Ray, William C Jr
			Raynor, Steven Earl
			Readenour, Kelty O
			Reagan, Roy
			Reason, Patrick W
			Reaux, Paul S Sr
			Reaves, Craig A
			Reaves, Laten
			Rebert, Paul J Sr
			Rebert, Steve M Jr
			Rebstock, Charles
			Rector, Lance Jr
			Rector, Warren L
			Redden, Yvonne
			Regnier, Leoncea B
			Remondet, Garland Jr
			Renard, Lanny
			Reno, Edward
			Reno, George C
			Reno, George H
			Reno, George T
			Reno, Harry
			Revell, Ben David
			Reyes, Carlton
			Reyes, Dwight D Sr
			Reynon, Marcello Jr
			Rhodes, Randolph N
			Rhoto, Christopher L
			Ribardi, Frank A
			Rich, Wanda Heafner
			Richard, Bruce J
			Richard, David L
			Richard, Edgar J
			Richard, James Ray
			Richard, Melissa
			Richard, Randall K
			Richardson, James T
			Richert, Daniel E

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Richo, Earl Sr
			Richoux, Dudley Donald Jr
			Richoux, Irvin J Jr
			Richoux, Judy
			Richoux, Larry
			Richoux, Mary A
			Riego, Raymond A
			Riffle, Josiah B
			Rigaud, Randall Ryan
			Riggs, Jeffrey B
			Riley, Jackie Sr
			Riley, Raymond
			Rinkus, Anthony J III
			Rios, Amado
			Ripp, Norris M
			Robbins, Tony
			Robert, Dan S
			Roberts, Michael A
			Robertson, Kevin
			Robeson, Richard S Jr
			Robichaux, Craig J
			Robin, Alvin G
			Robin, Cary Joseph
			Robin, Charles R III
			Robin, Danny J
			Robin, Donald
			Robin, Floyd A
			Robin, Kenneth J Sr
			Robin, Ricky R
			Robinson, Johnson P III
			Robinson, Walter
			Roccaforte, Clay
			Rodi, Dominick R
			Rodi, Rhonda
			Rodrigue, Brent J
			Rodrigue, Carrol Sr
			Rodrigue, Glenn
			Rodrigue, Lerlene
			Rodrigue, Reggie Sr
			Rodrigue, Sonya
			Rodrigue, Wayne
			Rodriguez, Barry
			Rodriguez, Charles V Sr
			Rodriguez, Gregory
			Rodriguez, Jesus
			Rodriguez, Joseph C Jr
			Roeum, Orn
			Rogers, Barry David
			Rogers, Chad
			Rogers, Chad M
			Rogers, Kevin J

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Rogers, Nathan J
			Rojas, Carlton J Sr
			Rojas, Curtis Sr
			Rojas, Dennis J Jr
			Rojas, Dennis J Sr
			Rojas, Gordon V
			Rojas, Kerry D
			Rojas, Kerry D Jr
			Rojas, Randy J Sr
			Rojas, Raymond J Jr
			Roland, Brad
			Roland, Mathias C
			Roland, Vincent
			Rollins, Theresa
			Rollo, Wayne A
			Rome, Victor J IV
			Romero, D H
			Romero, Kardel J
			Romero, Norman
			Romero, Philip J
			Ronquille, Glenn
			Ronquille, Norman C
			Ronquillo, Earl
			Ronquillo, Richard J
			Ronquillo, Timothy
			Roseburrough, Charles R Jr
			Ross, Dorothy
			Ross, Edward Danny Jr
			Ross, Leo L
			Ross, Robert A
			Roth, Joseph F Jr
			Roth, Joseph M Jr
			Rotolo, Carolyn
			Rotolo, Feliz
			Rouse, Jimmy
			Roussel, Michael D Jr
			Roy, Henry Lee Jr
			Rudolph, Chad A
			Ruiz, Donald W
			Ruiz, James L
			Ruiz, Paul E
			Ruiz, Paul R
			Russell, Bentley R
			Russell, Casey
			Russell, Daniel
			Russell, James III
			Russell, Julie Ann
			Russell, Michael J
			Russell, Nicholas M
			Russell, Paul
			Rustick, Kenneth

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ruttley, Adrian K
			Ruttley, Ernest T Jr
			Ruttley, JT
			Ryan, James C Sr
			Rybiski, Rhebb R
			Ryder, Luther V
			Sadler, Stewart
			Sagnes, Everett
			Saha, Amanda K
			Saling, Don M
			Saltalamacchia, Preston J
			Saltalamacchia, Sue A
			Salvato, Lawrence Jr
			Samanie, Caroll J
			Samanie, Frank J
			Samsome, Don
			Sanamo, Troy P
			Sanchez, Augustine
			Sanchez, Jeffery A
			Sanchez, Juan
			Sanchez, Robert A
			Sanders, William Shannon
			Sandras, R J
			Sandras, R J Jr
			Sandrock, Roy R III
			Santini, Lindberg W Jr
			Santiny, James
			Santiny, Patrick
			Sapia, Carroll J Jr
			Sapia, Eddie J Jr
			Sapia, Willard
			Saturday, Michael Rance
			Sauce, Carlton Joseph
			Sauce, Joseph C Jr
			Saucier, Houston J
			Sauls, Russell
			Savage, Malcolm H
			Savant, Raymond
			Savoie, Allen
			Savoie, Brent T
			Savoie, James
			Savoie, Merlin F Jr
			Savoie, Reginald M II
			Sawyer, Gerald
			Sawyer, Rodney
			Scarabin, Clifford
			Scarabin, Michael J
			Schaffer, Kelly
			Schaubhut, Curry A
			Schellinger, Lester B Jr
			Schexnaydre, Michael

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Schirmer, Robert Jr
			Schjott, Joseph J Sr
			Schlindwein, Henry
			Schmit, Paul A Jr
			Schmit, Paul A Sr
			Schmit, Victor J Jr
			Schouest, Ellis J III
			Schouest, Ellis Jr
			Schouest, Juston
			Schouest, Mark
			Schouest, Noel
			Schrimpf, Robert H Jr
			Schultz, Troy A
			Schwartz, Sidney
			Scott, Aaron J
			Scott, Audie B
			Scott, James E III
			Scott, Milford P
			Scott, Paul
			Seabrook, Terry G
			Seal, Charles T
			Seal, Joseph G
			Seaman, Garry
			Seaman, Greg
			Seaman, Ollie L Jr
			Seaman, Ollie L Sr
			Seang, Meng
			Sehon, Robert Craig
			Sekul, Morris G
			Sekul, S George
			Sellers, Isaac Charles
			Seng, Sophan
			Serigne, Adam R
			Serigne, Elizabeth
			Serigne, James J III
			Serigne, Kimmie J
			Serigne, Lisa M
			Serigne, Neil
			Serigne, O'Neil N
			Serigne, Richard J Sr
			Serigne, Rickey N
			Serigne, Ronald Raymond
			Serigne, Ronald Roch
			Serigne, Ross
			Serigny, Gail
			Serigny, Wayne A
			Serpas, Lenny Jr
			Sessions, William O III
			Sessions, William O Jr
			Sevel, Michael D
			Sevin, Carl Anthony

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Sevin, Earline
			Sevin, Janell A
			Sevin, Joey
			Sevin, Nac J
			Sevin, O'Neil and Symantha
			Sevin, Phillip T
			Sevin, Shane
			Sevin, Shane Anthony
			Sevin, Stanley J
			Sevin, Willis
			Seymour, Janet A
			Shackelford, David M
			Shaffer, Curtis E
			Shaffer, Glynnon D
			Shay, Daniel A
			Shilling, Jason
			Shilling, L E
			Shugars, Robert L
			Shutt, Randy
			Sifuentes, Esteban
			Sifuentes, Fernando
			Silver, Curtis A Jr
			Simon, Curnis
			Simon, John
			Simon, Leo
			Simpson, Mark
			Sims, Donald L
			Sims, Mike
			Singley, Charlie Sr
			Singley, Glenn
			Singley, Robert Joseph
			Sirgo, Jace
			Sisung, Walter
			Sisung, Walter Jr
			Skinner, Gary M Sr
			Skinner, Richard
			Skipper, Malcolm W
			Skrmetta, Martin J
			Smelker, Brian H
			Smith, Brian
			Smith, Carl R Jr
			Smith, Clark W
			Smith, Danny
			Smith, Danny M Jr
			Smith, Donna
			Smith, Elmer T Jr
			Smith, Glenda F
			Smith, James E
			Smith, Margie T
			Smith, Mark A
			Smith, Nancy F

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Smith, Raymond C Sr
			Smith, Tim
			Smith, Walter M Jr
			Smith, William T
			Smithwick, Ted Wayne
			Smoak, Bill
			Smoak, William W III
			Snell, Erick
			Snodgrass, Sam
			Soeung, Phat
			Soileau, John C Sr
			Sok, Kheng
			Sok, Montha
			Sok, Nhip
			Solet, Darren
			Solet, Donald M
			Solet, Joseph R
			Solet, Raymond J
			Solorzano, Marilyn
			Son, Kim
			Son, Sam Nang
			Son, Samay
			Son, Thuong Cong
			Soprano, Daniel
			Sork, William
			Sou, Mang
			Soudelier, Louis Jr
			Soudelier, Shannon
			Sour, Yem Kim
			Southerland, Robert
			Speir, Barbara Kay
			Spell, Jeffrey B
			Spell, Mark A
			Spellmeyer, Joel F Sr
			Spencer, Casey
			Spiers, Donald A
			Sprinkle, Avery M
			Sprinkle, Emery Shelton Jr
			Sprinkle, Joseph Warren
			Squarsich, Kenneth J
			Sreiy, Siphan
			St Amant, Dana A
			St Ann, Mr and Mrs Jerome K
			St Pierre, Darren
			St Pierre, Scott A
			Staves, Patrick
			Stechmann, Chad
			Stechmann, Karl J
			Stechmann, Todd
			Steele, Arnold D Jr
			Steele, Henry H III

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Steen, Carl L
			Steen, James D
			Steen, Kathy G
			Stein, Norris J Jr
			Stelly, Adlar
			Stelly, Carl A
			Stelly, Chad P
			Stelly, Delores
			Stelly, Sandrus J Sr
			Stelly, Sandrus Jr
			Stelly, Toby J
			Stelly, Veronica G
			Stelly, Warren
			Stephenson, Louis
			Stevens, Alvin
			Stevens, Curtis D
			Stevens, Donald
			Stevens, Glenda
			Stewart, Chester Jr
			Stewart, Derald
			Stewart, Derek
			Stewart, Fred
			Stewart, Jason F
			Stewart, Ronald G
			Stewart, William C
			Stiffler, Thanh
			Stipelcovich, Lawrence L
			Stipelcovich, Todd J
			Stockfett, Brenda
			Stokes, Todd
			Stone-Rinkus, Pamela
			Strader, Steven R
			Strickland, Kenneth
			Strickland, Rita G
			Stuart, James Vernon
			Stutes, Rex E
			Sulak, Billy W
			Sun, Hong Sreng
			Surmik, Donald D
			Swindell, Keith M
			Sylve, Dennis A
			Sylve, James L
			Sylve, Nathan
			Sylve, Scott
			Sylvesr, Paul A
			Ta, Ba Van
			Ta, Chris
			Tabb, Calvin
			Taliancich, Andrew
			Taliancich, Ivan
			Taliancich, Joseph M

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Taliancich, Srecka
			Tan, Ho Dung
			Tan, Hung
			Tan, Lan T
			Tan, Ngo The
			Tang, Thanh
			Tanner, Robert Charles
			Taravella, Raymond
			Tassin, Alton J
			Tassin, Keith P
			Tate, Archie P
			Tate, Terrell
			Tauzier, Kevin M
			Taylor, Doyle L
			Taylor, Herman R
			Taylor, Herman R Jr
			Taylor, J P Jr
			Taylor, John C
			Taylor, Leander J Sr
			Taylor, Leo Jr
			Taylor, Lewis
			Taylor, Nathan L
			Taylor, Robert L
			Taylor, Robert M
			Teap, Phal
			Tek, Heng
			Templat, Paul
			Terluin, John L III
			Terrebonne, Adrein Scott
			Terrebonne, Alphonse J
			Terrebonne, Alton S Jr
			Terrebonne, Alton S Sr
			Terrebonne, Carol
			Terrebonne, Carroll
			Terrebonne, Chad
			Terrebonne, Chad Sr
			Terrebonne, Daniel J
			Terrebonne, Donavon J
			Terrebonne, Gary J Sr
			Terrebonne, Jimmy Jr
			Terrebonne, Jimmy Sr
			Terrebonne, Kline A
			Terrebonne, Lanny
			Terrebonne, Larry F Jr
			Terrebonne, Scott
			Terrebonne, Steven
			Terrebonne, Steven
			Terrebonne, Toby J
			Terrel, Chad J Sr
			Terrell, C Todd
			Terrio, Brandon James

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Terrio, Harvey J Jr
			Terry, Eloise P
			Tesvich, Kuzma D
			Thac, Dang Van
			Thach, Phuong
			Thai, Huynh Tan
			Thai, Paul
			Thai, Thomas
			Thanh, Thien
			Tharpe, Jack
			Theriot, Anthony
			Theriot, Carroll A Jr
			Theriot, Clay J Jr
			Theriot, Craig A
			Theriot, Dean P
			Theriot, Donnie
			Theriot, Jeffery C
			Theriot, Larry J
			Theriot, Lynn
			Theriot, Mark A
			Theriot, Roland P Jr
			Theriot, Wanda J
			Thibodaux, Jared
			Thibodeaux, Bart James
			Thibodeaux, Brian A
			Thibodeaux, Brian M
			Thibodeaux, Calvin A Jr
			Thibodeaux, Fay F
			Thibodeaux, Glenn P
			Thibodeaux, Jeffrey
			Thibodeaux, Jonathan
			Thibodeaux, Josephine
			Thibodeaux, Keith
			Thibodeaux, Tony J
			Thibodeaux, Warren J
			Thidobaux, James V Sr
			Thiet, Tran
			Thomas, Alvin
			Thomas, Brent
			Thomas, Dally S
			Thomas, Janie G
			Thomas, John Richard
			Thomas, Kenneth Ward
			Thomas, Monica P
			Thomas, Ralph L Jr
			Thomas, Ralph Lee Jr
			Thomas, Randall
			Thomas, Robert W
			Thomas, Willard N Jr
			Thomassie, Gerard
			Thomassie, Nathan A

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Thomassie, Philip A
			Thomassie, Ronald J
			Thomassie, Tracy Joseph
			Thompson, Bobbie
			Thompson, David W
			Thompson, Edwin A
			Thompson, George
			Thompson, James D Jr
			Thompson, James Jr
			Thompson, John E
			Thompson, John R
			Thompson, Randall
			Thompson, Sammy
			Thompson, Shawn
			Thong, R
			Thonn, John J Jr
			Thonn, Victor J
			Thorpe, Robert Lee Jr
			Thurman, Charles E
			Tiet, Thanh Duc
			Tilghman, Gene E
			Tillett, Billy Carl
			Tillman, Lewis A Jr
			Tillman, Timothy P and Yvonne M
			Tillotson, Pat
			Tinney, Mark A
			Tisdale, Georgia W
			Tiser, Oscar
			Tiser, Thomas C Jr
			Tiser, Thomas C Sr
			To, Cang Van
			To, Du Van
			Todd, Fred Noel
			Todd, Patricia J
			Todd, Rebecca G
			Todd, Robert C and Patricia J
			Todd, Vonnie Frank Jr
			Tompkins, Gerald Paul II
			Toney, George Jr
			Tong, Hai V
			Tong, Linh C
			Toomer, Christina Abbott
			Toomer, Christy
			Toomer, Frank G Jr
			Toomer, Jeffrey E
			Toomer, Kenneth
			Toomer, Lamar K
			Toomer, Larry Curtis and Tina
			Toomer, William Kemp
			Torrible, David P
			Torrible, Jason

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Touchard, Anthony H
			Touchard, John B Jr
			Touchard, Paul V Jr
			Touchet, Eldridge III
			Touchet, Eldridge Jr
			Toups, Anthony G
			Toups, Bryan
			Toups, Jeff
			Toups, Jimmie J
			Toups, Kim
			Toups, Manuel
			Toups, Ted
			Toups, Tommy
			Toureau, James
			Tower, H Melvin
			Townsend, Harmon Lynn
			Townsend, Marion Brooks
			Tra, Hop T
			Trabeau, James D
			Trahan, Allen A Jr
			Trahan, Alvin Jr
			Trahan, Druby
			Trahan, Dudley
			Trahan, Elie J
			Trahan, Eric J
			Trahan, James
			Trahan, Karen C
			Trahan, Lynn P Sr
			Trahan, Ricky
			Trahan, Ronald J
			Trahan, Tracey L
			Trahan, Wayne Paul
			Tran, Allen Hai
			Tran, Andana
			Tran, Anh
			Tran, Anh
			Tran, Anh N
			Tran, Bay V
			Tran, Bay Van
			Tran, Binh
			Tran, Binh Van
			Tran, Ca Van
			Tran, Cam Van
			Tran, Chau V
			Tran, Chau Van
			Tran, Chau Van
			Tran, Chi T
			Tran, Christina Phuong
			Tran, Chu V
			Tran, Cuong
			Tran, Cuong

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Tran, Danny Duc
			Tran, Den
			Tran, Dien
			Tran, Dinh M
			Tran, Dinh Q
			Tran, Doan
			Tran, Dung Van
			Tran, Duoc
			Tran, Duoc
			Tran, Duong
			Tran, Eric
			Tran, Francis
			Tran, Francis
			Tran, Giang
			Tran, Giao
			Tran, Ha Mike
			Tran, Hai
			Tran, Hien H
			Tran, Hiep Phuoc
			Tran, Hieu
			Tran, Hoa
			Tran, Hoa
			Tran, Hue T
			Tran, Huey
			Tran, Hung
			Tran, Hung
			Tran, Hung
			Tran, Hung P
			Tran, Hung Van
			Tran, Hung Van
			Tran, Hung Viet
			Tran, James N
			Tran, John
			Tran, Johnny Dinh
			Tran, Joseph
			Tran, Joseph T
			Tran, Khan Van
			Tran, Khanh
			Tran, Kim
			Tran, Kim Chi Thi
			Tran, Lan Tina
			Tran, Le and Phat Le
			Tran, Leo Van
			Tran, Loan
			Tran, Long
			Tran, Long Van
			Tran, Luu Van
			Tran, Ly
			Tran, Ly Van
			Tran, Mai Thi
			Tran, Mary

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Tran, Miel Van
			Tran, Mien
			Tran, Mike
			Tran, Mike Dai
			Tran, Minh Huu
			Tran, Muoi
			Tran, My T
			Tran, Nam Van
			Tran, Nang Van
			Tran, Nghia and T Le Banh
			Tran, Ngoc
			Tran, Nhanh Van
			Tran, Nhieu T
			Tran, Nhieu Van
			Tran, Nho
			Tran, Peter
			Tran, Phu Van
			Tran, Phuc D
			Tran, Phuc V
			Tran, Phung
			Tran, Quan Van
			Tran, Quang Quang
			Tran, Quang T
			Tran, Quang Van
			Tran, Qui V
			Tran, Quy Van
			Tran, Ran Van
			Tran, Sarah T
			Tran, Sau
			Tran, Scotty
			Tran, Son
			Tran, Son Van
			Tran, Steven Tuan
			Tran, Tam
			Tran, Te Van
			Tran, Than
			Tran, Thang Van
			Tran, Thanh
			Tran, Thanh
			Tran, Thanh Van
			Tran, Theresa
			Tran, Thi
			Tran, Thich Van
			Tran, Thien
			Tran, Thien Van
			Tran, Thiet
			Tran, Tommy
			Tran, Tony
			Tran, Tri
			Tran, Trinh
			Tran, Trung

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Tran, Trung Van
			Tran, Tu
			Tran, Tuan
			Tran, Tuan
			Tran, Tuan Minh
			Tran, Tuong Van
			Tran, Tuyet Thi
			Tran, Van T
			Tran, Victor
			Tran, Vinh
			Tran, Vinh Q
			Tran, Vinh Q
			Tran, Vui Kim
			Trang, Tan
			Trapp, Tommy
			Treadaway, Michael
			Tregle, Curtis
			Treloar, William Paul
			Treuil, Gary J
			Trevino, Manuel
			Treybig, E H "Buddy" Jr
			Triche, Donald G
			Trieu, Hiep and Jackie
			Trieu, Hung Hoa
			Trieu, Jasmine and Ly
			Trieu, Lorie and Tam
			Trieu, Tam
			Trinh, Christopher B
			Trinh, Philip P
			Trosclair, Clark K
			Trosclair, Clark P
			Trosclair, Eugene P
			Trosclair, James J
			Trosclair, Jerome
			Trosclair, Joseph
			Trosclair, Lori
			Trosclair, Louis V
			Trosclair, Patricia
			Trosclair, Randy
			Trosclair, Ricky
			Trosclair, Wallace Sr
			Truong, Andre
			Truong, Andre V
			Truong, Be Van
			Truong, Benjamin
			Truong, Dac
			Truong, Huan
			Truong, Kim
			Truong, Nhut Van
			Truong, Steve
			Truong, Tham T

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Truong, Thanh Minh
			Truong, Them Van
			Truong, Thom
			Truong, Timmy
			Trutt, George W Sr
			Trutt, Wanda
			Turlich, Mervin A
			Turner, Calvin L
			Tyre, John
			Upton, Terry R
			Valentino, J G Jr
			Valentino, James
			Vallot, Christopher A
			Vallot, Nancy H
			Valure, Hugh P
			Van Alsburg, Charles
			Van Gordstnoven, Jean J
			Van Nguyen, Irving
			Van, Than
			Van, Vui
			Vanacor, Kathy D
			Vanacor, Malcolm J Sr
			Vanicor, Bobbie
			VanMeter, Matthew T
			VanMeter, William Earl
			Varney, Randy L
			Vath, Raymond S
			Veasel, William E III
			Vegas, Brien J
			Vegas, Percy J
			Vegas, Terry J
			Vegas, Terry J Jr
			Vegas, Terry Jr
			Vela, Peter
			Verdin, Aaron
			Verdin, Av
			Verdin, Bradley J
			Verdin, Brent A
			Verdin, Charles A
			Verdin, Charles E
			Verdin, Coy P
			Verdin, Curtis A Jr
			Verdin, Delphine
			Verdin, Diana A
			Verdin, Ebro W
			Verdin, Eric P
			Verdin, Ernest Joseph Sr
			Verdin, Jeff C
			Verdin, Jeffrey A
			Verdin, Jessie J
			Verdin, John P

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Verdin, Joseph
			Verdin, Joseph A Jr
			Verdin, Joseph Cleveland
			Verdin, Joseph D Jr
			Verdin, Joseph S
			Verdin, Joseph W Jr
			Verdin, Justilien G
			Verdin, Matthew W Sr
			Verdin, Michel A
			Verdin, Paul E
			Verdin, Perry Anthony
			Verdin, Rodney
			Verdin, Rodney P
			Verdin, Rodney P
			Verdin, Skylar
			Verdin, Timmy J
			Verdin, Toby
			Verdin, Tommy P
			Verdin, Tony J
			Verdin, Troy
			Verdin, Vincent
			Verdin, Viness Jr
			Verdin, Wallace P
			Verdin, Webb A Sr
			Verdin, Wesley D Sr
			Verdine, Jimmy R
			Vermeulen, Joseph Thomas
			Verret, Darren L
			Verret, Donald J
			Verret, Ernest J Sr
			Verret, James A
			Verret, Jean E
			Verret, Jimmy J Sr
			Verret, Johnny R
			Verret, Joseph L
			Verret, Paul L
			Verret, Preston
			Verret, Quincy
			Verret, Ronald Paul Sr
			Versaggi, Joseph A
			Versaggi, Salvatore J
			Vicknair, Brent J Sr
			Vicknair, Duane P
			Vicknair, Henry Dale
			Vicknair, Ricky A
			Vidrine, Bill and Kathi
			Vidrine, Corey
			Vidrine, Richard
			Vila, William F
			Villers, Joseph A
			Vincent, Gage Tyler

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Vincent, Gene
			Vincent, Gene B
			Vincent, Robert N
			Vise, Charles E III
			Vizier, Barry A
			Vizier, Christopher
			Vizier, Clovis J III
			Vizier, Douglas M
			Vizier, Tommie Jr
			Vo, Anh M
			Vo, Chin Van
			Vo, Dam
			Vo, Dan M
			Vo, Dany
			Vo, Day V
			Vo, Duong V
			Vo, Dustin
			Vo, Hai Van
			Vo, Hanh Xuan
			Vo, Hien Van
			Vo, Hoang The
			Vo, Hong
			Vo, Hung Thanh
			Vo, Huy K
			Vo, Johnny
			Vo, Kent
			Vo, Lien Van
			Vo, Man
			Vo, Mark Van
			Vo, Minh Hung
			Vo, Minh Ngoc
			Vo, Minh Ray
			Vo, Mong V
			Vo, My Dung Thi
			Vo, My Lynn
			Vo, Nga
			Vo, Nhon Tai
			Vo, Nhu Thanh
			Vo, Quang Minh
			Vo, Sang M
			Vo, Sanh M
			Vo, Song V
			Vo, Tan Thanh
			Vo, Tan Thanh
			Vo, Thanh Van
			Vo, Thao
			Vo, Thuan Van
			Vo, Tien Van
			Vo, Tom
			Vo, Tong Ba
			Vo, Trao Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Vo, Truong
			Vo, Van Van
			Vo, Vi Viet
			Vodopija, Benjamin S
			Vogt, James L
			Voisin, Eddie James
			Voisin, Joyce
			Voison, Jamie
			Von Harten, Harold L
			Vona, Michael A
			Vongrith, Richard
			Vossler, Kirk
			Vu, Hung
			Vu, John H
			Vu, Khanh
			Vu, Khoi Van
			Vu, Quan Quoc
			Vu, Ruyen Viet
			Vu, Sac
			Vu, Sean
			Vu, Tam
			Vu, Thiem Ngoc
			Vu, Thuy
			Vu, Tom
			Vu, Tu Viet
			Vu, Tuyen Jack
			Vu, Tuyen Viet
			Wade, Calvin J Jr
			Wade, Gerard
			Waguespack, David M Sr
			Waguespack, Randy P II
			Wainwright, Vernon
			Walker, Jerry
			Walker, Rogers H
			Wallace, Dennis
			Wallace, Edward
			Wallace, John A
			Wallace, John K
			Wallace, Trevis L
			Waller, Jack Jr
			Waller, John M
			Waller, Mike
			Wallis, Craig A
			Wallis, Keith
			Walters, Samuel G
			Walton, Marion M
			Wannage, Edward Joseph
			Wannage, Fred Jr
			Wannage, Frederick W Sr
			Ward, Clarence Jr
			Ward, Olan B

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ward, Walter M
			Washington, Clifford
			Washington, John Emile III
			Washington, Kevin
			Washington, Louis N
			Wattigney, Cecil K Jr
			Wattigney, Michael
			Watts, Brandon A
			Watts, Warren
			Webb, Bobby
			Webb, Bobby N
			Webb, Josie M
			Webre, Donald
			Webre, Dudley A
			Webster, Harold
			Weeks, Don Franklin
			Weems, Laddie E
			Weinstein, Barry C
			Weiskopf, Rodney
			Weiskopf, Rodney Sr
			Weiskopf, Todd
			Welch, Amos J
			Wells, Douglas E
			Wells, Stephen Ray
			Wendling, Steven W
			Wescovich, Charles W
			Wescovich, Wesley Darryl
			Whatley, William J
			White, Allen Sr
			White, Charles
			White, Charles Fulton
			White, David L
			White, Gary Farrell
			White, James Hugh
			White, Perry J
			White, Raymond
			White, Robert Sr
			Wicher, John
			Wiggins, Chad M Sr
			Wiggins, Ernest
			Wiggins, Harry L
			Wiggins, Kenneth A
			Wiggins, Matthew
			Wilbur, Gerald Anthony
			Wilcox, Robert
			Wiles, Alfred Adam
			Wiles, Glen Gilbert
			Wiles, Sonny Joel Sr
			Wilkerson, Gene Dillard and Judith
			Wilkinson, William Riley
			Williams, Allen Jr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Williams, Andrew
			Williams, B Dean
			Williams, Clyde L
			Williams, Dale A
			Williams, Emmett J
			Williams, Herman J Jr
			Williams, J T
			Williams, John A
			Williams, Johnny Paul
			Williams, Joseph H
			Williams, Kirk
			Williams, Leopold A
			Williams, Mark A
			Williams, Mary Ann C
			Williams, Melissa A
			Williams, Nina
			Williams, Oliver Kent
			Williams, Parish
			Williams, Roberto
			Williams, Ronnie
			Williams, Scott A
			Williams, Steven
			Williams, Thomas D
			Williamson, Richard L Sr
			Willyard, Derek C
			Willyard, Donald R
			Wilson, Alward
			Wilson, Hosea
			Wilson, Joe R
			Wilson, Jonathan
			Wilson, Katherine
			Wiltz, Allen
			Wing, Melvin
			Wiseman, Allen
			Wiseman, Clarence J Jr
			Wiseman, Jean P
			Wiseman, Joseph A
			Wiseman, Michael T Jr
			Wiseman, Michael T Sr
			Wolfe, Charles
			Woods, John T III
			Wright, Curtis
			Wright, Leonard
			Wright, Randy D
			Yeamans, Douglas
			Yeamans, Neil
			Yeamans, Ronnie
			Yoeuth, Peon
			Yopp, Harold
			Yopp, Jonathon
			Yopp, Milton Thomas

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Young, James
			Young, Taing
			Young, Willie
			Yow, Patricia D
			Yow, Richard C
			Zanca, Anthony V Sr
			Zar, Ashley A
			Zar, Carl J
			Zar, John III
			Zar, Steve
			Zar, Steven
			Zar, Troy A
			Zerinque, John S Jr
			Zirlott, Curtis
			Zirlott, Jason D
			Zirlott, Jeremy
			Zirlott, Kimberly
			Zirlott, Milton
			Zirlott, Perry
			Zirlott, Rosa H
			Zito, Brian C
			Zuvich, Michael A Jr
			Ad Hoc Shrimp Trade Action Committee
			Bryan Fishermens' Co-Op Inc
			Louisiana Shrimp Association
			South Carolina Shrimpers Association
			Vietnamese-American Commerical Fisherman's Union
			3-G Enterprize dba Griffin's Seafood
			A & G Trawlers Inc
			A & T Shrimping
			A Ford Able Seafood
			A J Horizon Inc
			A&M Inc
			A&R Shrimp Co
			A&T Shrimping
			AAH Inc
			AC Christopher Sea Food Inc
			Ace of Trade LLC
			Adriana Corp
			AJ Boats Inc
			AJ Horizon Inc
			AJ's Seafood
			Alario Inc
			Alcide J Adams Jr
			Aldebaran Inc
			Aldebran Inc
			Alexander and Dola
			Alfred Englade Inc
			Alfred Trawlers Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Allen Hai Tran dba Kien Giang
			Al's Shrimp Co
			Al's Shrimp Co LLC
			Al's Shrimp Co LLC
			Al's Whosale & Retail
			Alton Cheeks
			Amada Inc
			Amber Waves
			Amelia Isle
			American Beauty
			American Beauty Inc
			American Eagle Enterprise Inc
			American Girl
			American Seafood
			Americana Shrimp
			Amvina II
			Amvina II
			Amy D Inc
			Amy's Seafood Mart
			An Kit
			Andy Boy
			Andy's SFD
			Angel Annie Inc
			Angel Leigh
			Angel Seafood Inc
			Angela Marie Inc
			Angela Marie Inc
			Angelina Inc
			Anna Grace LLC
			Anna Grace LLC
			Annie Thornton Inc
			Annie Thornton Inc
			Anthony Boy I
			Anthony Boy I
			Anthony Fillinich Sr
			Apalachee Girl Inc
			Aparicio Trawlers Inc dba Marcosa
			Apple Jack Inc
			Aquila Seafood Inc
			Aquillard Seafood
			Argo Marine
			Arnold's Seafood
			Arroya Cruz Inc
			Art & Red Inc
			Arthur Chisholm
			A-Seafood Express
			Ashley Deeb Inc
			Ashley W 648675
			Asian Gulf Corp
			Atlantic
			Atocha Troy A LeCompte Sr

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Atwood Enterprises
			B & B Boats Inc
			B & B Seafood
			B&J Seafood
			BaBe Inc
			Baby Ruth
			Bailey, David B Sr - Bailey's Seafood
			Bailey's Seafood of Cameron Inc
			Bait Inc
			Bait Inc
			Baker Shrimp
			Bama Love Inc
			Bama Sea Products Inc
			Bao Hung Inc
			Bao Hung Inc
			Bar Shrimp
			Barbara Brooks Inc
			Barbara Brooks Inc
			Barisich Inc
			Barisich Inc
			Barnacle-Bill Inc
			Barney's Bait & Seafood
			Barrios Seafood
			Bay Boy
			Bay Islander Inc
			Bay Sweeper Nets
			Baye's Seafood 335654
			Bayou Bounty Seafood LLC
			Bayou Caddy Fisheries Inc
			Bayou Carlin Fisheries
			Bayou Carlin Fisheries Inc
			Bayou Shrimp Processors Inc
			BBC Trawlers Inc
			BBS Inc
			Beachcomber Inc
			Beachcomber Inc
			Bea's Corp
			Beecher's Seafood
			Believer Inc
			Bennett's Seafood
			Benny Alexie
			Bergeron's Seafood
			Bertileana Corp
			Best Sea-Pack of Texas Inc
			Beth Lomonte Inc
			Beth Lomonte Inc
			Betty B
			Betty H Inc
			Bety Inc
			BF Millis & Sons Seafood
			Big Daddy Seafood Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Big Grapes Inc
			Big Kev
			Big Oak Seafood
			Big Oak Seafood
			Big Oaks Seafood
			Big Shrimp Inc
			Billy J Foret - BJF Inc
			Billy Sue Inc
			Billy Sue Inc
			Biloxi Freezing & Processing
			Binh Duong
			BJB LLC
			Blain & Melissa Inc
			Blanca Cruz Inc
			Blanchard & Cheramie Inc
			Blanchard Seafood
			Blazing Sun Inc
			Blazing Sun Inc
			Blue Water Seafood
			Bluewater Shrimp Co
			Bluffton Oyster Co
			Boat Josey Wales
			Boat Josey Wales LLC
			Boat Monica Kiff
			Boat Warrior
			Bob-Rey Fisheries Inc
			Bodden Trawlers Inc
			Bolillo Prieto Inc
			Bon Secour Boats Inc
			Bon Secour Fisheries Inc
			Bon Secur Boats Inc
			Bonnie Lass Inc
			Boone Seafood
			Bosarge Boats
			Bosarge Boats
			Bosarge Boats Inc
			Bottom Verification LLC
			Bowers Shrimp
			Bowers Shrimp Farm
			Bowers Valley Shrimp Inc
			Brad Friloux
			Brad Nicole Seafood
			Bradley John Inc
			Bradley's Seafood Mkt
			Brava Cruz Inc
			Brenda Darlene Inc
			Brett Anthony
			Bridgeside Marina
			Bridgeside Seafood
			Bridget's Seafood Service Inc
			Bridget's Seafood Service Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			BRS Seafood
			BRS Seafood
			Bruce W Johnson Inc
			Bubba Daniels Inc
			Bubba Tower Shrimp Co
			Buccaneer Shrimp Co
			Buchmer Inc
			Buck & Peed Inc
			Buddy Boy Inc
			Buddy's Seafood
			Bumble Bee Seafoods LLC
			Bumble Bee Seafoods LLC
			Bundy Seafood
			Bundy's Seafood
			Bunny's Shrimp
			Burgbe Gump Seafood
			Burnell Trawlers Inc
			Burnell Trawlers Inc/Mamacita/Swamp Irish
			Buster Brown Inc
			By You Seafood
			C & R Trawlers Inc
			CA Magwood Enterprises Inc
			Cajun Queen of LA LLC
			Calcasien Point Bait N More Inc
			Cam Ranh Bay
			Camardelle's Seafood
			Candy Inc
			Cao Family Inc
			Cap Robear
			Cap'n Bozo Inc
			Capn Jasper's Seafood Inc
			Capt Aaron
			Capt Adam
			Capt Anthony Inc
			Capt Bean (Richard A Ragas)
			Capt Beb Inc
			Capt Bill Jr Inc
			Capt Brother Inc
			Capt Bubba
			Capt Buck
			Capt Carl
			Capt Carlos Trawlers Inc
			Capt Chance Inc
			Capt Christopher Inc
			Capt Chuckie
			Capt Craig
			Capt Craig Inc
			Capt Crockett Inc
			Capt Darren Hill Inc
			Capt Dennis Inc
			Capt Dickie Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Capt Dickie V Inc
			Capt Doug
			Capt Eddie Inc
			Capt Edward Inc
			Capt Eli's
			Capt Elroy Inc
			Capt Ernest LLC
			Capt Ernest LLC
			Capt GDA Inc
			Capt George
			Capt H & P Corp
			Capt Havey Seafood
			Capt Henry Seafood Dock
			Capt Huy
			Capt JDL Inc
			Capt Jimmy Inc
			Capt Joe
			Capt Johnny II
			Capt Jonathan
			Capt Jonathan Inc
			Capt Joshua Inc
			Capt Jude 520556 13026
			Capt Ken
			Capt Kevin Inc
			Capt Ko Inc
			Capt Koung Lim
			Capt Larry Seafood Market
			Capt Larry's Inc
			Capt LC Corp
			Capt LD Seafood Inc
			Capt Linton Inc
			Capt Mack Inc
			Capt Marcus Inc
			Capt Morris
			Capt Opie
			Capt P Inc
			Capt Pappie Inc
			Capt Pat
			Capt Paw Paw
			Capt Pete Inc
			Capt Peter Long Inc
			Capt Pool Bear II's Seafood
			Capt Quang
			Capt Quina Inc
			Capt Richard
			Capt Ross Inc
			Capt Roy
			Capt Russell Jr Inc
			Capt Ryan Inc
			Capt Ryan's
			Capt Sam

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Capt Sang
			Capt Scar Inc
			Capt Scott
			Capt Scott 5
			Capt Scott Seafood
			Capt Sparkers Shrimp
			Capt St Peter
			Capt T&T Corp
			Capt Thien
			Capt Tommy Inc
			Capt Two Inc
			Capt Van's Seafood
			Capt Walley Inc
			Capt Zoe Inc
			Captain Allen's Bait & Tackle
			Captain Arnulfo Inc
			Captain Blair Seafood
			Captain Dexter Inc
			Captain D's
			Captain Homer Inc
			Captain Jeff
			Captain JH III Inc
			Captain Joshua
			Captain Larry'O
			Captain Miss Cammy Nhung
			Captain Regis
			Captain Rick
			Captain T/Thiet Nguyen
			Captain Tony
			Captain Truong Phi Corp
			Captain Vinh
			Cap't-Brandon
			Captian Thomas Trawler Inc
			Carlino Seafood
			Carly Sue Inc
			Carmelita Inc
			Carolina Lady Inc
			Carolina Sea Foods Inc
			Caroline and Calandra Inc
			Carson & Co
			Carson & Co Inc
			Cary Encalade Trawling
			Castellano's Corp
			Cathy Cheramie Inc
			CBS Seafood & Catering LLC
			CBS Seafood & Catering LLC
			Cecilia Enterprise Inc
			CF Gollot & Son Sfd Inc
			CF Gollott and Son Seafood Inc
			Chackbay Lady
			Chad & Chaz LLC

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Challenger Shrimp Co Inc
			Chalmette Marine Supply Co Inc
			Chalmette Net & Trawl
			Chapa Shrimp Trawlers
			Chaplin Seafood
			Charlee Girl
			Charles Guidry Inc
			Charles Sellers
			Charles White
			Charlotte Maier Inc
			Charlotte Maier Inc
			Chef Seafood Ent LLC
			Cheramies Landing
			Cherry Pt Seafood
			Cheryl Lynn Inc
			Chez Francois Seafood
			Chilling Pride Inc
			Chin Nguyen Co
			Chin Nguyen Co
			Chinatown Seafood Co Inc
			Chines Cajun Net Shop
			Chris Hansen Seafood
			Christian G Inc
			Christina Leigh Shrimp Co
			Christina Leigh Shrimp Company Inc
			Christina Leigh Shrimp Company Inc
			Cieutat Trawlers
			Cinco de Mayo Inc
			Cindy Lynn Inc
			Cindy Mae Inc
			City Market Inc
			CJ Seafood
			CJs Seafood
			Clifford Washington
			Clinton Hayes - C&S Enterprises of Brandon Inc
			Cochran's Boat Yard
			Colorado River Seafood
			Colson Marine
			Comm Fishing
			Commercial Fishing Service CFS Seafoods
			Cong Son
			Cong-An Inc
			Country Girl Inc
			Country Inc
			Courtney & Ory Inc
			Cowdrey Fish
			Cptn David
			Crab-Man Bait Shop
			Craig A Wallis, Keith Wallis dba W&W Dock & 10 boats
			Cristina Seafood
			CRJ Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Cruillas Inc
			Crusader Inc
			Crustacean Frustration
			Crystal Gayle Inc
			Crystal Light Inc
			Crystal Light Inc
			Curtis Henderson
			Custom Pack Inc
			Custom Pack Inc
			Cyril's Ice House & Supplies
			D & A Seafood
			D & C Seafood Inc
			D & J Shrimping LLC
			D & M Seafood & Rental LLC
			D Ditcharo Jr Seafoods
			D G & R C Inc
			D S L & R Inc
			D&T Marine Inc
			Daddys Boys
			DaHa Inc/Cat'Sass
			DAHAPA Inc
			Dale's Seafood Inc
			Dang Nguyen
			Daniel E Lane
			Danny Boy Inc
			Danny Max
			David & Danny Inc
			David C Donnelly
			David Daniels
			David Ellison Jr
			David Gollott Sfd Inc
			David W Casanova's Seafood
			David White
			David's Shrimping Co
			Davis Seafood
			Davis Seafood
			Davis Seafood Inc
			Dawn Marie
			Deana Cheramie Inc
			Deanna Lea
			Dean's Seafood
			Deau Nook
			Debbe Anne Inc
			Deep Sea Foods Inc/Jubilee Foods Inc
			Delcambre Seafood
			Dell Marine Inc
			Dennis Menesses Seafood
			Dennis' Seafood Inc
			Dennis Shrimp Co Inc
			Desperado
			DFS Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Diamond Reef Seafood
			Diem Inc
			Dinh Nguyen
			Dixie General Store LLC
			Dixie Twister
			Dominick's Seafood Inc
			Don Paco Inc
			Donald F Boone II
			Dong Nguyen
			Donini Seafoods Inc
			Donna Marie
			Donovan Tien I & II
			Dopson Seafood
			Dorada Cruz Inc
			Double Do Inc
			Double Do Inc
			Doug and Neil Inc
			Douglas Landing
			Doxey's Oyster & Shrimp
			Dragnet II
			Dragnet Inc
			Dragnet Seafood LLC
			Dubberly's Mobile Seafood
			Dudenhefer Seafood
			Dugas Shrimp Co LLC
			Dunamis Towing Inc
			Dupree's Seafood
			Duval & Duval Inc
			Dwayne's Dream Inc
			E & M Seafood
			E & T Boating
			E Gardner McClellan
			E&E Shrimp Co Inc
			East Coast Seafood
			East Coast Seafood
			East Coast Seafood
			East Coast Seafood
			Edisto Queen LLC
			Edward Garcia Trawlers
			EKV Inc
			El Pedro Fishing & Trading Co Inc
			Eliminator Inc
			Elizabeth Nguyen
			Ellerbee Seafoods
			Ellie May
			Elmira Pflueckhahn Inc
			Elmira Pflueckhahn Inc
			Elvira G Inc
			Emily's SFD
			Emmanuel Inc
			Ensenada Cruz Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Enterprise
			Enterprise Inc
			Equalizer Shrimp Co Inc
			Eric F Dufrene Jr LLC
			Erica Lynn Inc
			Erickson & Jensen Seafood Packers
			Ethan G Inc
			Excalibur LLC
			F/V Apalachee Warrior
			F/V Atlantis I
			F/V Capt Walter B
			F/V Captain Andy
			F/V Eight Flags
			F/V Mary Ann
			F/V Miss Betty
			F/V Morning Star
			F/V Nam Linh
			F/V Olivia B
			F/V Phuoc Thanh Mai II
			F/V Sea Dolphin
			F/V Southern Grace
			F/V Steven Mai
			F/V Steven Mai II
			Famer Boys Catfish Kitchens
			Family Thing
			Father Casimir Inc
			Father Dan Inc
			Father Mike Inc
			Fiesta Cruz Inc
			Fine Shrimp Co
			Fire Fox Inc
			Fisherman's Reef Shrimp Co
			Fishermen IX Inc
			Fishing Vessel Enterprise Inc
			Five Princesses Inc
			FKM Inc
			Fleet Products Inc
			Flower Shrimp House
			Flowers Seafood Co
			Floyd's Wholesale Seafood Inc
			Fly By Night Inc
			Forest Billiot Jr
			Fortune Shrimp Co Inc
			FP Oubre
			Francis Brothers Inc
			Francis Brothers Inc
			Francis III
			Frank Toomer Jr
			Fran-Tastic Too
			Frederick-Dan
			Freedom Fishing Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Freeman Seafood
			Frelich Seafood Inc
			Frenchie D-282226
			Fripp Point Seafood
			G & L Trawling Inc
			G & O Shrimp Co Inc
			G & O Trawlers Inc
			G & S Trawlers Inc
			G D Ventures II Inc
			G G Seafood
			G R LeBlanc Trawlers Inc
			Gail's Bait Shop
			Gale Force Inc
			Gambler Inc
			Gambler Inc
			Garijak Inc
			Gary F White
			Gator's Seafood
			Gay Fish Co
			Gay Fish Co
			GeeChee Fresh Seafood
			Gemita Inc
			Gene P Callahan Inc
			George J Price Sr Ent Inc
			Georgia Shrimp Co LLC
			Gerica Marine
			Gilden Enterprises
			Gillikin Marine Railways Inc
			Gina K Inc
			Gisco Inc
			Gisco Inc
			Glenda Guidry Inc
			Gloria Cruz Inc
			Go Fish Inc
			God's Gift
			God's Gift Shrimp Vessel
			Gogie
			Gold Coast Seafood Inc
			Golden Gulf Coast Pkg Co Inc
			Golden Phase Inc
			Golden Text Inc
			Golden Text Inc
			Golden Text Inc
			Goldenstar
			Gollott Brothers Sfd Co Inc
			Gollott's Oil Dock & Ice House Inc
			Gonzalez Trawlers Inc
			Gore Enterprises Inc
			Gore Enterprizes Inc
			Gore Seafood Co
			Gore Seafood Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Gove Lopez
			Graham Fisheries Inc
			Graham Shrimp Co Inc
			Graham Shrimp Co Inc
			Gramps Shrimp Co
			Grandma Inc
			Grandpa's Dream
			Grandpa's Dream
			Granny's Garden and Seafood
			Green Flash LLC
			Greg Inc
			Gregory Mark Gaubert
			Gregory Mark Gaubert
			Gregory T Boone
			Gros Tete Trucking Inc
			Guidry's Bait Shop
			Guidry's Net Shop
			Gulf Central Seaood Inc
			Gulf Crown Seafood Co Inc
			Gulf Fish Inc
			Gulf Fisheries Inc
			Gulf Island Shrimp & Seafood II LLC
			Gulf King Services Inc
			Gulf Pride Enterprises Inc
			Gulf Seaway Seafood Inc
			Gulf Shrimp
			Gulf South Inc
			Gulf Stream Marina LLC
			Gulf Sweeper Inc (Trawler Gulf Sweeper)
			Gypsy Girl Inc
			H & L Seafood
			Hack Berry Seafood
			Hagen & Miley Inc
			Hailey Marie Inc
			Hanh Lai Inc
			Hannah Joyce Inc
			Hardy Trawlers
			Hardy Trawlers
			Harrington Fish Co Inc
			Harrington Seafood & Supply Inc
			Harrington Shrimp Co Inc
			Harrington Trawlers Inc
			Harris Fisheries Inc
			Hazel's Hustler
			HCP LLC
			Heather Lynn Inc
			Heavy Metal Inc
			Hebert Investments Inc
			Hebert's Mini Mart LLC
			Helen E Inc
			Helen Kay Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Helen Kay Inc
			Helen W Smith Inc
			Henderson Seafood
			Henry Daniels Inc
			Hermosa Cruz Inc
			Hi Seas of Dulac Inc
			Hien Le Van Inc
			High Hope Inc
			Hoang Anh
			Hoang Long I, II
			Holland Enterprises
			Holly Beach Seafood
			Holly Marie's Seafood Market
			Hombre Inc
			Home Loving Care Co
			Hondumex Ent Inc
			Hong Nga Inc
			Hongri Inc
			Houston Foret Seafood
			Howerin Trawlers Inc
			HTH Marine Inc
			Hubbard Seafood
			Hurricane Emily Seafood Inc
			Hutcherson Christian Shrimp Inc
			Huyen Inc
			Icy Seafood II Inc
			ICY Seafood Inc
			Icy Seafood Inc
			Ida's Seafood Rest & Market
			Ike & Zack Inc
			Independent Fish Company Inc
			Inflation Inc
			Integrity Fisheries Inc
			Integrity Fishing Inc
			International Oceanic Ent
			Interstate Vo LLC
			Intracoastal Seafood Inc
			Iorn Will Inc
			Irma Trawlers Inc
			Iron Horse Inc
			Isabel Maier Inc
			Isabel Maier Inc
			Isla Cruz Inc
			J & J Rentals Inc
			J & J Trawler's Inc
			J & R Seafood
			J Collins Trawlers
			J D Land Co
			Jackie & Hiep Trieu
			Jacob A Inc
			Jacquelin Marie Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Jacquelin Marie Inc
			James D Quach Inc
			James E Scott III
			James F Dubberly
			James Gadson
			James J Matherne Jr
			James J Matherne Sr
			James Kenneth Lewis Sr
			James LaRive Jr
			James W Green Jr dba Miss Emilie Ann
			James W Hicks
			Janet Louise Inc
			Jani Marie
			JAS Inc
			JBS Packing Co Inc
			JBS Packing Inc
			JCM
			Jean's Bait
			Jeff Chancey
			Jemison Trawler's Inc
			Jenna Dawn LLC
			Jennifer Nguyen - Capt T
			Jensen Seafood Pkg Co Inc
			Jesse LeCompte Jr
			Jesse LeCompte Sr
			Jesse Shantelle Inc
			Jessica Ann Inc
			Jessica Inc
			Jesus G Inc
			Jimmy and Valerie Bonvillain
			Jimmy Le Inc
			Jim's Cajen Shrimp
			Joan of Arc Inc
			JoAnn and Michael W Daigle
			Jody Martin
			Joe Quach
			Joel's Wild Oak Bait Shop & Fresh Seafood
			John A Norris
			John J Alexie
			John Michael E Inc
			John V Alexie
			Johnny & Joyce's Seafood
			Johnny O Co
			Johnny's Seafood
			John's Seafood
			Joker's Wild
			Jones - Kain Inc
			Joni John Inc (Leon J Champagne)
			Jon's C Seafood Inc
			Joseph Anthony
			Joseph Anthony Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Joseph Garcia
			Joseph Martino
			Joseph Martino Corp
			Joseph T Vermeulen
			Josh & Jake Inc
			Joya Cruz Inc
			JP Fisheries
			Julie Ann LLC
			Julie Hoang
			Julie Shrimp Co Inc (Trawler Julie)
			Julio Gonzalez Boat Builders Inc
			Justin Dang
			JW Enterprise
			K & J Trawlers
			K&D Boat Company
			K&S Enterprises Inc
			Kalliainen Seafoods Inc
			KAM Fishing
			Kandi Sue Inc
			Karl M Belsome LLC
			KBL Corp
			KDH Inc
			Keith M Swindell
			Kellum's Seafood
			Kellum's Seafood
			Kelly Marie Inc
			Ken Lee's Dock LLC
			Kenneth Guidry
			Kenny-Nancy Inc
			Kentucky Fisheries Inc
			Kentucky Trawlers Inc
			Kevin & Bryan (M/V)
			Kevin Dang
			Khang Dang
			Khanh Huu Vu
			Kheng Sok Shrimping
			Kim & James Inc
			Kim Hai II Inc
			Kim Hai Inc
			Kim's Seafood
			Kingdom World Inc
			Kirby Seafood
			Klein Express
			KMB Inc
			Knight's Seafood Inc
			Knight's Seafood Inc
			Knowles Noel Camardelle
			Kramer's Bait Co
			Kris & Cody Inc
			KTC Fishery LLC
			L & M

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			L & N Friendship Corp
			L & O Trawlers Inc
			L & T Inc
			L&M
			LA - 3184 CA
			La Belle Idee
			La Macarela Inc
			La Pachita Inc
			LA-6327-CA
			LaBauve Inc
			LaBauve Inc
			Lade Melissa Inc
			Lady Agnes II
			Lady Agnes III
			Lady Amelia Inc
			Lady Anna I
			Lady Anna II
			Lady Barbara Inc
			Lady Carolyn Inc
			Lady Catherine
			Lady Chancery Inc
			Lady Chelsea Inc
			Lady Danielle
			Lady Debra Inc
			Lady Dolcina Inc
			Lady Gail Inc
			Lady Katherine Inc
			Lady Kelly Inc
			Lady Kelly Inc
			Lady Kristie
			Lady Lavang LLC
			Lady Liberty Seafood Co
			Lady Lynn Ltd
			Lady Marie Inc
			Lady Melissa Inc
			Lady Shelly
			Lady Shelly
			Lady Snow Inc
			Lady Stephanie
			Lady Susie Inc
			Lady Kim T Inc
			Lady TheLna
			Lady Toni Inc
			Lady Veronica
			Lafitte Frozen Foods Corp
			Lafont Inc
			Lafourche Clipper Inc
			Lafourche Clipper Inc
			Lamarah Sue Inc
			Lan Chi Inc
			Lan Chi Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Lancero Inc
			Lanny Renard and Daniel Bourque
			Lapeyrouse Seafood Bar Groc Inc
			Larry G Kellum Sr
			Larry Scott Freeman
			Larry W Hicks
			Lasseigne & Sons Inc
			Laura Lee
			Lauren O
			Lawrence Jacobs Sfd
			Lazaretta Packing Inc
			Le & Le Inc
			Le Family Inc
			Le Family Inc
			Le Tra Inc
			Leek & Millington Trawler Privateeer
			Lee's Sales & Distribution
			Leonard Shrimp Producers Inc
			Leoncea B Regnier
			Lerin Lane
			Li Johnson
			Liar Liar
			Libertad Fisheries Inc
			Liberty I
			Lighthouse Fisheries Inc
			Lil Aly
			Lil Arthur Inc
			Lil BJ LLC
			Lil Robbie Inc
			Lil Robbie Inc
			Lil Robin
			Lil Robin
			Lilla
			Lincoln
			Linda & Tot Inc
			Linda Cruz Inc
			Linda Hoang Shrimp
			Linda Lou Boat Corp
			Linda Lou Boat Corp
			Lisa Lynn Inc
			Lisa Lynn Inc
			Little Andrew Inc
			Little Andy Inc
			Little Arthur
			Little David Gulf Trawler Inc
			Little Ernie Gulf Trawler Inc
			Little Ken Inc
			Little Mark
			Little William Inc
			Little World
			LJL Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Long Viet Nguyen
			Longwater Seafood dba Ryan H Longwater
			Louisiana Gulf Shrimp LLC
			Louisiana Lady Inc
			Louisiana Man
			Louisiana Newpack Shrimp Co Inc
			Louisiana Pride Seafood Inc
			Louisiana Pride Seafood Inc
			Louisiana Seafood Dist LLC
			Louisiana Shrimp & Packing Inc
			Louisiana Shrimp and Packing Co Inc
			Lovely Daddy II & III
			Lovely Jennie
			Low Country Lady (Randolph N Rhodes)
			Low County Lady
			Luchador Inc
			Lucky
			Lucky I
			Lucky Jack Inc
			Lucky Lady
			Lucky Lady II
			Lucky Leven Inc
			Lucky MV
			Lucky Ocean
			Lucky Sea Star Inc
			Lucky Star
			Lucky World
			Lucky's Seafood Market & Poboys LLC
			Luco Drew's
			Luisa Inc
			Lupe Martinez Inc
			LV Marine Inc
			LW Graham Inc
			Lyle LeCompte
			Lynda Riley Inc
			Lynda Riley Inc
			M & M Seafood
			M V Sherry D
			M V Tony Inc
			M&C Fisheries
			M/V Baby Doll
			M/V Chevo's Bitch
			M/V Lil Vicki
			M/V Loco-N Motion
			M/V Patsy K #556871
			M/V X L
			Mabry Allen Miller Jr
			Mad Max Seafood
			Madera Cruz Inc
			Madison Seafood
			Madlin Shrimp Co Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Malibu
			Malolo LLC
			Mamacita Inc
			Man Van Nguyen
			Manteo Shrimp Co
			Marco Corp
			Marcos A
			Maria Elena Inc
			Maria Sandi
			Mariachi Trawlers Inc
			Mariah Jade Shrimp Company
			Marie Teresa Inc
			Marine Fisheries
			Marisa Elida Inc
			Mark and Jace
			Marleann
			Martin's Fresh Shrimp
			Mary Bea Inc
			Master Brandon Inc
			Master Brock
			Master Brock
			Master Dylan
			Master Gerald Trawlers Inc
			Master Hai
			Master Hai II
			Master Henry
			Master Jared Inc
			Master Jhy Inc
			Master John Inc
			Master Justin Inc
			Master Justin Inc
			Master Ken Inc
			Master Kevin Inc
			Master Martin Inc
			Master Mike Inc
			Master NT Inc
			Master Pee-Wee
			Master Ronald Inc
			Master Scott
			Master Scott II
			Master Seelos Inc
			Master T
			Master Tai LLC
			Master Tai LLC
			Mat Roland Seafood Co
			Maw Doo
			Mayflower
			McQuaig Shrimp Co Inc
			Me Kong
			Melerine Seafood
			Melody Shrimp Co

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Mer Shrimp Inc
			Michael Lynn
			Michael Nguyen
			Michael Saturday's Fresh Every Day South Carolina Shrimp
			Mickey Nelson Net Shop
			Mickey's Net
			Midnight Prowler
			Mike's Seafood Inc
			Miley's Seafood Inc
			Militello and Son Inc
			Miller & Son Seafood Inc
			Miller Fishing
			Milliken & Son's
			Milton J Dufrene and Son Inc
			Milton Yopp - Capt'n Nathan & Thomas Winfield
			Minh & Liem Doan
			Mis Quynh Chi II
			Miss Adrianna Inc
			Miss Alice Inc
			Miss Ann Inc
			Miss Ann Inc
			Miss Ashleigh
			Miss Ashleigh Inc
			Miss Barbara
			Miss Barbara Inc
			Miss Bernadette A Inc
			Miss Bertha (M/V)
			Miss Beverly Kay
			Miss Brenda
			Miss Candace
			Miss Candace Nicole Inc
			Miss Carla Jean Inc
			Miss Caroline Inc
			Miss Carolyn Louise Inc
			Miss Caylee
			Miss Charlotte Inc
			Miss Christine III
			Miss Cleda Jo Inc
			Miss Courtney Inc
			Miss Courtney Inc
			Miss Cynthia
			Miss Danielle Gulf Trawler Inc
			Miss Danielle LLC
			Miss Dawn
			Miss Ellie Inc
			Miss Faye LLC
			Miss Fina Inc
			Miss Georgia Inc
			Miss Hannah
			Miss Hannah Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Miss Hazel Inc
			Miss Hilary Inc
			Miss Jennifer Inc
			Miss Joanna Inc
			Miss Julia
			Miss Kandy Tran LLC
			Miss Kandy Tran LLC
			Miss Karen
			Miss Kathi Inc
			Miss Kathy
			Miss Kaylyn LLC
			Miss Khayla
			Miss Lil
			Miss Lillie Inc
			Miss Liz Inc
			Miss Loraine
			Miss Loraine Inc
			Miss Lori Dawn IV Inc
			Miss Lori Dawn V Inc
			Miss Lori Dawn VI Inc
			Miss Lori Dawn VII Inc
			Miss Lorie Inc
			Miss Luana D Shrimp Co
			Miss Luana D Shrimp Co
			Miss Madeline Inc
			Miss Madison
			Miss Marie
			Miss Marie Inc
			Miss Marilyn Louis Inc
			Miss Marilyn Louise
			Miss Marilyn Louise Inc
			Miss Marissa Inc
			Miss Martha Inc
			Miss Martha Inc
			Miss Mary T
			Miss Myle
			Miss Narla
			Miss Nicole
			Miss Nicole Inc
			Miss Plum Inc
			Miss Quynh Anh I
			Miss Quynh Anh I LLC
			Miss Quynh Anh II LLC
			Miss Redemption LLC
			Miss Rhianna Inc
			Miss Sambath
			Miss Sandra II
			Miss Sara Ann
			Miss Savannah
			Miss Savannah II
			Miss Soriya

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Miss Suzanne
			Miss Sylvia
			Miss Than
			Miss Thom
			Miss Thom Inc
			Miss Tina Inc
			Miss Trinh Trinh
			Miss Trisha Inc
			Miss Trisha Inc
			Miss Verna Inc
			Miss Vicki
			Miss Victoria Inc
			Miss Vivian Inc
			Miss WillaDean
			Miss Winnie Inc
			Miss Yvette Inc
			Miss Yvonne
			Misty Morn Eat
			Misty Star
			MJM Seafood Inc
			M'M Shrimp Co Inc
			Mom & Dad Inc
			Mona-Dianne Seafood
			Montha Sok and Tan No Le
			Moon River Inc
			Moon Tillett Fish Co Inc
			Moonlight
			Moonlight Mfg
			Moore Trawlers Inc
			Morgan Creek Seafood
			Morgan Rae Inc
			Morning Star
			Morrison Seafood
			Mother Cabrini
			Mother Teresa Inc
			Mr & Mrs Inc
			Mr & Mrs Inc
			Mr Coolly
			Mr Fox
			Mr Fox
			Mr G
			Mr Gaget LLC
			Mr Henry
			Mr Natural Inc
			Mr Neil
			Mr Phil T Inc
			Mr Sea Inc
			Mr Verdin Inc
			Mr Williams
			Mrs Judy Too
			Mrs Tina Lan Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ms Alva Inc
			Ms An
			My Angel II
			My Blues
			My Dad Whitney Inc
			My Girls LLC
			My Thi Tran Inc
			My Three Sons Inc
			My V Le Inc
			My-Le Thi Nguyen
			Myron A Smith Inc
			Nancy Joy
			Nancy Joy Inc
			Nancy Joy Inc
			Nanny Granny Inc
			Nanny Kat Seafood LLC
			Napolean Seafoods
			Napoleon II
			Napoleon Seafood
			Napoleon SF
			Naquin's Seafood
			Nautilus LLC
			Nelma Y Lane
			Nelson and Son
			Nelson Trawlers Inc
			Nelson's Quality Shrimp Company
			Nevgulmarco Co Inc
			New Deal Comm Fishing
			New Way Inc
			Nguyen Day Van
			Nguyen Express
			Nguyen Int'l Enterprises Inc
			Nguyen Shipping Inc
			NHU UYEN
			Night Moves of Cut Off Inc
			Night Shift LLC
			Night Star
			North Point Trawlers Inc
			North Point Trawlers Inc
			Nuestra Cruz Inc
			Nunez Seafood
			Oasis
			Ocean Bird Inc
			Ocean Breeze Inc
			Ocean Breeze Inc
			Ocean City Corp
			Ocean Emperor Inc
			Ocean Harvest Wholesale Inc
			Ocean Pride Seafood Inc
			Ocean Seafood
			Ocean Select Seafood LLC

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Ocean Springs Seafood Market Inc
			Ocean Wind Inc
			Oceanica Cruz Inc
			Odin LLC
			Old Maw Inc
			Ole Holbrook's Fresh Fish Market LLC
			Ole Nelle
			One Stop Bait & Ice
			Open Sea Inc
			Orage Enterprises Inc
			Orn Roeum Shrimping
			Otis Cantrelle Jr
			Otis M Lee Jr
			Owens Shrimping
			Palmetto Seafood Inc
			Papa Rod Inc
			Papa T
			Pappy Inc
			Pappy's Gold
			Parfait Enterprises Inc
			Paris/Asia
			Parramore Inc
			Parrish Shrimping Inc
			Pascagoula Ice & Freezer Co Inc
			Pat-Lin Enterprises Inc
			Patricia Foret
			Patrick Sutton Inc
			Patty Trish Inc
			Paul Piazza and Son Inc
			Paw Paw Allen
			Paw Paw Pride Inc
			Pearl Inc dba Indian Ridge Shrimp Co
			Pei Gratia Inc
			Pelican Point Seafood Inc
			Penny V LLC
			Perlita Inc
			Perseverance I LLC
			Pete & Queenie Inc
			Phat Le and Le Tran
			Phi Long Inc
			Phi-Ho LLC
			Pip's Place Marina Inc
			Plaisance Trawlers Inc
			Plata Cruz Inc
			Poc-Tal Trawlers Inc
			Pointe-Aux-Chene Marina
			Pontchautrain Blue Crab
			Pony Express
			Poppee
			Poppy's Pride Seafood
			Port Bolivar Fisheries Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Port Marine Supplies
			Port Royal Seafood Inc
			Poteet Seafood Co Inc
			Potter Boats Inc
			Price Seafood Inc
			Prince of Tides
			Princess Ashley Inc
			Princess Celine Inc
			Princess Cindy Inc
			Princess Lorie LLC
			Princess Mary Inc
			Prosperity
			PT Fisheries Inc
			Punch's Seafood Mkt
			Purata Trawlers Inc
			Pursuer Inc
			Quality Seafood
			Quang Minh II Inc
			Queen Lily Inc
			Queen Mary
			Queen Mary Inc
			Quinta Cruz Inc
			Quoc Bao Inc
			Quynh NHU Inc
			Quynh Nhu Inc
			R & J Inc
			R & K Fisheries LLC
			R & L Shrimp Inc
			R & P Fisheries
			R & R Bait/Seafood
			R & S Shrimping
			R & T Atocha LLC
			R&D Seafood
			R&K Fisheries LLC
			R&R Seafood
			RA Lesso Brokerage Co Inc
			RA Lesso Seafood Co Inc
			Rachel-Jade
			Ralph Lee Thomas Jr
			Ralph W Jones
			Ramblin Man Inc
			Ranchero Trawlers Inc
			Randall J Pinell Inc
			Randall J Pinell Inc
			Randall K and Melissa B Richard
			Randall Pinell
			Randy Boy Inc
			Randy Boy Inc
			Rang Dong
			Raul L Castellanos
			Raul's Seafood

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Raul's Seafood
			Rayda Cheramie Inc
			Raymond LeBouef
			RCP Seafood I II III
			RDR Shrimp Inc
			Reagan's Seafood
			Rebecca Shrimp Co Inc
			Rebel Seafood
			Regulus
			Rejimi Inc
			Reno's Sea Food
			Res Vessel
			Reyes Trawlers Inc
			Rick's Seafood Inc
			Ricky B LLC
			Ricky G Inc
			Riffle Seafood
			Rigolets Bait & Seafood LLC
			Riverside Bait & Tackle
			RJ's
			Roatex Ent Inc
			Robanie C Inc
			Robanie C Inc
			Robanie C Inc
			Robert E Landry
			Robert H Schrimpf
			Robert Johnson
			Robert Keenan Seafood
			Robert Upton or Terry Upton
			Robert White Seafood
			Rockin Robbin Fishing Boat Inc
			Rodney Hereford Jr
			Rodney Hereford Sr
			Rodney Hereford Sr
			Roger Blanchard Inc
			Rolling On Inc
			Romo Inc
			Ronald Louis Anderson Jr
			Rosa Marie Inc
			Rose Island Seafood
			RPM Enterprises LLC
			Rubi Cruz Inc
			Ruf-N-Redy Inc
			Ruttley Boys Inc
			Sadie D Seafood
			Safe Harbour Seafood Inc
			Salina Cruz Inc
			Sally Kim III
			Sally Kim IV
			Sam Snodgrass & Co
			Samaira Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			San Dia
			Sand Dollar Inc
			Sandy N
			Sandy O Inc
			Santa Fe Cruz Inc
			Santa Maria I Inc
			Santa Maria II
			Santa Monica Inc
			Scavanger
			Scooby Inc
			Scooby Inc
			Scottie and Juliette Dufrene
			Scottie and Juliette Dufrene
			Sea Angel
			Sea Angel Inc
			Sea Bastion Inc
			Sea Drifter Inc
			Sea Durbin Inc
			Sea Eagle
			Sea Eagle Fisheries Inc
			Sea Frontier Inc
			Sea Gold Inc
			Sea Gulf Fisheries Inc
			Sea Gypsy Inc
			Sea Hawk I Inc
			Sea Horse Fisheries
			Sea Horse Fisheries Inc
			Sea King Inc
			Sea Pearl Seafood Company Inc
			Sea Queen IV
			Sea Trawlers Inc
			Sea World
			Seabrook Seafood Inc
			Seabrook Seafood Inc
			Seafood & Us Inc
			Seaman's Magic Inc
			Seaman's Magic Inc
			Seaside Seafood Inc
			Seaweed 2000
			Seawolf Seafood
			Second Generation Seafood
			Shark Co Seafood Inter Inc
			Sharon - Ali Michelle Inc
			Shelby & Barbara Seafood
			Shelby & Barbara Seafood
			Shelia Marie LLC
			Shell Creek Seafood Inc
			Shirley Elaine
			Shirley Girl LLC
			Shrimp Boat Patrice
			Shrimp Boating Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Shrimp Express
			Shrimp Man
			Shrimp Networks Inc
			Shrimp Trawler
			Shrimper
			Shrimper
			Shrimpy's
			Si Ky Lan Inc
			Si Ky Lan Inc
			Si Ky Lan Inc
			Sidney Fisheries Inc
			Silver Fox
			Silver Fox LLC
			Simon
			Sims Shrimping
			Skip Toomer Inc
			Skip Toomer Inc
			Skyla Marie Inc
			Smith & Sons Seafood Inc
			Snowdrift
			Snowdrift
			Sochenda
			Soeung Phat
			Son T Le Inc
			Son's Pride Inc
			Sophie Marie Inc
			Soul Mama Inc
			Souther Obsession Inc
			Southern Lady
			Southern Nightmare Inc
			Southern Star
			Southshore Seafood
			Spencers Seafood
			Sprig Co Inc
			St Anthony Inc
			St Daniel Phillip Inc
			St Dominic
			St Joseph
			St Joseph
			St Joseph II Inc
			St Joseph III Inc
			St Joseph IV Inc
			St Martin
			St Martyrs VN
			St Mary Seafood
			St Mary Seven
			St Mary Tai
			St Michael Fuel & Ice Inc
			St Michael's Ice & Fuel
			St Peter
			St Peter 550775

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			St Teresa Inc
			St Vincent Andrew Inc
			St Vincent Gulf Shrimp Inc
			St Vincent One B
			St Vincent One B Inc
			St Vincent SF
			St Vincent Sfd Inc
			Start Young Inc
			Steamboat Bills Seafood
			Stella Mestre Inc
			Stephen Dantin Jr
			Stephney's Seafood
			Stipelcovich Marine Wks
			Stone-Co Farms LP
			Stone-Co Farms LP
			Stormy Sean Inc
			Stormy Seas Inc
			Sun Star Inc
			Sun Swift Inc
			Sunshine
			Super Coon Inc
			Super Cooper Inc
			Swamp Irish Inc
			Sylvan P Racine Jr - Capt Romain
			T & T Seafood
			T Brothers
			T Cvitanovich Seafood LLC
			Ta Do
			Ta T Vo Inc
			Ta T Vo Inc
			Tana Inc
			Tanya Lea Inc
			Tanya Lea Inc
			Tanya Lea Inc
			Tasha Lou
			T-Brown Inc
			Tee Frank Inc
			Tee Tigre Inc
			Tercera Cruz Inc
			Terrebonne Seafood Inc
			Terri Monica
			Terry Luke Corp
			Terry Luke Corp
			Terry Luke Corp
			Terry Lynn Inc
			Te-Sam Inc
			Texas 1 Inc
			Texas 18 Inc
			Texas Lady Inc
			Texas Pack Inc
			Tex-Mex Cold Storage Inc

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Tex-Mex Cold Storage Inc
			Thai & Tran Inc
			Thai Bao Inc
			Thanh Phong
			The Boat Phat Tai
			The Fishermans Dock
			The Last One
			The Light House Bait & Seafood Shack LLC
			The Mayporter Inc
			The NGO
			The Seafood Shed
			Thelma J Inc
			Theresa Seafood Inc
			Third Tower Inc
			Thomas Winfield - Capt Nathan
			Thompson Bros
			Three C's
			Three Dads
			Three Sons
			Three Sons Inc
			Three Sons Inc
			Thunder Roll
			Thunderbolt Fisherman's Seafood Inc
			Thy Tra Inc
			Thy Tra Inc
			Tidelands Seafood Co Inc
			Tiffani Claire Inc
			Tiffani Claire Inc
			Tiger Seafood
			Tikede Inc
			Timmy Boy Corp
			Tina Chow
			Tina T LLC
			Tino Mones Seafood
			TJ's Seafood
			Toan Inc
			Todd Co
			Todd's Fisheries
			Tom LE LLC
			Tom Le LLC
			Tom N & Bill N Inc
			Tommy Bui dba Mana II
			Tommy Cheramie Inc
			Tommy Gulf Sea Food Inc
			Tommy's Seafood Inc
			Tonya Jane Inc
			Tony-N
			Tookie Inc
			Tot & Linda Inc
			T-Pops Inc
			Tran Phu Van

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Tran's Express Inc
			Travis - Shawn
			Travis - Shawn
			Trawler Azteca
			Trawler Becky Lyn Inc
			Trawler Capt GC
			Trawler Capt GC II
			Trawler Dalia
			Trawler Doctor Bill
			Trawler Gulf Runner
			Trawler HT Seaman
			Trawler Joyce
			Trawler Kristi Nicole
			Trawler Kyle & Courtney
			Trawler Lady Catherine
			Trawler Lady Gwen Doe
			Trawler Linda B Inc
			Trawler Linda June
			Trawler Little Brothers
			Trawler Little Gavino
			Trawler Little Rookie Inc
			Trawler Mary Bea
			Trawler Master Alston
			Trawler Master Jeffrey Inc
			Trawler Michael Anthony Inc
			Trawler Mildred Barr
			Trawler Miss Alice Inc
			Trawler Miss Jamie
			Trawler Miss Kelsey
			Trawler Miss Sylvia Inc
			Trawler Mrs Viola
			Trawler Nichols Dream
			Trawler Raindear Partnership
			Trawler Rhonda Kathleen
			Trawler Rhonda Lynn
			Trawler Sandra Kay
			Trawler Sarah Jane
			Trawler Sea Wolf
			Trawler Sea Wolf
			Trawler SS Chaplin
			Trawler The Mexican
			Trawler Wallace B
			Trawler Wylie Milam
			Triple C Seafood
			Triple T Enterprises Inc
			Triplets Production
			Tropical SFD
			Troy A LeCompte Sr
			True World Foods Inc
			T's Seafood
			Tu Viet Vu

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			TVN Marine Inc
			TVN Marine Inc
			Two Flags Inc
			Tyler James
			Ultima Cruz Inc
			UTK Enterprises Inc
			V & B Shrimping LLC
			Valona Sea Food
			Valona Seafood Inc
			Van Burren Shrimp Co
			Vaquero Inc
			Varon Inc
			Venetian Isles Marina
			Venice Seafood Exchange Inc
			Venice Seafood LLC
			Vera Cruz Inc
			Veronica Inc
			Versaggi Shrimp Corp
			Victoria Rose Inc
			Viet Giang Corp
			Vigilante Trawlers Inc
			Village Creek Seafood
			Villers Seafood Co Inc
			Vina Enterprises Inc
			Vincent L Alexie Jr
			Vincent Piazza Jr & Sons Seafood Inc
			Vin-Penny
			Vivian Lee Inc
			Von Harten Shrimp Co Inc
			VT & L Inc
			Vu NGO
			Vu-Nguyen Partners
			W L & O Inc
			Waccamaw Producers
			Wait-N-Sea Inc
			Waller Boat Corp
			Walter R Hicks
			Ward Seafood Inc
			Washington Seafood
			Watermen Industries Inc
			Watermen Industries Inc
			Waymaker Inc
			Wayne Estay Shrimp Co Inc
			WC Trawlers Inc
			We Three Inc
			We Three Inc
			Webster's Inc
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros

Commerce Case Number	Commission Case Number	Product/Country	Petitioners/Supporters
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros
			Weems Bros Seafood
			Weems Bros Seafood Co
			Weiskopf Fisheries LLC
			Wendy & Eric Inc
			Wescovich Inc
			West Point Trawlers Inc
			Westley J Domangue
			WH Blanchard Inc
			Whiskey Joe Inc
			White and Black
			White Bird
			White Foam
			White Gold
			Wilcox Shrimping Inc
			Wild Bill
			Wild Eagle Inc
			William E Smith Jr Inc
			William Lee Inc
			William O Nelson Jr
			William Patrick Inc
			William Smith Jr Inc
			Willie Joe Inc
			Wind Song Inc
			Wonder Woman
			Woods Fisheries Inc
			Woody Shrimp Co Inc
			Yeaman's Inc
			Yen Ta
			Yogi's Shrimp
			You & Me Shrimp
			Ysclaskey Seafood
			Zirlott Trawlers Inc
			Zirlott Trawlers Inc

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Part III

Consumer Financial Protection Bureau

12 CFR Part 1002

Small Business Lending Under the Equal Credit Opportunity Act (Regulation B); Final Rule

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1002

[Docket No. CFPB–2021–0015]

RIN 3170–AA09

Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule.

SUMMARY: The Consumer Financial Protection Bureau (CFPB or Bureau) is amending Regulation B to implement changes to the Equal Credit Opportunity Act (ECOA) made by section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Consistent with section 1071, covered financial institutions are required to collect and report to the CFPB data on applications for credit for small businesses, including those that are owned by women or minorities. The final rule also addresses the CFPB's approach to privacy interests and the publication of data; shielding certain demographic data from underwriters and other persons; recordkeeping requirements; enforcement provisions; and the rule's effective and compliance dates.

DATES:

Effective date: This final rule is effective August 29, 2023.

Compliance dates: Covered financial institutions must comply with the final rule beginning October 1, 2024, April 1, 2025, or January 1, 2026, as set forth in § 1002.114(b).

FOR FURTHER INFORMATION CONTACT: Camille Gray, Paralegal Specialist; Kris Andreassen, Pavitra Bacon, Joseph Devlin, Amy Durant, Angela Fox, Caroline Hong, David Jacobs, Kathryn Lazarev, Lawrence Lee, Adam Mayle, Kristen Phinnessee, or Melissa Stegman, Senior Counsels, Office of Regulations, at 202–435–7700 or *https://reginquiries.consumerfinance.gov/.* If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

In 2010, Congress passed the Dodd-Frank Act. Section 1071 of that Act [1] amended ECOA [2] to require that financial institutions collect and report to the CFPB certain data regarding applications for credit for women-owned, minority-owned, and small businesses. Section 1071's statutory purposes are to (1) facilitate enforcement of fair lending laws, and (2) enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the CFPB to require any additional data that it determines would aid in fulfilling section 1071's statutory purposes. Section 1071 also contains a number of other requirements, including those that address restricting the access of underwriters and other persons to certain data; recordkeeping; publication of small business lending data; and modifications or deletions of data prior to publication in order to advance a privacy interest.

Section 1071 directs the CFPB to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, and permits it to adopt exceptions to any requirement or to exempt financial institutions from the requirements of section 1071 as it deems necessary or appropriate to carry out the purposes of section 1071. The CFPB is adding a new subpart B to Regulation B to implement the requirements of section 1071. Key aspects of the CFPB's final rule are summarized below.

As envisioned by Congress, the small business lending rule will create our nation's first consistent and comprehensive database regarding lending to small businesses, including small farms. This will fulfill section 1071's statutory purposes by allowing Federal, State, and local enforcement agencies to assess potential areas for fair lending enforcement and by enabling a range of stakeholders to better identify business and community development needs and opportunities for small businesses, including women-owned and minority-owned small businesses. The database, again as dictated by Congress, will not reveal privacy-protected information about any particular small business applicant, and small businesses will retain control over how much of their demographic information they choose to divulge. In addition, the CFPB believes that its final rule will help to sharpen competition in credit supply by creating greater transparency around small business lending.

Scope. The CFPB is requiring financial institutions to collect and report data regarding applications for credit for small businesses, including those that are owned by women and minorities. The CFPB is not requiring financial institutions to collect and report data regarding applications for women-owned and minority-owned businesses that are *not* small. Because more than 99 percent of women-owned and minority-owned businesses are small businesses, covering small businesses necessarily means nearly all women-owned and minority-owned businesses will also be covered. The CFPB believes that this scope is consistent with the statute and will allow the rule to carry out section 1071's purposes without requiring collection of data that would be of limited utility.

Covered financial institutions. Consistent with language from section 1071, a ''financial institution'' is defined to include any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. The rule thus applies to a variety of entities that engage in small business lending, including depository institutions (*i.e.,* banks, savings associations, and credit unions),[3] online lenders, platform lenders, community development financial institutions (both depository and nondepository institutions), Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit nondepository lenders.[4]

[1] Public Law 111–203, tit. X, section 1071, 124 Stat. 1376, 2056 (2010), codified at ECOA section 704B, 15 U.S.C. 1691c–2.

[2] 15 U.S.C. 1691 *et seq.*

[3] For purposes of this document, the Bureau is using the term depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1), or credit union defined pursuant to the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.,* as implemented by 12 CFR 700.2. The Bureau notes that the Dodd-Frank Act defines a depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.;* there, that term does not encompass credit unions. 12 U.S.C. 5301(18)(A), 1813(c)(1). To facilitate analysis and discussion, the Bureau is referring to banks and savings associations together with credit unions as depository institutions throughout this document, unless otherwise specified.

[4] The Bureau's rules, including this final rule to implement section 1071, generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

The rule uses the term ''covered financial institution'' to refer to those financial institutions that are required to comply with its data collection and reporting requirements. A covered financial institution is defined as a financial institution that originated at least 100 covered credit transactions (rather than 25, as proposed) for small businesses in each of the two preceding calendar years. The CFPB is not adopting an asset-based exemption threshold for depository institutions, or any other general exemptions for particular categories of financial institutions.

The final rule also permits creditors that are not covered financial institutions to voluntarily collect and report small business lending data in certain circumstances.

Covered credit transactions. Covered financial institutions are required to collect and report data regarding covered applications from small businesses for covered credit transactions. A ''covered credit transaction'' is one that meets the definition of business credit under existing Regulation B, with certain exceptions. Transactions within the scope of the rule include loans, lines of credit, credit cards, merchant cash advances, and credit products used for agricultural purposes. The CFPB is excluding trade credit, public utilities credit, securities credit, and incidental credit as proposed. In addition, the CFPB has added exclusions for transactions that are reportable under the Home Mortgage Disclosure Act of 1975 (HMDA) [5] and insurance premium financing. Consistent with the CFPB's proposal, factoring, leases, and consumer-designated credit that is used for business or agricultural purposes are also not covered credit transactions. In addition, the CFPB has made clear that purchases of originated covered credit transactions are not reportable.

Covered applications. A ''covered application''—which triggers data collection, reporting, and related requirements when submitted by a small business—is defined as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. This definition of covered application is largely consistent with the existing Regulation B definition of that term. However, certain circumstances are not covered applications for purposes of this rule, even if they are considered applications under existing Regulation B. Specifically, covered applications for purposes of this rule do not include (1) reevaluation, extension, or renewal requests on existing business credit accounts, unless the request seeks additional credit amounts; or (2) inquiries and prequalification requests.

Small business definition. A covered financial institution is required to collect and report data on a covered application from a ''small business,'' which the rule defines in accordance with the meaning of ''business concern or concern'' and ''small business concern'' under the Small Business Act [6] and Small Business Administration (SBA) regulations. However, in lieu of using the SBA's size standards for defining a small business concern, the definition in this final rule looks to whether the business had $5 million or less in gross annual revenue for its preceding fiscal year. The CFPB believes that a straightforward $5 million threshold strikes the right balance in terms of broadly covering the small business credit market to fulfill section 1071's statutory purposes while meeting the SBA's criteria for an alternative size standard.[7] The final rule also anticipates updates to this size standard, not more than every five years, to account for inflation. The SBA Administrator has approved the CFPB's use of this alternative size standard pursuant to the Small Business Act.[8]

Data to be collected and reported. The rule addresses the data points that must be collected and reported by covered financial institutions for covered applications from small businesses. Congress specifically enumerated many of these data points in ECOA section 704B(e)(2); for the others, the Congress granted the CFPB express authority in 704B(e)(2)(H) to require financial institutions to compile and maintain, along with enumerated data points, a record of ''any additional data that the Bureau determines would aid in fulfilling the purposes'' of section 1071. Certain of these data points are or could be collected from the applicant; other data points are based on information within the financial institution's control. Covered financial institutions must not discourage an applicant from responding to requests for applicant-provided data and must otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response; when collecting data directly from the applicant, the rule identifies certain minimum provisions that must be included within financial institutions' procedures in order for them to be considered ''reasonably designed.'' The rule also addresses what financial institutions should do if, despite having such procedures in place, they are unable to obtain certain data from an applicant. Furthermore, the rule makes clear that a financial institution may rely on information from the applicant, or appropriate third-party sources, when compiling data. If the financial institution verifies particular information, however, it must report that verified information. Financial institutions are permitted to reuse previously collected data in certain circumstances, rather than having to request it from the applicant for each covered application.

As noted above, the rule includes data points that are, or could be, provided by the applicant. Some data points specifically relate to the credit being applied for: the credit type (which includes information on the credit product, types of guarantees, and loan term); the credit purpose; and the amount applied for. There are also data points that relate to the applicant's business: census tract based on an address or location provided by the applicant; gross annual revenue for the applicant's preceding full fiscal year; the 3-digit North American Industry Classification System (NAICS) code for the applicant; the number of workers that the applicant has; the applicant's time in business; and the number of principal owners the applicant has.

There are also applicant-provided data points on the demographics of the applicant's ownership: first, whether the applicant is a minority-owned business or a women-owned business, along with a new data field capturing whether the applicant is an LGBTQI+-owned business; and second, the ethnicity, race, and sex of the applicant's principal owners. The CFPB refers to these data points collectively as an applicant's ''protected demographic information.'' Principal owners' ethnicity and race will be collected from applicants using aggregate categories as well as disaggregated subcategories. Principal owners' sex/gender will be collected from applicants without using pre-defined response categories.

The CFPB is not finalizing its proposed requirement to have financial institutions collect race and ethnicity via visual observation or surname if an in-person applicant does not provide any ethnicity, race, or sex information for any principal owners; instead, the final rule requires that these data be reported based only on information provided by the applicant.

[5] 12 U.S.C. 2801 *et seq.*

[6] 15 U.S.C. 631 *et seq.*

[7] *See* 15 U.S.C. 632(a)(2)(C); 13 CFR 121.903.

[8] *See* 15 U.S.C. 632(a)(2)(C).

The CFPB is providing lenders with a sample data collection form, in both digital and paper form, to assist them in collecting protected demographic data from applicants. Although the contents of the sample form reflect certain legal requirements that financial institutions must follow, their use of the sample form is not itself required under the final rule. Rather, it is an available resource to financial institutions.

In addition, the rule includes data points that will be generated or supplied solely by the financial institution. These data points include, for all applications: a unique identifier for each application for or extension of credit; the application date; the application method (that is, the means by which the applicant submitted the application); the application recipient (that is, whether the financial institution or its affiliate received the application directly, or whether it was received by the financial institution via a third party); the action taken by the financial institution on the application; and the action taken date. For denied applications, there is also a data point for denial reasons. For applications that are originated or approved but not accepted, there is a data point for the amount originated or approved, and a data point for pricing information (which includes, as applicable, interest rate, total origination charges, broker fees, initial annual charges, additional cost for merchant cash advances or other sales-based financing, and prepayment penalties).

Firewall. The CFPB's rule implements a requirement in section 1071 that certain data collected from applicants be shielded from underwriters and certain other persons (or, if a firewall is not feasible, a notice is given instead); the CFPB refers to this as the "firewall."

Generally, an employee or officer of a financial institution or a financial institution's affiliate that is involved in making any determination concerning a covered application is prohibited from accessing the applicant's responses to the inquiries about protected demographic information that the financial institution makes pursuant to the rule. This prohibition does not apply to an employee or officer, however, if the financial institution determines that employee or officer should have access to an applicant's responses to its inquiries regarding the applicant's protected demographic information and the financial institution provides a notice to the applicant regarding that access. The notice must be provided to each applicant whose information will be accessed or, alternatively, the financial institution could provide the notice to all applicants. The final rule does not require specific language for this notice but does provide sample language that a covered financial institution may use. The final rule also clarifies several key points of the firewall provision.

Reporting data to the CFPB; publication of data by the CFPB and other disclosures; and privacy considerations. Financial institutions must collect small business lending data on a calendar year basis and report it to the CFPB on or before June 1 of the following year. Financial institutions reporting data to the CFPB are required to provide certain identifying information about themselves as part of their submission. The CFPB is releasing, concurrently with this final rule, technical instructions for the submission of small business lending data in a Filing Instructions Guide.[9]

The CFPB will make available to the public, on an annual basis, the application-level data submitted to it by financial institutions, subject to modifications or deletions made by the CFPB, to advance privacy interests. To ease burden on covered entities, CFPB publication of application-level data will satisfy financial institutions' statutory obligation to make data available to the public upon request. At this time, the CFPB is not making a final decision on the best way to protect privacy interests through pre-publication modification and deletion of reported data. Assessing the many comments it received in this area, the CFPB is preliminarily of the view that its privacy assessment will focus primarily on whether (and, if so, how) small business lending data, individually or in combination with other data, pose re-identification risk for small businesses and, as a result, for their owners. The CFPB also anticipates taking account of compelling risks to financial institution privacy interests. The CFPB does not anticipate that it can carry out the necessary analysis of pre-publication modifications and deletions without at least one full year of application-level data. The CFPB intends to further engage with stakeholders on the issue of data publication before it resolves on a particular approach to protecting privacy interests through modifications and deletions. Finally, the CFPB anticipates publishing select aggregate data—*i.e.,* data that does not include application-level information—before it publishes application-level data.

[9] *See* CFPB, *Small Business Lending Filing Instructions Guide, https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/.*

In addition, the final rule prohibits a financial institution or third party from disclosing protected demographic information, except in limited circumstances. Specifically, the final rule prohibits financial institutions from disclosing or providing to third parties the protected demographic information collected pursuant to the rule, except to further compliance with ECOA or Regulation B or as required by law. The final rule also limits third parties' disclosure of protected demographic information.

Recordkeeping, enforcement, and severability. The rule addresses issues related to recordkeeping, enforcement of violations, and severability. The CFPB is also finalizing provisions regarding treatment of bona fide errors under the rule in general along with several safe harbors for particular kinds of errors. Relatedly, as explained in part VII below, covered financial institutions will also have a 12-month grace period during which the CFPB—for institutions under its jurisdiction—will not assess penalties for errors in data reporting, and will conduct examinations only to assist institutions in diagnosing compliance weaknesses, to the extent that these institutions engaged in good faith compliance efforts.

Effective and compliance dates, transitional provisions. This final rule will become effective 90 days after publication in the **Federal Register**. The CFPB is adopting a tiered compliance date schedule because it believes that smaller and mid-sized lenders would have particular difficulties complying within the single 18-month compliance period proposed in the NPRM. Compliance with the rule beginning October 1, 2024 is required for financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026. Covered financial institutions may begin collecting applicants' protected demographic information one year prior to their compliance date to help prepare for coming into compliance with this final rule. The CFPB is also adopting a new provision to permit financial institutions that do not have ready access to sufficient information to determine their compliance tier (or whether they are covered by the rule at all) to use reasonable methods to estimate their volume of originations to small businesses for this purpose.

Compliance and technical assistance. The CFPB is supporting small business lenders with a variety of compliance and technical tools to help them determine if they are covered by this new rule, and if so when their obligations arise. For lenders that are covered, the agency is also making available a range of resources to assist with effective implementation of the rule, including a small entity compliance guide. These materials are available at *https://www.consumerfinance.gov/compliance/compliance-resources/small-business-lending-resources/small-business-lending-collection-and-reporting-requirements.* The CFPB is also launching a dedicated regulatory and technical support program that can provide oral and written assistance in response to stakeholder questions about collection and reporting obligations, and a range of technical resources to make it easier to report data to the CFPB. The support program and related materials are available at *https://www.consumerfinance.gov/data-research/small-business-lending-data/.* To further assist covered financial institutions that serve small business customers in their preferred languages, the CFPB will make the sample data collection form available in several languages. The CFPB is also planning to develop resources to help small businesses understand how their data are treated, the availability of the dataset, and the broader purposes of the rule.

Use of technology partners and industry consortia for accurate, cost-efficient data collection and reporting. The final rule broadly permits financial institutions to work with third parties, including industry consortia, to develop services and technologies to aid in collecting and reporting data. So long as they meet the obligations stated in the rule, including collecting data in a manner that does not discourage small businesses from providing it, financial institutions are free to work with third parties to assist them with their compliance obligations, whether that is with respect to data collection, maintenance or reporting. The CFPB plans to work with consortia or other entities seeking to assist financial institutions to deploy industry-identified solutions. For example, the CFPB plans to provide Application Programming Interfaces in an open-source environment to assist financial institutions' technology partners to develop accurate and efficient data reporting tools.

II. Background

As discussed above, in 2010, Congress enacted the Dodd-Frank Act. Section 1071 of the Dodd-Frank Act, which amended ECOA, requires financial institutions to collect and report to the CFPB data regarding applications for credit for women-owned, minority-owned, and small businesses. Section 1071 was adopted for the dual purposes of facilitating fair lending enforcement and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of such businesses. Section 1071 complements other Federal efforts to ensure fair lending and to promote community development for small businesses, including through ECOA, the Community Reinvestment Act of 1977 (CRA),[10] and the Community Development Financial Institutions (CDFI) Fund.[11]

The collection and subsequent publication of more robust and granular data regarding credit applications for small businesses will provide much-needed transparency to the small business lending market. The COVID–19 pandemic has shown that transparency is essential, particularly at a time of crisis, when small businesses are in urgent need of credit to recover from economic shocks.

In addition to informing policymaking, data collected under the final rule can help creditors identify potentially profitable opportunities to extend credit. As a result, small business owners stand to benefit from increased credit availability. More transparency will also allow small business owners to more easily compare credit terms and evaluate credit alternatives, helping them to find the credit product that best suits their needs at the best price. In these different ways, the data will help stakeholders to enhance business and community development, boosting broad-based economic activity and growth. Furthermore, in the years and decades to come, the collection and publication of these data will be helpful in identifying potential fair lending violations and otherwise facilitating the enforcement of anti-discrimination laws.

[10] 12 U.S.C. 2901 *et seq.*

[11] The Riegle Community Development Banking and Financial Institutions Act of 1994, 12 U.S.C. 4701 *et seq.*, authorized the Community Development Financial Institution Fund (CDFI Fund). The CDFI Fund is discussed in more detail in part II.F.2.ii below.

Overview

Small businesses are a cornerstone of the U.S. economy. There were over 33 million small businesses in the U.S. in 2019, employing almost half of all private sector employees.[12] Small businesses, particularly start-ups, also generated 62 percent of new jobs since 1995.[13] Small businesses were hit hard by two major shocks in the last two decades. First, the Great Recession, which began in 2007, disproportionately affected small businesses.[14] Between 2007 and 2009, employment at businesses with under 50 employees fell by 10.4 percent, compared with 7.5 percent at larger firms,[15] while between 2008 and 2011, lending to small firms fell by 18 percent, compared with 9 percent for all firms.[16] Small businesses suffered again because of the COVID–19 pandemic. Around 40 percent of small businesses were at least temporarily closed in late March and early April 2020, due primarily to demand shocks and employee health concerns.[17] Across the first year of the pandemic, some

[12] Off. of Advocacy, Small Bus. Admin., *2022 Small Business Profile,* at 2, 4 (Aug. 2022), *https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/30121338/Small-Business-Economic-Profile-US.pdf* (estimating 33.2 million small businesses in the United States, accounting for 46.4 percent of employees) (2022 Small Business Profile).

[13] Off. of Advocacy, Small Bus. Admin., *Frequently Asked Questions About Small Business,* at 1 (Dec. 2021), *https://cdn.advocacy.sba.gov/wp-content/uploads/2021/12/06095731/Small-Business-FAQ-Revised-December-2021.pdf* (SBA OA 2021 FAQs). *See generally* Cong. Rsch. Serv., *Small Business Administration and Job Creation* (updated Jan. 4, 2022), *https://fas.org/sgp/crs/misc/R41523.pdf* (discussing small business job creation); John Haltiwanger *et al., Who Creates Jobs? Small Versus Large Versus Young,* 95 Rev. Econ. Stat. 347, 347–48 (May 2013), *https://direct.mit.edu/rest/article/95/2/347/58100/Who-Creates-Jobs-Small-versus-Large-versus-Young* (finding that young firms, which are generally small, contribute disproportionately to both gross and net job creation).

[14] Jason Dietrich *et al.,* CFPB, *Data Point: Small Business Lending and the Great Recession,* at 9 (Jan. 23, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_data-point_small-business-lending-great-recession.pdf* (finding that small business lending fell sharply during the Great Recession and recovered slowly, still not reaching pre-Recession levels by 2017).

[15] Ayşegül Şahin *et al.,* Fed. Rsrv. Bank of N.Y., 17 Current Issues in Econ. & Fin., *Why Small Businesses Were Hit Harder by the Recent Recession,* at 1 (2011), *https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci17-4.pdf.*

[16] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did the Financial Crisis Affect Small Business Lending in the United States?,* at 25–26 (Nov. 2012), *https://www.microbiz.org/wp-content/uploads/2014/04/SBA-SmallBizLending-and-FiscalCrisis.pdf.*

[17] Alexander W. Bartik *et al., The Impact of COVID–19 on Small Business Outcomes and Expectations,* 117 Proc. Nat'l Acad. Sci. 17656, 17656 (July 2020), *https://www.pnas.org/content/pnas/117/30/17656.full.pdf.*

200,000 more businesses exited the market relative to historic levels.[18] It took until July 2021 for non-farm private sector jobs at establishments with fewer than 50 employees to recover to pre-pandemic levels.[19] As of mid-2022, small business loan approvals (other than for government emergency programs) still remained below pre-pandemic levels.[20]

During the last two decades, the small business lending landscape has also transformed. Traditional providers—namely banks—consolidated, leading to branch closures. The number of banks in the U.S. has declined from over 18,000 in 1986 to under 4,800 as of June 30, 2022 and the number of branches declined by 14 percent from 2009 to 2020.[21] Meanwhile, new providers and products, such as online lenders and merchant cash advances, have become increasingly prevalent in the small business lending market. Financing by merchant cash advance providers is estimated to have increased from $8.6 billion in volume in 2014 to $15.3 billion in 2017.[22] From 2017 to 2019, the volume may have increased further to $19 billion.[23] Meanwhile, financing provided by online ''fintech'' [24] lenders is estimated to have increased from $1.4 billion [25] in outstanding balances in 2013 to approximately $25 billion [26] in 2019.

Regarding trends in the small business financing landscape, the shift away from traditional providers of small business credit toward newer types of providers gives rise to both potential harm and opportunity. In terms of potential harms, bank closures may have made it more difficult for small businesses, particularly those that are already underserved, to access credit and remain open—especially in low- and moderate-income areas and rural communities. Newer providers, often offering newer products, have less experience complying with both Federal and State lending laws and regulations than traditional providers. Differences in funding models may also make non-traditional credit providers less resilient than depository banks or credit unions during shocks to the financial system such as the onset of the COVID–19 pandemic.[27] Additionally, they may use complex algorithms and artificial intelligence, which may create or heighten ''risks of unlawful discrimination, unfair, deceptive, or abusive acts or practices . . . or privacy concerns.'' [28] Opaque product terms and high costs can also trap business owners in cycles of debt. In terms of opportunity, some newer approaches may help applicants with low or nonexistent personal or business credit scores—including women and minorities who own or seek to start small businesses but on average have lower personal credit scores than male and white business owners [29]—to access credit.[30] Non-traditional credit providers as well as digital offerings by traditional financial institutions may also help offset decreases in lending

[18] Leland D. Crane *et al.,* Bd. of Governors of the Fed. Rsrv. Sys., Finance and Economics Discussion Series, 2020–089, *Business Exit During the COVID–19 Pandemic: Non-Traditional Measures in Historical Context,* at 4 (2020), *https://www.federalreserve.gov/econres/feds/files/2020089r1pap.pdf* (estimating excess establishment exits and analyzing other estimates of small business exits during the pandemic). The paper defines ''exit'' as permanent shutdown and calculates ''excess'' exits by comparing the number of exits during the 12-month period from March 2020 to February 2021 with previous years. *Id.* at 2–4. *See also* Ryan A. Decker & John Haltiwanger, Bd. of Governors of the Fed. Rsrv. Sys., FEDS Notes, *Business Entry and Exit in the COVID–19 Pandemic: A Preliminary Look at Official Data* (May 6, 2022), *https://www.federalreserve.gov/econres/notes/feds-notes/business-entry-and-exit-in-the-covid-19-pandemic-a-preliminary-look-at-official-data-20220506.html* (estimating excess establishment exits to be roughly 181,000).

[19] ADP Rsch. Inst., *ADP National Employment Report, https://adpemploymentreport.com/* (last visited Mar. 20, 2023) (seasonally adjusted non-farm private sector jobs at establishments with between 1–49 employees as of July 1, 2021 as compared to March 1, 2020).

[20] Biz2Credit, *Biz2Credit Small Business Lending Index Finds April 2021 Non-PPP Loan Approval Rates Move Little for All Types of Lenders* (Apr. 2021), *https://www.biz2credit.com/small-business-lending-index/april-2021*; Biz2Credit, *Biz2Credit Small Business Lending Index Finds Business Loan Approval Rates Rose at Small Banks, dipped at Big Banks in July 2022* (July 2022), *https://www.biz2credit.com/small-business-lending-index/july-2022* (approvals as of July 2022).

[21] Cong. Rsch. Serv., *Small Business Credit Markets and Selected Policy Issues,* at 6 (Aug. 20, 2019), *https://fas.org/sgp/crs/misc/R45878.pdf* (decline since 1986); Fed. Deposit Ins. Corp., *Quarterly Banking Profile,* at 6 (Aug. 2022), *https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2022jun/qbp.pdf* (number of banks as of June 30, 2022); Bruce C. Mitchell *et al.,* Nat'l Cmty. Reinvestment Coal., *Relationships Matter: Small Business and Bank Branch Locations* (Mar. 2021), *https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/* (branch closures).

[22] PYMNTS, *How Long Can MCAs Avoid the 'Loan' Label?* (Jan. 20, 2016), *https://www.pymnts.com/in-depth/2016/how-long-can-mcas-avoid-the-loan-label/.*

[23] Paul Sweeney, *Gold Rush: Merchant Cash Advances are Still Hot,* deBanked (Aug. 18, 2019), *https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/.* Although the article does not specify one way or the other, estimates by the underlying source, Bryant Park Capital, appear to reference origination volumes rather than outstanding balances. *See* Nimayi Dixit, S&P Glob. Mkt. Intel., *Payment Fintechs Leave Their Mark On Small Business Lending* (Aug. 28, 2018), *https://www.spglobal.com/marketintelligence/en/news-insights/research/payment-fintechs-leave-their-mark-on-small-business-lending.* Depending on credit multiplier effects, the value of annual origination volumes could be smaller or greater than outstanding balances. Without information on outstanding balances and for the purposes of calculating a market size for small business financing in 2019, the Bureau assumes in this paper a 1:1 ratio between annual origination volumes and outstanding balances for merchant cash advance products. See part II.D below for discussion of credit multiplier effects and for market size calculations for merchant cash advance and other small business financing products in 2019.

[24] ''Fintechs'' have been defined as ''technology companies providing alternatives to traditional banking services, most often exclusively in an online environment,'' and may overlap in part with other categories of financial institutions, such as commercial finance companies and/or providers of specialized products, including factoring and merchant cash advances. Brett Barkley & Mark Schweitzer, *The Rise of Fintech Lending to Small Businesses: Businesses' Perspectives on Borrowing,* 17 Int'l J. Cent. Banking 35, 35–36 (Mar. 2021), *https://www.ijcb.org/journal/ijcb21q1a2.pdf.*

[25] *Id. (citing* Katie Darden *et al.,* S&P Glob. Mkt. Intel., *2018 US Fintech Market Report,* at 5, *https://www.spglobal.com/marketintelligence/en/documents/2018-us-fintech-market-report.pdf* (2018 US Fintech Market Report)). This figure annualizes $121 million in estimated 2013 quarterly originations to $484 million in annual originations and scales up to estimated outstanding balances using the ratio between the FFIEC Call Report and the CRA data discussed in part II.D below.

[26] 2018 US Fintech Market Report at 6. This figure scales up $9.3 billion in estimated 2019 credit originations for small- to medium-sized enterprise borrowers to outstanding balances using the ratio methodology discussed in part II.D below.

[27] Itzhak Ben-David *et al.,* Nat'l Bureau of Econ. Res., *Why Did Small Business Fintech Lending Dry Up During March 2020,* at 1–7 (Sept. 2021), *https://www.nber.org/system/files/working_papers/w29205/w29205.pdf* (discussing how nondepository lenders faced a credit crunch in March 2020 that impaired their ability to continue funding small business borrowers despite increased demand due to the COVID–19 shock).

[28] 86 FR 16837, 16839 (Mar. 31, 2021); *see also* Rohit Chopra, CFPB, *Remarks of Director Rohit Chopra at a Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action* (Oct. 22, 2021), *https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/* (discussing risks of discriminatory bias from black box underwriting algorithms).

[29] Geng Li, Bd. of Governors of the Fed. Rsrv. Sys., *FEDS Notes: Gender-Related Differences in Credit Use and Credit Scores* (June 22, 2018), *https://www.federalreserve.gov/econres/notes/feds-notes/gender-related-differences-in-credit-use-and-credit-scores-20180622.htm* (finding that single women on average have lower credit scores than single men); Alicia Robb, Off. of Advocacy, Small Bus. Admin., *Minority-Owned Employer Businesses and their Credit Market Experiences in 2017,* at 4 (July 22, 2020), *https://cdn.advocacy.sba.gov/wp-content/uploads/2020/07/22172533/Minority-Owned-Employer-Businesses-and-their-Credit-Market-Experiences-in-2017.pdf* (finding that Black and Hispanic small business borrowers are disproportionately denied credit or discouraged from applying for credit on the basis of their credit score).

[30] *See* Jessica Battisto *et al., Who Benefited from PPP Loans by Fintech Lenders?,* Liberty St. Econ. (May 27, 2021), *https://libertystreeteconomics.newyorkfed.org/2021/05/who-received-ppp-loans-by-fintech-lenders.html* (Who Benefited from PPP Loans) (showing that online lenders were an important source of credit for Black owners during the COVID–19 pandemic.

associated with the closure of bank branches.[31]

The precise impacts of these broader trends are not well understood at present because there are no comprehensive, comparable, and application-level data across the fragmented and complex small business lending market. Some small business lending data exist, provided in data reported to Federal regulators, but available data are incomplete in certain ways. Some do not include lending by certain categories of institutions, such as smaller depository institutions. And none include lending by nondepository institutions, which comprises almost half of all small business financing.[32]

The datasets that do exist both over- and underestimate small business lending in certain respects by including small dollar loans to non-small businesses and by excluding larger loans to small businesses.[33] Further, these datasets almost exclusively concern originated loans; they do not include information on applications that do not result in originated loans. Nor do they generally include borrower demographics. Other public, private, and nonprofit datasets offer only partial snapshots of particular areas of the market. Finally, much of the publicly available data are aggregated, which does not permit more granular, loan- or application-level analysis that would facilitate fair lending or business and community development analysis by stakeholders other than those that collected the data. See part II.B below for a detailed discussion on existing data on small business financing.

The remainder of this part II focuses on several broad topics that explain, in more detail, the need for the small business lending data that the CFPB's rule to implement section 1071 will provide: (A) improved understanding of the role of small businesses in the U.S. economy; (B) existing data on small business financing; (C) the landscape of small business financing; (D) estimating the size of the small business financing market despite limited data; (E) the particular challenges faced by women-owned, minority-owned, and LGBTQI+-owned small businesses; and (F) the purposes and impact of section 1071.

A. Small Businesses in the United States

Small businesses are an important, dynamic, and widely diverse part of the U.S. economy. They are critical to employment, innovation, and economic growth and stability, both overall and specifically for minority, women, and LGBTQI+ entrepreneurs.

The Small Business Act, as implemented by the Small Business Administration (SBA), defines a small business using size standards that generally hinge on the average number of employees or average annual receipts of the business concern and are customized industry by industry across 1,012 six-digit North American Industry Classification System (NAICS) codes.[34] Size standards based on average number of employees are used in all industries in the manufacturing and wholesale trade sectors, as well as in certain industries across a variety of other sectors. Employee-based size standards range from 100 employees (used almost entirely in certain industries within the wholesale trade sector) to 1,500 employees (used in industries across a variety of sectors including, for example, petroleum refineries, automobile manufacturing, and greeting card publishers).[35] Size standards based on average annual receipts are used in nearly all other industries, and range from $2.25 million (used in several industries in the crop production and animal production and aquaculture subsectors) to $47 million (used in industries across a variety of sectors including, for example, passenger car leasing, television broadcasting, and general medical and surgical hospitals).[36]

Simpler definitions of what constitutes a small business are used in certain contexts. For example, in certain annual research releases the SBA Office of Advocacy defines a small business as one that has fewer than 500 employees.[37] According to the Office of Advocacy, and based on this definition of a small business, in 2018 there were 32.5 million such businesses in the U.S. that represent 99.9 percent of all U.S. firms and employ over 60 million Americans.[38] Over six million of these small businesses have paid employees, while 26.5 million are non-employer businesses (*i.e.,* the owner(s) are the only people involved in the business).[39] From 1995 to 2020, small businesses, particularly young businesses and start-ups, created 12.7 million net new jobs in the U.S., while large businesses created 7.9 million.[40]

Nearly one third of all businesses are minority-owned and more than one third are women-owned, though minorities and women own a smaller share of employer firms. As of 2019, minorities owned around 1.1 million employer firms in the U.S. (amounting to 18.7 percent of all employer firms)[41] and, as of 2018, approximately 8.7 million non-employer firms (33.6 percent of all non-employer firms).[42] Likewise, as of 2019, women owned about 1.2 million employer firms (20.9 percent of all employer firms)[43] and, as of 2018, approximately 10.9 million non-employer firms (41.0 percent of all non-employer firms).[44] Additionally, in

[31] *See* Cong. Rsch. Serv., *Fintech: Overview of Innovative Financial Technology and Selected Policy Issues,* at 1 (Apr. 28, 2020), *https://crsreports.congress.gov/product/pdf/R/R46332.*

[32] The Bureau estimates that nondepository private business financing totaled approximately $550 billion out of around $1.2 trillion in total private outstanding balances in 2019 (47 percent). This $550 billion figure includes estimated financing by fintechs (around $25 billion), commercial finance companies (around $160 billion), nondepository CDFIs (around $1.5 billion), merchant cash advance providers (around $19 billion), factors (around $100 billion), equipment leasing providers (around $160 billion), nondepository mortgage lenders originating loans for 5+ unit residential developments (around $30 billion), and non-financial trade creditors (around $50 billion). There may additionally be lending that is not captured here by equipment and vehicle dealers originating loans in their own names. Public lenders include SBA, the Federal Housing Administration, Fannie Mae and Freddie Mac, and the Farm Credit System, with public lending totaling around $210 billion in traditional lending programs plus $1 trillion in emergency COVID–19 SBA lending programs. See part II.D below for methodology and sources regarding market size estimates for each lending category.

[33] *See* part II.B below.

[34] *See* Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (effective Mar. 17, 2023), *https://www.sba.gov/sites/default/files/2023-03/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%281%29%20%281%29_0.pdf.*

[35] *See id.*

[36] A small number of industries use a size standard based on a metric other than average annual receipts or average number of employees. For example, the commercial banking industry (NAICS 522110) is subject to an asset-based size standard. *See id.*

[37] *See* SBA OA 2021 FAQs at 1.

[38] *See id.*

[39] *See id.*

[40] *See id.; see also* Haltiwanger *et al.,* 95 Rev. Econ. Stat. at 347–48 (finding that young firms, which are generally small, contribute disproportionately to both gross and net job creation).

[41] *See* Press Release, U.S. Census Bureau, *Census Bureau Releases New Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses* (Oct. 28, 2021), *https://www.census.gov/newsroom/press-releases/2021/characteristics-of-employer-businesses.html* (Census Bureau 2021 Minority- and Women-Owned Businesses Data).

[42] Minority Bus. Dev. Agency, U.S. Dep't of Com., *All Minority-Owned Firms: Fact Sheet* (June 10, 2022), *https://www.mbda.gov/sites/default/files/2022-06/All%20Minority%20Owned%20Firms%20Fact%20Sheet%20-%20FINAL%206.10.2022.pdf* (stating that the nearly 8.7 million minority non-employer firms in the U.S. generated $306.1 billion in revenues in 2018).

[43] *See* Census Bureau 2021 Minority- and Women-Owned Businesses Data.

[44] *See* Press Release, U.S. Census Bureau, *Nonemployer Statistics by Demographics* (Dec. 16, 2021), *https://www.census.gov/newsroom/press-releases/2021/nonemployer-statistics-by-demographics.html* (also stating that these firms collectively generated $300 billion in annual receipts). In 2017, nearly half of all women-owned

Continued

2016 there were an estimated 1.4 million LGBTQI+ business owners in the United States.[45]

Businesses are legally structured in several ways. In 2018, 87 percent of non-employer businesses were sole proprietorships, which means that the business is not distinguishable from the owner for tax and legal purposes; the owner receives profits directly but is also legally responsible for the business's obligations.[46] Seven percent of non-employer businesses were partnerships, which can be structured to limit the personal liability of some or all owners; limited partners may exchange control for limited liability, while general partners that run the business may remain personally liable.[47] Six percent of non-employer businesses were structured as corporations—4.5 percent are S-corporations and 1.5 percent are C-corporations—which are independent legal entities owned by shareholders who are not personally liable for the corporation's obligations.[48] In 2018, most small employer businesses were corporations, with 52.1 percent choosing to be S-corporations and 15.3 percent preferring C-corporation status, although sole proprietorship and partnership structures remained relatively popular at 13.7 percent and 11.9 percent, respectively.[49] By contrast, in 2017, 74.2 percent of large employer businesses chose to be C-corporations, with 9.3 percent preferring a partnership structure and 8.1 percent S-corporation status.[50]

Small businesses are particularly important in specific sectors of the economy. In 2019, in the services sector, small businesses supplied 9.2 million healthcare and social services jobs (44 percent of all healthcare and social services jobs), 8.8 million accommodation and food services jobs (61 percent), and 5.7 million construction jobs (81 percent).[51] In the same year, in manufacturing, small businesses supplied 5.1 million manufacturing jobs (42 percent of all manufacturing jobs).[52] Finally, in 2016, family farms with annual gross sales under $500,000 totaled over 91 percent out of 2.2 million farms,[53] and small businesses provided over 137,000 agriculture, forestry, fishing and hunting jobs (84 percent of all agriculture, forestry, fishing and hunting jobs).[54] As such, the financial health of small businesses is essential to the U.S. economy, especially to the supply of critical and basic goods and services—from producing food to serving it at restaurants, and from home building to healthcare.

Small businesses were especially hard-hit by the onset of the COVID–19 pandemic. At one point in the pandemic in April 2020, 20 percent of self-employed workers had temporarily exited the labor market.[55] Industries in which small businesses played a large role have been particularly impacted. For example, comparing April 2020 with April 2019, employment declined by almost 50 percent in the leisure and hospitality businesses (also declining by almost 50 percent among food services and drinking establishments within the leisure and hospitality industry), in which small businesses employ over 60 percent of workers.[56] Women-, minority-, and LGBTQI+-owned small businesses were hit particularly hard. Between February and April 2020, some 373,000 jobs were lost in child daycare services, a sector in which women-ownership predominates and minority-ownership is very significant. Only 54 percent of these jobs were recovered by the end of 2020.[57] In 2021, 85 percent of LGBTQI+-owned small businesses reported the pandemic was having a negative effect on their business, compared to 76 percent of non-LGBTQI+-owned small businesses.[58] Since 2022, small businesses have faced different economic shocks, including inflation and a shortage of labor, as the economy reopened and resurgent consumer demand has stretched still-fragile supply chains.[59]

B. Existing Data on Small Business Lending

While small businesses are a critical part of the U.S. economy and require financial support, it is still true—as it was in 2017 when the CFPB published its White Paper on small business lending—that it is not possible with current data to confidently answer basic questions regarding the state of small business lending. This limitation is especially the case with regard to the ethnicity, race, and sex of small business owners, applications as opposed to originations, and for small business financing products that are not currently reported in Call Report data.[60]

Data on small business lending are fragmented, incomplete, and not standardized, making it difficult to

non-employer firms generated less than $10,000 in annual receipts, while only 0.05 percent generated $1 million or more in receipts. *See* Press Release, Nat'l Women's Bus. Council, *NWBC Shares 2017 Nonemployer Statistics by Demographics Estimates for Women-Owned Businesses* (Dec. 17, 2020), *https://www.nwbc.gov/2020/12/17/nwbc-shares-2017-nonemployer-statistics-by-demographics-estimates-for-women-owned-businesses/*.

[45] Nat'l Gay & Lesbian Chamber of Com., *America's LGBT Economy: The Premiere Report on the Impact of LGBT-Owned Businesses,* at 2 (Jan. 2017), *https://nglcc.org/wp-content/uploads/2022/02/REPORT-NGLCC-Americas-LGBT-Economy-1-1.pdf*.

[46] *See* SBA OA 2021 FAQs at 3.

[47] *Id.* at 4.

[48] *Id.*

[49] *Id.*

[50] Off. of Advocacy, Small Bus. Admin., *Frequently Asked Questions About Small Business,* at 4 (Oct. 2020), *https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf* (SBA OA 2020 FAQs).

[51] *See* 2022 Small Business Profile at 4.

[52] *Id.*

[53] Nat'l Inst. of Food & Agric., U.S. Dep't of Agric., *Family Farms, https://nifa.usda.gov/family-farms* (last visited Mar. 20, 2023) (classifying family farms as any farm organized as a sole proprietorship, partnership, or family corporation. Family farms exclude farms organized as non-family corporations or cooperatives, as well as farms with hired managers).

[54] 2022 Small Business Profile at 4.

[55] Daniel Wilmoth, Off. of Advocacy, Small Bus. Admin., *The Effects of the COVID–19 Pandemic on Small Businesses* (Issue Brief No. 16), at 5 (Mar. 2021), *https://cdn.advocacy.sba.gov/wp-content/uploads/2021/03/02112318/COVID-19-Impact-On-Small-Business.pdf*.

[56] *Id.* at 4. *By the third quarter of 2020 many of these jobs had since returned as mandatory closure orders ended and the economy began to recover. Cf.* Robert W. Fairlie *et al.,* Nat'l Bureau of Econ. Res., *Were Small Businesses More Likely to Permanently Close in the Pandemic,* at 3, 14 (July 2022), *https://www.nber.org/system/files/working_papers/w30285/w30285.pdf* (finding a sharp increase in California business closures in the first and second quarters of 2020 that reversed in the third quarter of 2020). However, small businesses still appear to have suffered more than large businesses. *See id.* (finding that small businesses experienced substantially higher closure rates than large businesses).

[57] Bureau of Labor Stat., *COVID–19 Ends Longest Employment Recovery and Expansion in CES History, Causing Unprecedented Job Losses in 2020* (June 2021), *https://www.bls.gov/opub/mlr/2021/article/covid-19-ends-longest-employment-expansion-in-ces-history.htm*. An estimated 90 percent of childcare businesses are women-owned and over half of these owners are minority women. Cindy Larson & Bevin Parker-Cerkez, *Investing in Child Care Fuels Women-owned Businesses & Racial Equity,* Loc. Initiatives Support Corp. (Mar. 8, 2022), *https://www.lisc.org/our-stories/story/investing-child-care-fuels-women-owned-businesses-racial-equity/*.

[58] Spencer Watson *et al., LGBTQ-Owned Small Businesses in 2021,* Ctr. for LGBTQ Econ. Advancement & Rsch. And Movement Advancement Project, at 9 (July 2022), *https://www.lgbtmap.org/file/LGBTQ-Small-Businesses-in-2021.pdf* (using data from the Federal Reserve's Small Business Credit Survey, which began collecting demographic data on LGBTQ small business ownership in 2021).

[59] *See* William C. Dunkelberg & Holly Wade, *Small Business Economic Trends,* Nat'l Fed'n of Indep. Bus., at 2, 11, 19 (Aug. 2022), *https://assets.nfib.com/nfibcom/SBET-August-2022.pdf* (finding that, out of 622 small businesses polled, 29 percent considered inflation their biggest problem, 49 percent had at least one unfilled job opening, and 32 percent reported that supply chain disruptions had a significant impact on their business).

[60] CFPB, *Key dimensions of the small business lending landscape,* at 39–40 (May 2017), *https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf* (White Paper).

conduct meaningful comparisons across products and over time. Against this background, it is not hard to see why Congress believed that the collection of small business application data would serve to identify business and community development needs and opportunities. The lack of data hinders attempts by policymakers and other stakeholders to understand the size, shape, and dynamics of the small business lending marketplace, including the interaction of supply and demand, as well as potentially problematic lending practices, gaps in the market, or trends in funding that may be holding back some communities.[61] For example, absent better data, it is hard to determine if relatively lower levels of bank loans to small businesses in the decade before the pandemic began were reflective of a net relative decline in lending to small businesses as compared to large businesses or rather a shift within small business lending from banks to nondepository lenders.[62] To the extent there may have been a relative decline, it is difficult to assess if that decline affected certain types of small businesses more than others, including women-owned and minority-owned small businesses.[63]

The primary sources of information on lending by depository institutions are the Federal Financial Institutions Examination Council (FFIEC) and National Credit Union Administration (NCUA) Consolidated Reports of Condition and Income (Call Reports), as well as reporting under the Community Reinvestment Act (CRA). Under the FFIEC and CRA reporting regimes, small loans to businesses of any size are used in whole or in part as a proxy for loans to small businesses. The FFIEC Call Report captures banks' outstanding number and amount of small loans to businesses (that is, loans originated under $1 million to businesses of any size; small loans to farms are those originated under $500,000).[64] The CRA currently requires banks and savings associations with assets over a specified threshold to report loans in original amounts of $1 million or less to businesses; reporters are asked to indicate whether the borrower's gross annual revenue is $1 million or less, if they have that information.[65] The NCUA Call Report captures data on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size.[66] There are no similar sources of information about lending to small businesses by nondepository institutions. The SBA also releases loan-level data concerning some of its loan programs, but these typically do not include demographic information, and cover only a small portion of the overall small business financing market.

These public data sources provide some of the most extensive information currently available on small business lending. However, they suffer from four material limitations: namely that the data capture only parts of the market, are published at a high level of aggregation, do not permit detailed analysis across the market, and lack standardization across different agencies.

First, these datasets exclude entire categories of lenders. For example, banks under $1.384 billion in assets, as of 2022, do not have to report under the CRA.[67] The FFIEC and NCUA Call Reports and CRA data do not include lending by nondepository financial institutions, which the CFPB estimates to represent 37 percent of the small business financing market and is rapidly growing.[68]

Second, Federal agencies publish summary data at a high level in a manner that does not facilitate independent analysis by other agencies or stakeholders. The FFIEC and NCUA Call Reports and the CRA data are all available at a higher level of aggregation than loan-level, limiting fair lending and detailed geographic analyses since ethnicity, race, and sex as well as business location data are rarely disclosed.

Third, the detailed data collected by these Federal sources have significant limitations as well, preventing any analysis into certain issues or types of borrowers, even by the regulators possessing these data. Neither Call Report nor CRA data include applications, which limits insights into any potential discrimination or discouragement in application processes as well as into the interaction between credit supply and demand. The FFIEC Call Report and CRA data separately identify loans of under $1 million in value and, among loans of under $1 million in value, CRA data also identify loans to businesses with annual revenues of $1 million or less (if the lender collects borrower revenue information).[69] However, the Call Report definition of ''small business loans'' as those with a loan size of $1 million or less at origination is both overinclusive, as it counts small loans to businesses of all sizes, and underinclusive, as it excludes loans over $1 million made to small businesses. Credit unions report any loans under $50,000 as consumer loans and not as commercial loans on the NCUA Call Report,[70] potentially excluding from measurement an important source of funding for many small businesses, particularly the smallest and often most underserved.

Finally, the Federal sources of small business lending data are not

[61] While Call Report and CRA data provide some indication of the level of supply of small business credit, the lack of data on small business credit applications makes demand for credit by small businesses more difficult to assess, including with respect to local markets or protected classes.

[62] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?,* at 26 (Jan. 2018), *https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf* (showing a decline in bank loans to small businesses from 2008 to 2015 from $710 billion to $600 billion). The level of bank lending to small businesses has recovered somewhat since a trough in 2012–13 that represented the lowest amount of lending since 2005. Fed. Deposit Ins. Corp., *Quarterly Banking Profile, https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx* (last visited Mar. 20, 2023).

[63] White Paper at 40.

[64] *See* Fed. Fin. Insts. Examination Council, *Reporting Forms 31, 41, and 51* (last updated Mar. 16, 2023), *https://www.ffiec.gov/ffiec_report_forms.htm* (FFIEC Call Report).

[65] *See* Fed. Fin. Insts. Examination Council, *A Guide to CRA Data Collection and Reporting,* at 11, 13 (2015), *https://www.ffiec.gov/cra/pdf/2015_CRA_Guide.pdf* (2015 FFIEC CRA Guide). Small business loans are currently defined for CRA purposes as loans whose original amounts are $1 million or less and that were reported on the institution's Call Report or Thrift Financial Report as either ''Loans secured by nonfarm or nonresidential real estate'' or ''Commercial and industrial loans.'' Small farm loans are currently defined for CRA purposes as loans whose original amounts are $500,000 or less and were reported as either ''Loans to finance agricultural production and other loans to farmers'' or ''Loans secured by farmland.'' *Id.* at 11. The Federal agencies responsible for implementing the CRA have proposed to amend the CRA regulations to adopt the Bureau's definition of small business. 87 FR 33884 (June 3, 2022).

[66] *See* Nat'l Credit Union Admin., *Call Report Form 5300 Instructions,* at 74–84 (Mar. 31, 2022), *https://www.ncua.gov/files/publications/regulations/call-report-instructions-march-2022.pdf* (Call Report Form 5300 Instructions).

[67] Joint Press Release, Bd. of Governors of the Fed. Rsrv. Sys. & Fed. Deposit Ins. Corp., *Agencies Release Annual Asset-Size Thresholds Under Community Reinvestment Act Regulations* (Dec. 16, 2021), *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211216a.htm.*

[68] Nondepository lending is estimated to total approximately $550 billion out of $1.5 trillion in total lending, excluding $1 trillion in COVID–19 emergency program lending. *See* part II.D below (providing a detailed breakdown and methodology of estimates across lending products).

[69] Fed. Fin. Insts. Examination Council, *Schedule RC–C, Part II Loans to Small Businesses and Farms* (2017), at 1, *https://www.fdic.gov/regulations/resources/call/crinst-031-041/2017/2017-03-rc-c2.pdf* (detailing the Call Report loan size threshold of $1 million at origination for loans to small businesses); 2015 FFIEC CRA Guide at 11 (detailing the CRA size thresholds of $1 million both for loan amount at origination and for revenue of small business borrowers).

[70] Call Report Form 5300 Instructions at 44.

standardized across agencies and cannot be easily compared. For example, as noted above, the FFIEC Call Report collects small loans to businesses as a proxy for small business lending, whereas the NCUA Call Report collects loans to members for commercial purposes above $50,000 but with no upper limit. The loan-level data for the Paycheck Protection Program offer an unprecedented level of insight into small business lending, but this dataset is a one-off snapshot into the market for a specific lending program at an acute moment of crisis and is also limited in utility by relatively low response levels to demographic questions concerning borrowers.[71]

The Federal government also conducts and releases a variety of statistics, surveys, and research reports on small business lending through the member banks for the Federal Reserve System, the FDIC, CDFI Fund, and the U.S. Census Bureau. These data sources offer insights into broad trends and specific small business lending issues but are less useful for detailed fair lending analyses or identification of specific areas, industries, or demographic groups being underserved. Periodic changes in survey methodology, sample sizes, and questions can also limit comparability and the ability to track developments over time.

There are also a variety of non-governmental data sources, issued by both private and nonprofit entities, that cover small businesses and/or the small business financing market. These include datasets and surveys published by commercial data and analytics firms, credit reporting agencies, trade associations, community groups, and academic institutions. Certain of these data sources are publicly available and track specific topics, such as small business optimism,[72] small business employment,[73] rates of small business credit application approvals,[74] and small business lending and delinquency levels.[75] Other databases have more granularity and provide detailed information on individual businesses, including revenue, credit utilization, industry, and location.[76]

While these non-public sources of data on small businesses may provide a useful supplement to existing Federal sources of small business lending data, these private and nonprofit sources often do not have lending information, may rely in places on unverified self-reporting or research based on public internet sources, and/or narrowly limit use cases for parties accessing data. Further, commercial datasets are generally not free to public users and can be costly as well as have restrictions on their use, raising equity issues for stakeholders who cannot afford access or are not permitted to use the data for their desired purposes.

C. The Landscape of Small Business Finance

Notwithstanding the lack of data on the market, it is clear that financing plays an important role in enabling small businesses to grow and contribute to the economy. When it is available, financing not only provides resources for small businesses to smooth cash flows for current operations, but also affords business owners the opportunity to invest in business growth. A study by a small business trade group found a correlation between small business owners' ability to access credit and their ability to hire.[77] This same study found that, while not the sole cause, the inability to secure financing may have led 16 percent of small businesses to reduce their number of employees and approximately 10 percent of small businesses to reduce employee benefits. Lack of access to financing also contributed to a further 10 percent of small businesses being unable to increase store inventory in order to meet existing demand.[78]

To support their growth or to make it through harder times, small businesses look to a variety of funding sources. Especially when starting out, entrepreneurs often rely on their own savings and help from family and friends. If a business generates a profit, its owners may decide to reinvest retained earnings to fund further growth. However, for many aspiring business owners—and their personal networks—savings and retained earnings may not be sufficient to fund a new venture or grow it, leading owners to seek other sources of funding. This is particularly true for minority households and women-led households, which on average have less wealth than white households and male-led households.[79]

One such source of funding comes from others besides family and friends, whether high net worth individuals or ''angel investors,'' venture capital funds, or, in a more recent development usually facilitated by online platforms, via crowdsourcing from retail investors. Often, these early investments take the form of equity funding, which business owners are not obligated to repay to investors. However, equity funding requires giving up some ownership and control to investors, which some entrepreneurs may not wish to do. For small businesses, equity funding also tends to be somewhat more expensive than debt financing in the long run. This is for a number of reasons, including that loan interest payments, unlike capital gains, are tax-deductible.[80] Finally, equity investments from others besides family and friends are available to only a small fraction of small businesses.

Many small businesses instead seek debt financing from a wide range of

[71] Zachary Warmbrodt, *Tracking the Money: Bid to Make Business Rescue More Inclusive Undercut by Lack of Data,* Politico (Mar. 2, 2021), *https://www.politico.com/news/2021/03/02/businesses-inclusive-coronavirus-relief-money-data-472539* (reporting that 75 percent of Paycheck Protection Program loan recipients did not report their ethnicity and 58 percent did not reveal their gender); *see also* Rachel Atkins *et al., Discrimination in Lending? Evidence from the Paycheck Protection Program,* 58 Small Bus. Econ. 843, 844 (Feb. 2022), *https://link.springer.com/article/10.1007/s11187-021-00533-1* (finding that borrower business owner race was reported for only 10 percent of Paycheck Protection Program loans).

[72] Nat'l Fed'n of Indep. Bus., *Small Business Optimism Index* (July 2022), *https://www.nfib.com/surveys/small-business-economic-trends/.*

[73] ADP Rsch. Inst., *Employment Reports, https://adpemploymentreport.com/* (last visited Mar. 20, 2023).

[74] Biz2Credit, *Biz2Credit Small Business Lending Index, https://www.biz2credit.com/small-business-lending-index* (last visited Mar. 20, 2023).

[75] PayNet, *Small Business Lending Index, https://sbinsights.paynetonline.com/lending-activity/* (last visited Mar. 20, 2023).

[76] *See, e.g.,* Dun & Bradstreet, *https://www.dnb.com/* (data provider and credit reporter); Data Axle, *https://www.data-axle.com/* (data provider); Equifax, *https://www.equifax.com/business/product/business-credit-reports-small-business/* (credit reporter); Experian, *https://www.experian.com/small-business/business-credit-reports* (credit reporter).

[77] White Paper at 17.

[78] *Id.*

[79] Emily Moss *et al., The Black-White Wealth Gap Left Black Households More Vulnerable,* Brookings Inst. (Dec. 8, 2020), *https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/* (detailing wealth gaps in 2019 by race and sex that show white male households with more wealth than white female or Black male or female households at all age brackets). *See also* Erin Ruel & Robert Hauser, *Explaining the Gender Wealth Gap,* 50 Demography 1155, 1165 (Dec. 2012), *https://read.dukeupress.edu/demography/article/50/4/1155/169553/Explaining-the-Gender-Wealth-Gap* (finding a gender wealth gap of over $100,000 in a longitudinal study over 50 years of a single age cohort in Wisconsin); Neil Bhutta *et al.,* Bd. of Governors of the Fed. Rsrv. Sys., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), *https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm* (finding median white family wealth in 2019 of $188,200 compared with $24,100 for Black families and $36,100 for Hispanic families).

[80] Jim Woodruff, *The Advantages and Disadvantages of Debt and Equity Financing,* CHRON (updated Mar. 4, 2019), *https://smallbusiness.chron.com/advantages-disadvantages-debt-equity-financing-55504.html.*

providers. These providers include depository institutions, such as banks, savings associations, and credit unions,[81] as well as online lenders and commercial finance companies, specialized providers of specific financing products, nonprofits, and a range of government and government-sponsored enterprises, among others.

In the past, small businesses principally sought credit from banks; however, as banks have merged and consolidated, particularly in the wake of the Great Recession, they have provided less financing to small businesses.[82] As noted earlier, the number of banks has declined significantly since a post-Great Depression peak in 1986 of over 18,000 institutions to under 4,800 institutions as of June 30, 2022,[83] while 13,500 branches closed from 2009 to mid-2020, representing a 14 percent decrease.[84] Although nearly half of counties either gained bank branches or retained the same number between 2012 and 2017, the majority lost branches over this period.[85] Out of 44 counties that were deeply affected by branch closures, defined as having 10 or fewer branches in 2012 and seeing five or more of those close by 2017, 39 were rural counties.[86] Of rural counties, just over 40 percent lost bank branches in that period; the rural counties that experienced substantial declines in bank branches tend to be lower-income and with a higher proportion of African American residents relative to other rural counties,[87] raising concerns about equal access to credit.

As banks have merged and the number of branches reduced, the share of banking assets has also become increasingly concentrated in the largest institutions, with banks of over $10 billion in assets representing 86 percent of all industry assets in 2021, totaling $20.3 trillion out of $23.7 trillion.[88] Nevertheless, banks of under $10 billion in assets continue to hold approximately half of all small business loans (using the FFIEC Call Report definition of loans of under $1 million), highlighting the importance of smaller banks to the small business lending market.[89] Since smaller bank credit approvals have traditionally been close to 50 percent, while large banks approve only 25–30 percent of applications, bank consolidation may have implications for small business credit access.[90] Since institutions under $1.384 billion in assets currently are not required to report on lending under the CRA,[91] it is difficult to precisely quantify the negative impact of bank consolidation and shuttered branches on small business lending and access to credit in local areas.[92] Qualitatively, community banks typically receive high satisfaction scores among small business borrowers, reflecting their greater commitment to relationship banking, a model of banking ''used to serve families, businesses, and communities as individuals, with an emphasis on providing customized help, rather than assembly line service.'' [93]

In contrast to banks, credit unions increased their small business lending from $30 billion in 2008 to $71 billion in 2021.[94] Like community banks, credit

[81] For purposes of this document, the Bureau is using the term depository institution to mean any bank or savings association defined by section 3(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1), or credit union defined pursuant to the Federal Credit Union Act, as implemented by 12 CFR 700.2. The Bureau notes that the Dodd-Frank Act defines a depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act; there, that term does not encompass credit unions. 12 U.S.C. 5301(18)(A), 1813(c)(1). The Bureau is referring to banks and savings associations together with credit unions as depository institutions throughout this document, unless otherwise specified, to facilitate analysis and discussion.

[82] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?,* at 26 (Jan. 2018), *https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf* (showing a decline in bank loans to small businesses from 2008 to 2015 from $710 billion to $600 billion). The level of bank lending to small businesses has recovered somewhat since a trough in 2012–13 that represented the lowest amount of lending since 2005. Fed. Deposit Ins. Corp., *https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx* (last visited Mar. 20, 2023).

[83] Cong. Rsch. Serv., *Small Business Credit Markets and Selected Policy Issues,* at 6 (Aug. 20, 2019), *https://fas.org/sgp/crs/misc/R45878.pdf (decline since 1986);* Fed. Deposit Ins. Corp., *Quarterly Banking Profile,* at 7 (Aug. 2022), *https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2022jun/qbp.pdf* (number of banks as of June 30, 2022).

[84] Bruce C. Mitchell *et al.,* Nat'l Cmty. Reinvestment Coal., *Relationships Matter: Small Business and Bank Branch Locations,* at 6 (2020), *https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/* (stating that in 2009 there were 95,596 brick and mortar full-service branches or retail locations but, as of June 30, 2020, that number had fallen to 82,086).

[85] Bd. of Governors of the Fed. Rsrv. Sys., *Perspectives from Main Street: Bank Branch Access in Rural Communities,* at 1, 3–4, 19 (Nov. 2019), *https://www.federalreserve.gov/publications/files/bank-branch-access-in-rural-communities.pdf.*

[86] *Id.*

[87] *Id.*

[88] Fed. Deposit Ins. Corp., *Bank Data and Statistics, https://www.fdic.gov/bank/statistical/* (last visited Mar. 20, 2023); *see also* Cong. Rsch. Serv., *Small Business Credit Markets and Selected Policy Issues,* at 6 (Aug. 20, 2019), *https://fas.org/sgp/crs/misc/R45878.pdf* (stating that banks over $10 billion held 84 percent of all industry assets in 2018).

[89] Speech by Board Governor Lael Brainard: *Community Banks, Small Business Credit, and Online Lending* (Sept. 30, 2015), *https://www.federalreserve.gov/newsevents/speech/brainard20150930a.htm.* Banks with under $10 billion in assets are often referred to as ''community banks.'' Cong. Rsch. Serv., *Over the Line: Asset Thresholds in Bank Regulation,* at 2–3 (May 3, 2021), *https://fas.org/sgp/crs/misc/R46779.pdf* (noting that the Board of Governors of the Federal Reserve System (Board) and the Office of the Comptroller of the Currency (OCC) define community banks as having under $10 billion in assets, although there may be other criteria, with the FDIC considering also geographic footprint and a relative emphasis on making loans and taking deposits as opposed to engaging in securities and derivatives trading).

[90] Biz2Credit, *Biz2Credit Small Business Lending Index, https://www.biz2credit.com/small-business-lending-index* (last visited Mar. 20, 2023). These historical approval rates are reflected in pre-pandemic Small Business Lending Index releases by Biz2Credit. *See, e.g.,* Biz2Credit, *Small Business Loan Approval Rates at Big Banks Remain at Record High in February 2020: Biz2Credit Small Business Lending Index, https://www.biz2credit.com/small-business-lending-index/february-2020* (last visited Mar. 20, 2023) (showing large bank approvals of 28.3 percent in February 2020 and of 27.2 percent in February 2019 and smaller bank approvals of 50.3 percent in February 2020 and of 48.6 percent in February 2019).

[91] *See* part II.B above.

[92] Bruce C. Mitchell *et al.,* Nat'l Cmty. Reinvestment Coal., *Relationships Matter: Small Business and Bank Branch Locations* (Mar. 2021), *https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/.*

[93] Rohit Chopra, CFPB, *Prepared Remarks of CFPB Director Rohit Chopra in Great Falls, Montana on Relationship Banking and Customer Service* (June 14, 2022), *https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-in-great-falls-montana-on-relationship-banking-and-customer-service/; see also* 87 FR 36828, 36829 (June 21, 2022) (stating that relationship banking is ''an aspirational model of banking that meets its customers' needs through strong customer service, responsiveness, and care''); Cong. Rsch. Serv., *Over the Line: Asset Thresholds in Bank Regulation,* at 3 (May 3, 2021), *https://fas.org/sgp/crs/misc/R46779.pdf* (stating that community banks are more likely to engage in relationship-based lending).

[94] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?,* at 51 (Jan. 2018), *https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf ($30 billion in lending in 2008);* Calculated from NCUA Call Report data accessed on October 18, 2022 ($71 billion in lending in 2021). The Bureau notes that, as discussed in part II.B above, credit unions only report credit transactions made to members for commercial purposes with values over $50,000. The Bureau uses this value as a proxy for small business credit. The Bureau acknowledges that the true value of small business credit extended by credit unions may be different than what is presented here. For example, this proxy may overestimate the value of outstanding small business credit because some members are taking out loans for large businesses. Alternatively, this proxy may underestimate the value of outstanding small business credit if credit unions originate a substantial number of small business loans with origination values of under $50,000. For this analysis, the Bureau includes all types of commercial loans to members except construction and development loans and multifamily residential property. This includes loans secured by farmland; loans secured by owner-occupied, non-farm, non-residential property; loans secured by non-owner occupied, non-farm, non-residential property; loans to finance agricultural

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unions typically receive high satisfaction scores among small business borrowers, reflecting more high-contact, relationship-based lending models.[95]

Certain banks and credit unions choose to be mission-based lenders, as CDFIs or minority depository institutions.[96] Mission-based lenders focus on providing credit to traditionally underserved and low-income communities and individuals to promote community development and expand economic opportunity, making them a relatively smaller by dollar value but essential part of the small business lending market. There were almost 1,400 CDFIs (over half of which are depository institutions) as of August 2022 and over 140 minority depository institutions as of March 2022.[97]

During a period in which depository institutions have been providing relatively less funding to small businesses,[98] some small businesses have increasingly relied on nondepository institutions for financing. Since nondepositories typically do not report their small business financing activities to regulators, there are no authoritative sources for either the number of such entities or the dollar value of financing they provide to small businesses.[99] However, what data are available make clear that nondepository online lenders are increasing their share of the small business financing market.[100]

Whether depository or nondepository, each provider of small business financing may assess a variety of different criteria to determine whether and on what terms to grant an extension of credit or other financing product, including business and financial performance, the credit history of the business and its owner(s), the time in business, and the industry, among other factors. Protections such as guarantees, collateral, and insurance can mitigate perceived risks, potentially enabling a lender to offer better terms or facilitating an extension of credit that would otherwise not meet lending limit or underwriting criteria. Often, government agencies—including the SBA, Federal Housing Administration, and USDA—guarantee or insure loans to encourage lenders to provide credit to borrowers that may not otherwise be able to obtain credit, either on affordable terms and conditions or at all.[101] Different lenders also employ diverse methods for assessing risk, with smaller banks generally relying more on traditional underwriting methods and typically managing multi-product relationships. Online lenders increasingly use complex algorithms, automation, and even artificial intelligence to assess risk and make underwriting decisions, with originations typically being less relationship-based in nature.

As well as diversity in underwriting methodology and criteria, there are also considerable differences across small business financing products and providers with respect to pricing methods and repayment structures. As a result, it can be challenging to compare the competitiveness of product pricing and terms. Term loans, lines of credit, and credit cards typically disclose annualized interest rates; leases often take into account depreciation; factoring products discount an invoice's value and add a fee; and merchant cash advances apply a multiple to the value of the up-front payment.[102] Moreover, providers may add additional fees that are not standardized within industries, much less across them.

D. Estimating the Size and Scope of the Small Business Financing Market

In light of the lack of data and the heterogeneity of products and providers within the small business financing market, it can be difficult to get a clear sense of the size and scope of the market. In this part, the CFPB describes its estimates of the total outstanding balances of credit in the market, the number of institutions that are active in the small business financing market, and how the CFPB arrived at these estimates. Where possible, the CFPB tries to estimate the state of the small business financing market at the end of 2019 in order to estimate the state of the market during the year prior to the onset of the COVID–19 pandemic.

One challenge is that some of the data report the dollar value of originations and some report outstanding balances. For the purposes of this exercise and for most, but not all, products, the CFPB assumes that for every $1 originated in the market in a given year, there is approximately a corresponding $3 of outstanding balances. This assumption is based on the ratio of the 2019 FFIEC Call Report data, which totaled $721 billion in outstanding balances on bank loans to small businesses and small farms, and the 2019 CRA data, which recorded $264 billion in bank loan originations to small businesses and small farms.[103] This assumption is limited by the extent to which other small business financing products differ from loans and lines of credit, which make up the majority of financing products captured by the FFIEC Call Report data and the CRA data.[104]

production and other loans to farmers; commercial and industrial loans; unsecured commercial loans; and unsecured revolving lines of credit for commercial purposes.

[95] Fed. Rsrv. Banks, *Small Business Credit Survey, 2021 Report On Employer Firms,* at 28 (2021), *https://www.fedsmallbusiness.org/survey/2021/report-on-employer-firms*.

[96] Minority depository institutions are depository institutions that are majority-owned by socially and economically disadvantaged individuals or that have a majority-minority board of directors and serve a predominantly minority community. Fed. Deposit Ins. Corp., *Minority Depository Institutions: Structure, Performance, and Social Impact,* at 1 (2019), *https://www.fdic.gov/regulations/resources/minority/2019-mdi-study/full.pdf*. Minority depository institutions focus more than other banks on minority and low- and moderate-income communities. *See id.* at 1, 5. *CDFI* banks are certified through the U.S. Department of the Treasury by demonstrating they serve low-income communities. CDFI Fund, *CDFI Certification, https://www.cdfifund.gov/programs-training/certification/cdfi* (last visited Mar. 17, 2023).

[97] CDFI Fund., *CDFI Certification, https://www.cdfifund.gov/programs-training/certification/cdfi* (last visited Mar. 20, 2023); Fed. Deposit Ins. Corp., *Minority Depository Institutions Program* (last visited Mar. 20, 2023), *https://www.fdic.gov/regulations/resources/minority/mdi.html*.

[98] *See* Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?,* at 26 (Jan. 2018), *https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf* (showing a decline in bank loans to small businesses from 2008–15 from $710 billion to $600 billion). The level of bank lending to small businesses has recovered somewhat since a trough in 2012–13 that represented the lowest amount of lending since 2005. *See also* Fed. Deposit Ins. Corp., *https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx* (last visited Mar. 20, 2023) (tabulating outstanding balances for credit extended to small- and non-small business lending by banks and thrifts over time).

[99] *See* part II.B above.

[100] *See* part II.D below.

[101] Cong. Rsch. Serv., *Small Business Administration 7(a) Loan Guaranty Program* (updated June 30, 2022), *https://fas.org/sgp/crs/misc/R41146.pdf* (discussing the SBA's flagship 7(a) loan guarantee program); U.S. Dep't of Hous. & Urban Dev., *Descriptions Of Multifamily Programs, https://www.hud.gov/program_offices/housing/mfh/progdesc* (last visited Mar. 20, 2023) (listing Federal Housing Administration mortgage insurance programs for 5+ unit residential developments); Farm Serv. Agency, U.S. Dep't of Agric., *Guaranteed Loan Program Fact Sheet* (Mar. 2020), *https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/guaranteed_loan_program-factsheet.pdf* (discussing the USDA's Farm Service Agency guaranteed loan program).

[102] See part II.D below for definitions of the different product categories.

[103] FFIEC Call Report data records outstanding balances on loans with origination amounts less than $1 million across Commercial & Industrial, Nonfarm Nonresidential, Agricultural, and Secured by Farmland lending categories. *See* FDIC Quarterly Banking Profile Time Series, *https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx* (last visited Mar. 20, 2023).

[104] FFIEC Call Report data and CRA data on small business credit products also include business credit card products, but loans and lines of credit made up $713 billion out of $775 billion in outstanding balances on bank, savings association, and credit union loans to small businesses in 2019.

As detailed in this section, the CFPB estimates that the market for small business financing products totaled $1.4 trillion in outstanding balances in 2019. The CFPB estimates that small business financing by depository institutions makes up just over half of small business financing by private institutions. In 2020 and 2021, COVID–19 emergency lending programs added a further $1 trillion to this value, bringing the overall size of the small business financing market up to $2.4 trillion. However, by July 2022, over $740 billion in Paycheck Protection Program loans had been forgiven, bringing the total market size back below $1.7 trillion.[105] Below, the CFPB estimates the market share for different small business financing products.

Since the available data regarding depository institutions' small loans to businesses address term loans, lines of credit, and credit cards together, the respective shares of these three products in the overall small business financing market are difficult to assess. As detailed in this part, the CFPB estimates that together, private term loans and lines of credit constitute the largest small business credit product by value, totaling approximately $770 billion in outstanding balances in 2019. As of July 2022, outstanding balances for Economic Impact Disaster Loan Program and Paycheck Protection Program loans totaled $260 billion, bringing the total value of all outstanding loans and lines of credit to around $1 trillion.[106]

Lending by banks, saving associations, and credit unions comprises the largest part of this total amount for private term loans and lines of credit. Using FFIEC Call Report data for December 2019, the CFPB estimates that banks and savings associations accounted for a total of about $721 billion in outstanding credit to small businesses and small farms as of December 2019.[107] Using NCUA Call Report data for December 2019, the CFPB estimates that credit unions accounted for a total of about $55 billion in outstanding credit to members for commercial purposes.[108] From this value, the CFPB subtracts $62 billion in credit card lending to arrive at $713 billion in outstanding balances for term loans and lines of credit. From this value, the CFPB further subtracts $134 billion in SBA guaranteed loans to arrive at $580 billion in outstanding balances for private term loans and lines of credit extended by depository institutions (*i.e.,* banks, savings associations, and credit unions) as of December 2019.

The remaining $190 billion in outstanding balances for private term loans and lines of credit was extended by various nondepository institutions, namely commercial finance companies, online lenders, and nondepository CDFIs.[109]

Commercial finance companies specialize in financing equipment and vehicle purchases. The CFPB estimates that the value of outstanding balances on credit extended by commercial finance companies totaled approximately $160 billion. Using data from the Board's Finance Company Business Receivables data on owned assets as of December 2019, the CFPB estimates commercial finance companies outstanding credit for commercial purposes as the value of retail motor vehicle loans plus equipment loans and other business receivables, which totaled about $215 billion.[110] The CFPB further assumes that about 75 percent of this value, or $162 billion, can be attributed to loans to small businesses.[111]

Typical ''fintech'' providers are characterized primarily by providing financial services exclusively in an online environment.[112] The CFPB estimates that total outstanding loan balances for such providers reached around $25 billion in 2019. Using this estimate, the CFPB scales up an estimated $9.3 billion in credit originations by online platform lenders to small and medium enterprises in 2019 to $25 billion in estimated outstanding balances, under the assumptions discussed above.[113] At the beginning of the COVID–19 pandemic and associated financial crisis, these lenders originated around $22 billion in Paycheck Protection Program loans to small businesses from March to August 2020[114] and likely continued to originate billions more during the third wave of Paycheck Protection Program loans in 2021, which represents an almost 90 percent increase or more in outstanding balances since 2019.[115] This follows already rapid growth from $1.4 billion in estimated outstanding balances in 2013.[116]

One important caveat to this assumption is that products with materially shorter average term lengths, for example credit cards, factoring products, and merchant cash advances, may have an inverse ratio of originations to outstanding balances. For example, top issuers of general-purpose credit cards recorded purchase volumes of two to seven times their outstanding balances in 2020. Nilson Report, Issue 1192, at 6 (Feb. 2021), *https://nilsonreport.com/publication_newsletter_archive_issue.php?issue=1192.* If business-purpose credit cards, factoring products, and merchant cash advances behaved similarly with respect to the ratio of originations to outstanding balances, then for every $1 originated in the market in a given year, there could be a corresponding $0.14–0.50 in outstanding balances for such products ($1 divided by two to seven).

[105] Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), *https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf.*

[106] *Id.*

[107] Calculated from FFIEC Call Report data accessed on October 18, 2022. The CFPB notes that, as discussed in part II.B above, these estimates rely on small loans to businesses as a proxy for loans to small businesses. As such, the CFPB acknowledges that the true outstanding value of credit extended to small businesses by such institutions may be different than what is presented here. For example, the small loans to businesses proxy would overestimate the value of outstanding credit if a significant number of small loans to businesses and farms are to businesses or farms that are actually large. Alternatively, the proxy would underestimate the value of outstanding credit to small businesses if a significant number of businesses and farms that are small under the rule take out loans that are larger than $1 million or $500,000, for businesses and farms, respectively.

[108] Calculated from NCUA Call Report data accessed on October 18, 2022.

[109] There may additionally be lending that is not captured here by equipment and vehicle dealers originating loans in their own names.

[110] Bd. of Governors of the Fed. Rsrv. Sys., *Finance Companies—G.20* (updated Aug. 17, 2022), *https://www.federalreserve.gov/releases/g20/hist/fc_hist_b_levels.html.* The Bureau does not include leases, since they are already counted within the product category of equipment and vehicle leasing, or wholesale loans, which it assumes are typically made to non-small businesses.

[111] This methodology is consistent with the approach taken by Gopal and Schnabl (2020).

[112] Barkley & Schweitzer, 17 Int'l J. Cent. Banking at 35–36.

[113] *See* 2018 US Fintech Market Report at 6. The Bureau notes that this figure may underestimate the total value of such lending because it focuses on platform lenders and may overestimate the value of lending to small businesses because it also includes credit to medium businesses. Additionally, the Bureau notes that fintechs often offer products besides loans and lines of credit, and that there is no clear demarcation between fintech, commercial finance company, and merchant cash advance provider, limiting the precision of market size estimates. Finally, fintechs often sell loans once originated to other entities, securitize their originations, or purchase loans that banks have originated, which may further present challenges to the precision of market size estimates for this market segment.

[114] Small Bus. Admin., *Paycheck Protection Program (PPP) Report* (approvals through 12 p.m. EST Apr. 16, 2020), *https://www.sba.gov/sites/default/files/2020-06/PPP%20Deck%20copy-508.pdf*; Small Bus. Admin., *Paycheck Protection Program (PPP) Report* (approvals through Aug. 8, 2020), *https://www.sba.gov/sites/default/files/2020-08/PPP_Report%20-%202020-08-10-508.pdf.*

[115] Per the program's intent, many Paycheck Protection Program loans have been forgiven since the program began, which likely means that outstanding balances on Paycheck Protection Program loans extended by online lenders have since declined. *See* Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), *https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf* (reporting that $742 billion in Paycheck Protection Program loans had been forgiven by July 2022).

[116] Barkley & Schweitzer, 17 Int'l J. Cent. Banking at 35–36 (citing 2018 US Fintech Market Report at

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The CFPB estimates the value of outstanding balances on credit extended by nondepository CDFIs to small business borrowers to be around $1.5 billion. Using reporting by the CDFI Fund for 2019, the CFPB scales down the outstanding balances for loan funds of $13.8 billion and for venture capital funds of $0.3 billion by the proportion of all CDFI lending attributable to business borrowers, which totaled $15.4 billion out of $141.2 billion.[117]

Categorized here separately so as to distinguish residential from non-residential loans, the CFPB estimates outstanding balances for loans on 5+ unit residential dwellings to total over $30 billion.[118] The CFPB scales up $11 billion in 2019 annual originations on loans of under $1 million in value at origination for 5+ unit residential dwellings to $30 billion in estimated outstanding balances, using the ratio between the FFIEC Call Report and the CRA data discussed above.[119]

Also categorized separately from depository institution totals so as to distinguish private from government and government-sponsored loans, the CFPB estimates that outstanding balances for loans extended by the SBA and the Farm Credit System totaled around $200 billion in 2019.[120]

The SBA, through its traditional 7(a), 504, and microloan programs as well as the Economic Impact Disaster Loan Program and funding for Small Business Investment Companies, is the largest governmental lender by value, with $143.5 billion in outstanding balances at the end of fiscal 2019.[121] As part of the Federal government's response to the COVID–19 pandemic, during 2020 and 2021 SBA lending increased in size by over $1 trillion due to the Paycheck Protection Program, which totaled almost $800 billion, and the Economic Impact Disaster Loan Program, which totaled $210 billion.[122] However, as noted above, over $740 billion in Paycheck Protection Program loans had been forgiven as of July 2022, bringing SBA outstanding loan balances back down.[123]

The Farm Credit System is another important government-related part of the small business credit landscape. The CFPB estimates that Farm Credit System lenders had around $55 billion in outstanding balances of credit extended to small farms in 2019. Using the same small loan to farms proxy as is used in the FFIEC Call Report, the CFPB estimates credit to farms with an origination value of less than $500,000. Based on the Farm Credit System's 2019 Annual Information Statement of the Farm Credit System, the CFPB estimates that outstanding balances of such small credit to farms totaled $55 billion at the end of 2019.[124] The CFPB notes that, as with the FFIEC Call Report proxy, this number may include credit to non-small farms and may exclude larger credit transactions extended to small farms. Considering credit extended with an origination value of between $500,000 and $5 million would increase the market size by $86 billion to $141 billion.[125]

Mostly extended by depository institutions, the CFPB estimates that the market for small business credit cards totaled over $60 billion in outstanding balances for 2020.[126] Using data from Y–14 Form submissions to the Federal Reserve Board, the CFPB estimates the value of outstanding balances for small business credit card accounts where the loan is underwritten with the sole proprietor or primary business owner as an applicant.[127]

Equipment and vehicle leasing, whereby businesses secure the right to possess and use a piece of equipment or vehicle for a term in return for consideration, is another important product category that is estimated to value roughly $160 billion in outstanding balances in 2019. The CFPB estimates the total size of the equipment and vehicle leasing market for all sized businesses in 2019 to be approximately $900 billion.[128] The CFPB further assumes that small businesses comprise around 18 percent of the total

5). This figure annualizes $121 million in estimated 2013 quarterly originations to $484 million in annual originations and scales up to estimated outstanding balances using the ratio between the FFIEC Call Report and the CRA data discussed above.

[117] CDFI Fund, *CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2019,* at 17, 22 (Oct. 2020), *https://www.cdfifund.gov/sites/cdfi/files/2021-01/ACR-Public-Report-Final-10292020-508Compliant.pdf.* To the extent that CDFI loan funds and venture capital funds extend credit to business customers at different rates than CDFI banks and credit unions, this calculation may over- or underestimate the value of lending to small businesses by nondepository CDFIs. This figure also assumes that all CDFI lending is for small businesses.

[118] Depository institutions, discussed above, extend a sizeable proportion of loans for 5+ unit residential dwellings; both nondepository and depository institutions are included in the total for 5+ unit outstanding balances.

[119] *See* Mortg. Bankers Ass'n, *Annual Report on Multi-Family Lending—2019,* at 5 (2020), *https://www.mba.org/store/products/research/general/report/2019-annual-report-on-multifamily-lending.* This includes both private loans, estimated at around $18 billion, and loans extended by Fannie Mae, Freddie Mac, and the Federal Housing Administration, estimated at around $13 billion. The share of 5+ unit residential dwelling loans of all sizes extended by governmental or government-sponsored entities was 41 percent. The Bureau assumes for the purposes of this exercise that the same share is reflected in loans of under $1 million in value at origination, although arguably this share would be higher if government and government-sponsored entities extended disproportionately smaller dollar value loans on average. There is also a substantial market for commercial real estate besides 5+ unit residential dwellings not captured here due to a lack of data on loans of small size or to small businesses. *See* Mortg. Bankers' Ass'n, *MBA: Commercial, Multifamily Mortgage Bankers Originated $683B in 2021; Total Lending Tally Reaches $891B* (Apr. 15, 2022), *https://newslink.mba.org/mba-newslinks/2022/april/mba-newslink-friday-apr-15-2022/mba-commercial-multifamily-mortgage-bankers-originated-683b-in-2021-total-lending-tally-reaches-891b/* (estimating the volume of commercial real estate lending of any size to be $890.6 billion in 2021, of which multifamily lending accounted for $376 billion).

[120] The grand total for lending by government and government-sponsored entities would be approximately $210 billion, including 5+ unit residential dwelling loans extended by Fannie Mae, Freddie Mac, and the Federal Housing Administration, which are separately recorded within the 5+ unit residential dwelling loan product category.

[121] Small Bus. Admin., *Small Business Administration Loan Program Performance* (effective Mar. 31, 2022), *https://www.sba.gov/document/report-small-business-administration-loan-program-performance.* SBA guaranteed loans comprised $134 billion out of this total, which amount has been deducted from the totals for depository institutions to avoid double counting.

[122] Small Bus. Admin., *Paycheck Protection Program (PPP) Report* (approvals through May 31, 2021), *https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf*; Small Bus. Admin., *Disaster Assistance Update—Nationwide COVID EIDL, Targeted EIDL Advances, Supplemental Targeted Advances* (June 3, 2021), *https://www.sba.gov/sites/default/files/2021-06/COVID-19%20EIDL%20TA%20STA_6.3.2021_Public-508.pdf*; Small Bus. Admin., *Disaster Assistance Update—Nationwide EIDL Loans* (Nov. 23, 2020), *https://www.sba.gov/sites/default/files/2021-02/EIDL%20COVID-19%20Loan%2011.23.20-508_0.pdf.*

[123] Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), *https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf.*

[124] Fed. Farm Credit Banks Funding Corp., *Farm Credit 2019 Annual Information Statement of the Farm Credit System,* at 54 (Feb. 28, 2020), *https://www.farmcreditfunding.com/ffcb_live/investorResources/informationStatements.html.*

[125] *Id.*

[126] *See* Bd. of Governors of the Fed. Rsrv. Sys., Report Forms FR Y-14M, *https://www.federalreserve.gov/apps/reportingforms/Report/Index/FR_Y-14M* (last updated Sept. 12, 2022). The Board's data are received from bank holding companies over $50 billion in assets, which represent 70 percent of outstanding balances for consumer credit cards; the corresponding percent of balances captured for small business cards is not known, so the total small business-purpose credit card market could be substantially higher or lower. *See* CFPB, *The Consumer Credit Card Market,* at 18 (Aug. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf.*

[127] Off. of Mgmt. & Budget, *Instructions for the Capital Assessments and Stress Testing Information Collection (Reporting Form FR–Y14M),* OMB No. 7100–0341, at 148 (Mar. 2020), *https://omb.report/icr/202101-7100-006/doc/108187801.*

[128] *See* Equip. Leasing & Fin. Found., *Horizon Report, https://www.leasefoundation.org/industry-resources/horizon-report/* (last updated Apr. 22, 2021).

equipment and vehicle leasing market.[129]

Factoring is a similarly significant product type, estimated at around $100 billion in market size for 2019.[130] In a factoring transaction, factors purchase, at a discount, a legally enforceable claim for payment (*i.e.,* accounts receivables or invoices) for goods already supplied or services already rendered by a business for which payment has not yet been made in full; hence, a factor's risk related to repayment lies with the business's customer and not the business itself. In most cases, specific companies, called factors, provide factoring products.

The market for merchant cash advances continues to develop rapidly and data are even more scarce than for other segments of the small business lending market. This limits the reliability of estimates as to the merchant cash advance market's size. The CFPB estimates the 2019 market size to be around $20 billion.[131] The merchant cash advance market is also of particular significance for smaller and traditionally underserved businesses that may not qualify for other types of credit.[132] Merchant cash advances are typically structured to provide a lump sum payment up front (a cash advance) in exchange for a share of future revenue until the advance, plus an additional amount, is repaid. Unlike the majority of other small business financing products, merchant cash advances typically purport to be for short durations.[133] The CFPB understands that merchant cash advances also tend to be relatively high-cost products.[134] Several States, including New York and California, are implementing laws that will require providers of ''sales-based financing,'' such as merchant cash advances, as well as other nondepositories to provide disclosures (including estimated APR in some States) similar to those required under the Truth in Lending Act (TILA),[135] which generally only applies to consumer credit.[136]

Finally, trade credit is another significant market, which the Bureau estimates to total $51 billion in outstanding balances in 2019. The Bureau estimates the trade credit market size by adding the total accounts payable for businesses under $1 million in annual revenue.[137] Considering the total value of accounts payable for businesses between $1 million and $5 million would increase the market size by $88 billion.[138] Trade credit is an often informal, business-to-business transaction, usually between non-financial firms whereby suppliers allow their customers to acquire goods and/or services without requiring immediate payment.

The CFPB estimates that there were approximately 8,200 financial institutions extending small business financing in 2019, almost 80 percent of which were depository institutions.[139]

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[129] *See* Karen Mills, Harvard Bus. Sch., *State of Small Business Lending,* at 29 (July 2014), *https://www.hbs.edu/ris/Supplemental%20Files/15-004%20HBS%20Working%20Paper%20Chart%20Deck_47695.pdf* (estimating equipment leasing outstanding balances for small business borrowers at approximately $160 billion at Dec. 31, 2013); Monitor Daily, *SEFI Report Finds Strong Performance Despite Challenges* (Oct. 21, 2014), *https://www.monitordaily.com/news-posts/sefi-report-finds-strong-performance-despite-challenges/* ($903 billion market in 2014, commensurate with an 18 percent market share for small business borrowers at the time of the Karen Mills report).

[130] *See* Secured Fin. Found., *2019 Secured Finance: Market Sizing & Impact Study Extract Report,* at 7 (June 2019), *https://www.sfnet.com/docs/default-source/data-files-and-research-documents/sfnet_market_sizing___impact_study_extract_f.pdf?sfvrsn=72eb7333_2.* This study estimated the total volume of the U.S. factoring market to be $101 billion. To the extent that factoring volumes differ from outstanding balances, the value of outstanding balances may be higher or lower than this estimate. Also, this estimate captures factoring for business borrowers of all sizes, not just small business borrowers. The CFPB assumes that most factoring is provided to small business customers.

[131] Paul Sweeney, *Gold Rush: Merchant Cash Advances are Still Hot,* deBanked (Aug. 18, 2019), *https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/.* BPC estimates appear to reference origination volumes rather than outstanding balances. *See* Nimayi Dixit, S&P Glob. Mkt. Intel., *Payment Fintechs Leave Their Mark On Small Business Lending* (Aug. 28, 2018), *https://www.spglobal.com/marketintelligence/en/news-insights/research/payment-fintechs-leave-their-mark-on-small-business-lending.* Depending on credit multiplier effects, the value of annual origination volumes could be smaller or greater than outstanding balances. Without information on outstanding balances and for the purposes of calculating a market size for small business financing in 2019, the CFPB assumes in this paper a 1:1 ratio between annual origination volumes and outstanding balances for merchant cash advance products. See above for discussion of credit multiplier effects.

[132] *Cf.* Barbara Lipman & Ann Marie Wiersch, Bd. of Governors of the Fed. Rsrv. Sys., *Uncertain Terms: What Small Business Borrowers Find When Browsing Online Lender websites,* at 3 (Dec. 2019), *https://www.federalreserve.gov/publications/files/what-small-business-borrowers-find-when-browsing-online-lender-websites.pdf* (observing that online lenders, including providers of merchant cash advance products, position themselves as offering financing to borrowers underserved by traditional lenders).

[133] *See id.* (stating that merchant cash advances are generally repaid in three to 18 months).

[134] *Id.* (stating that annual percentage rates on merchant cash advance products can exceed 80 percent or rise to triple digits). *See also* Fed. Trade Comm'n, *'Strictly Business' Forum, Staff Perspective,* at 5 (Feb. 2020), *https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf* (observing stakeholder concern about the high-cost of merchant cash advances that can reach triple digit annual percentage rates).

[135] 15 U.S.C. 1601 *et seq.*

[136] New York State law requires that providers of ''sales-based financing'' provide disclosures to borrowers that include calculations of an estimated annual percentage rate in accordance with the CFPB's Regulation Z, 12 CFR part 1026. *See* N.Y. S.898, section 803(c) (signed Jan. 6, 2021) (amending S.5470–B), *https://legislation.nysenate.gov/pdf/bills/2021/s898.* The New York Department of Financial Services is currently developing regulations to implement the law. *See* N.Y. Dep't of Fin. Servs., *Proposed Financial Services Regulations, https://www.dfs.ny.gov/industry_guidance/regulations/proposed_fsl.* Similarly, California's Department of Financial Protection and Innovation has adopted regulations to implement a California law requiring disclosures by commercial financing companies, including those providing sales-based financing. *See* 10 Cal. Code Reg. 900(a)(28) (effective Dec. 9, 2022) (defining sales-based financing as ''a commercial financing transaction that is repaid by a recipient to the financer as a percentage of sales or income, in which the payment amount increases and decreases according to the volume of sales made or income received by the recipient'' and including ''a true-up mechanism''); 10 Cal. Code Reg. 914 and 940 (requiring sales-based financing providers disclosure estimated annual percentage rate according to Regulation Z, 12 CFR part 1026). Under these laws, providers of commercial financing generally will be required to disclose: (1) the total amount financed, and the amount disbursed if it is different from the total amount financed; (2) the finance charge; (3) the APR (or the estimated APR for sales-based financing and factoring transactions), calculated in accordance with TILA and Regulation Z; (4) the total repayment amount; (5) the term (or the estimated term for sales-based financing) of the financing; (6) periodic payment amounts; (7) prepayment charges; (8) all other fees and charges not otherwise disclosed; and (9) any collateral requirements or security interests. *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B.* Other States, including Virginia and Utah, have passed commercial financing disclosure laws that do not require disclosure of the APR. *See* Virginia H. 1027 (enacted Apr. 11, 2022), *https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0516*; Utah S.B. 183 (enacted Mar. 24, 2022), *https://le.utah.gov/~2022/bills/static/SB0183.html.*

[137] *See* Fundbox/PYMNTS.com, *The Trade Credit Dilemma,* at 11 (May 2019), *https://www.pymnts.com/wp-content/uploads/2019/05/Trade-Credit-Dilemma-Report.pdf* (estimating accounts payable for businesses with revenue of under $250,000 at $6.7 billion and for businesses with revenue of $250,000 to $999,000 at $44.6 billion).

[138] *Id.* The trade credit market is estimated to total $1.6 trillion across all business sizes in the United States. In the overall $1.4 trillion market size total for all small business financing products, the CFPB has included only the trade credit market for businesses of up to $1 million in revenue for consistency with its White Paper.

[139] This number has increased from 8,100 financial institutions estimated in the NPRM for two reasons related to the number of nondepository financial institutions participating in the credit market for 5+ unit residential dwellings in 2019. First, the CFPB revised its methodology for excluding depository institutions from the total number of participants active in the credit market for 5+ unit residential dwellings, as detailed below. Second, the NPRM total for all financial institutions active in the small business financing market

Continued

Based on FFIEC Call Report data for December 2019, the CFPB estimates that about 5,100 banks and savings associations were active in the small business lending market, out of a total of about 5,200 banks and savings associations.[140] The CFPB assumes that a bank or savings association is ''active'' in the market if it reports a positive outstanding balance of small loans, lines of credit, and credit cards to businesses.

Based on the NCUA Call Report data for December 2019, the CFPB estimates that about 1,200 out of 5,300 total credit unions were active in the small business lending market.[141] The CFPB defines a credit union as ''active'' in the market if it reported a positive number of originations of loans, lines of credit, and credit cards to members for commercial purposes in 2019.

The CFPB estimates that there were about 1,900 nondepository institutions active in the small business financing market in 2019,[142] accounting for around $550 billion in outstanding credit to small businesses. This total number of nondepository institutions includes approximately 300 commercial finance companies, 30 or more online lenders, 340 nondepository CDFIs, 150 nondepository mortgage lenders in the multifamily market, 100 merchant cash advance providers, 700–900 factors, at least 100 government lenders, and 72 Farm Credit System institutions.

The Bureau estimates that about 300 commercial finance companies were engaged in small business lending in 2019.[143] The Bureau also estimates there to be about 30 or more online lenders that were active in the small business lending market in 2019, not including merchant cash advance providers.[144]

The Bureau estimates that 340 nondepository CDFIs were engaged in small business lending in 2019. Both depository and nondepository institutions can be CDFIs. Depository CDFIs are counted in the numbers of banks, savings associations, and credit unions engaged in small business lending. According to the CDFI Fund, 487 nondepository funds (*i.e.,* loan funds and venture capital funds) reported as CDFIs in 2019.[145] Of these, 340 institutions reported that business finance or commercial real estate finance were a primary or secondary line of business in 2019.[146]

The Bureau estimates that about 150 nondepository mortgage lenders participated in the credit market for 5+ unit residential dwellings in 2019.[147] In its *2019 Multifamily Lending Report,* the Mortgage Bankers Association lists annual multifamily lending volumes by institution, including a distinction for loans of under $1 million in value at origination.[148] Using the same small loan to business proxy as is used in the FFIEC Call Report, the Bureau estimates the number of nondepository mortgage lenders by counting the number of institutions that appear on this list that are not depository institutions and that extended at least two loans in 2019.[149]

Data from UCC filings indicates that about 100 institutions were active in the market for providing merchant cash advances to small businesses in 2021.[150]

included only those nondepository financial institutions participating in the credit market for 5+ unit residential dwellings estimated to be covered by the proposed rule rather than all those active in the market at all.

[140] Calculated from FFIEC Call Report data accessed on October 18, 2022. Although 2019 figures are used here for consistency across types of lenders, consolidation among depository institutions has continued since 2019. As of June 30, 2022, 4,692 commercial banks or savings associations and 1,575 credit unions reported a positive outstanding balance of small loans, lines of credit, and credit cards to businesses. Calculated from FFIEC Call Report data accessed on October 14, 2022.

[141] Nat'l Credit Union Admin., *2019 Call Report Quarterly Data, https://www.ncua.gov/analysis/credit-union-corporate-call-report-data/quarterly-data* (last updated Mar. 8, 2023). (One hundred twelve credit unions were not federally insured as of December 2019 but are included here as depository institutions. Calculated from NCUA Call Report data accessed on June 8, 2021.) Although 2019 figures are used here for consistency across types of lenders, consolidation among depository institutions has continued since 2019. As of June 30, 2022, 1,120 credit unions reported a positive number of originations of loans, lines of credit, and credit cards to members for commercial purposes during the first half of 2022. This number was calculated from NCUA Call Report data accessed on October 14, 2022.

[142] There may also be cooperative or nonprofit lenders as well as equipment and vehicle finance dealers originating in their own name that are not captured by the CFPB in these figures. For example, by searching Uniform Commercial Code (UCC) filings, Manasa Gopal and Philipp Schnabl identified 19 cooperative lenders that originated at least 1,500 loans over the period from 2006 to 2016. Manasa Gopal & Philipp Schnabl, *The Rise of Finance Companies and FinTech Lenders in Small Business Lending,* N.Y.U. Stern Sch. of Bus., at 18 (May 13, 2020), *https://ssrn.com/abstract=3600068.* Additionally, these figures do not include trade creditors, which are non-companies that extend credit by allowing customers a period of time in which to pay and which are much greater in number since the practice is widespread across the economy. This number has increased from 1,800 financial institutions estimated in the NPRM for two reasons related to the number of nondepository financial institutions participating in the credit market for 5+ unit residential dwellings in 2019. First, the CFPB revised its methodology for excluding depository institutions from the total number of participants active in the credit market for 5+ unit residential dwellings, as detailed below. Second, the Notice of Proposed Rulemaking total for all nondepository financial institutions active in the small business financing market included only those nondepository financial institutions participating in the credit market for 5+ unit residential dwellings that were estimated to be covered by the proposed rule rather than all those active in the market at all.

[143] *See id.* By searching UCC filings, Manasa Gopal and Philipp Schnabl identified almost 300 commercial finance companies, including both independent and captive finance companies, with at least 1,500 small business loans between 2006 and 2016. This figure combines 192 independent finance companies with 95 captive finance companies. Since this estimate captures only those commercial finance companies averaging at least 150 loans per year over the 2006 to 2016 period, it may exclude smaller volume lenders and should be considered conservative.

[144] *Id.* Using the same methodology as for commercial finance companies, Gopal and Schnabl identified 19 fintech companies. The CFPB conservatively increases this estimate to 30 to account for rapid growth in the industry from 2016 to 2019. Since this estimate captures only those fintechs averaging at least 150 loans per year over the 2006 to 2016 period, it may exclude smaller volume lenders and should be considered conservative. On the other hand, since 2019, the COVID–19 economic shock may have led to some fintechs scaling back or exiting the small business financing market. *See, e.g.,* Ingrid Lunden, *Amex Acquires SoftBank-backed Kabbage After Tough 2020 for the SMB Lender,* TechCrunch (Aug. 17, 2020), *https://techcrunch.com/2020/08/17/amex-acquires-softbank-backed-kabbage-after-tough-2020-for-the-smb-lender/* (noting that Kabbage temporarily shut down credit lines to small businesses during April 2020 and then spun off its small business loan portfolio when it was subsequently acquired by American Express).

[145] CDFI Fund, *CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2019,* at 8 (Oct. 2020), *https://www.cdfifund.gov/sites/cdfi/files/2021-01/ACR-Public-Report-Final-10292020-508Compliant.pdf.*

[146] *Id.* at 15–16.

[147] Nondepository lenders providing financing for commercial real estate transactions besides 5+ unit residential dwellings are not separately captured here but often overlap with those lenders providing financing for 5+ unit residential dwellings. *See* Com. Prop. Exec., *Top 20 Commercial Mortgage Banking and Brokerage Firms of 2022* (Jan. 3, 2022), *https://www.commercialsearch.com/news/top-20-commercial-mortgage-banking-and-brokerage-firms-of-2022/* (listing top commercial real estate lenders and identifying sectors financed by lender).

[148] *See* Mortg. Bankers Ass'n, *Annual Report on Multi-Family Lending—2019,* at 9–66 (2020), *https://www.mba.org/store/products/research/general/report/2019-annual-report-on-multifamily-lending.* In the Notice of Proposed Rulemaking, the CFPB had estimated nondepository financial institutions participating in the credit market for 5+ unit residential dwellings by excluding financial institutions included in the above-cited report with the word ''bank'' or ''credit union'' in the institution name and further manually removing around ten more institutions that appeared to be depository institutions at first glance. To improve accuracy, for the Final Rule the CFPB has manually coded all 2,588 institutions in the above-cited report to exclude any institutions that are banks, savings associations, credit unions, or farm credit associations but which do not have the word ''bank'' or ''credit union'' in the institution name as recorded in the report. As a result, the total number of nondepository financial institutions active in this market fell from 270 to 150.

[149] The CFPB counts institutions extending at least two loans of any size in order to estimate institutions extending at least one small loan, based on the assumption that some 50 percent of these loans may have been for values greater than $1 million.

[150] deBanked, *UCC–1 and UCC–3 Filings by Merchant Cash Advance Companies & Alternative Business Lenders, https://debanked.com/merchant-cash-advance-resource/merchant-cash-advance-ucc/* (last visited Mar. 20, 2023).

The Bureau estimates the number of factors in 2019 to be between 700–900 and assumes that most factors were providing financing to small business.[151]

Finally, many government agencies and government-sponsored enterprises provide or facilitate a significant proportion of small business credit. As the flagship government lender, the SBA managed in 2019 a portfolio of over $140 billion in loans to small businesses, to which it added over $1 trillion in loans extended as part of the COVID–19 emergency lending programs. (As noted above, over $740 billion in Paycheck Protection Program loans had been forgiven as of July 2022, bringing SBA outstanding loan balances back down.[152]) Across Federal, State, and municipal governments, the Bureau estimates that there are likely over 100 government small business lending programs.[153] Additionally, the Farm Credit System reports that, as of December 2019, the Farm Credit System contained a total of 72 banks and associations.[154] All of these Farm Credit System institutions were engaged in lending to small farms in 2019.[155]

E. Challenges for Women-Owned, Minority-Owned, and LGBTQI+-Owned Small Businesses

Within the context of small business financing, women-owned, minority-owned, and LGBTQI+-owned small businesses often face relatively challenges than their counterparts to obtain credit. In line with congressional purpose, information collected about these businesses may provide opportunities for community development lending, and the information collected may be particularly important to support fair lending analysis and enforcement.

Women-owned, minority-owned, and LGBTQI+-owned small businesses have smaller cash reserves on average, leaving them less able to weather credit crunches. For example, in February 2021, 39 percent of women-owned businesses had one month or less in cash reserves, compared with 29 percent of men-owned firms.[156] And in around 90 percent of majority Black and Hispanic communities, most businesses have fewer than 14 days of cash buffer, while this is true of only 35 percent of majority white communities.[157] As a result, many small businesses, especially those owned by women, minorities, and LGBTQI+ individuals, may have a greater need for financing in general and particularly during economic downturns.

Policy responses to support small businesses in economic downturns may struggle to reach small businesses owned by women, minorities, and LGBTQI+ individuals. For example, although LGBTQI+-owned small businesses were more likely to apply for Paycheck Protection Program loans, they were less likely to receive all of the funds that they applied for, and more likely to have gotten none of the funding they applied for.[158]

Established relationships between applicants and lenders were often critical to approvals in the earliest period of Paycheck Protection Program underwriting;[159] many minority-owned[160] and women-owned[161] businesses did not have such relationships. Minority borrowers with limited English proficiency may also have faced difficulties overcoming language barriers,[162] particularly during the first round of the Paycheck Protection Program in April 2020 when application materials had not yet been translated from English.[163] Further, many minority-owned and women-owned firms are sole proprietorships and independent contractors, both of which received delayed access to Paycheck Protection Program loans.[164]

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[151] *See* Secured Fin. Found., *2019 Secured Finance: Market Sizing & Impact Study Extract Report,* at 15 (June 2019), *https://www.sfnet.com/docs/default-source/data-files-and-research-documents/sfnet_market_sizing___impact_study_extract_f.pdf?sfvrsn=72eb7333_2* (estimating the number of factors at between 700 and 900).

[152] Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), *https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf.*

[153] In addition to several Federal small business lending programs, States and major municipalities also often have one or more programs of their own. One State and one municipal program in each State would already total 100 government lending programs across Federal, State, and municipal governments.

[154] Fed. Farm Credit Banks Funding Corp., *Farm Credit 2019 Annual Information Statement of the Farm Credit System,* at 7 (Feb. 28, 2020), *https://www.farmcreditfunding.com/ffcb_live/serve/public/pressre/finin/report.pdf?assetId=395570.* The CFPB notes that Farm Credit System banks do not report FFIEC Call Reports and are thus not counted in the number of banks and savings associations discussed above.

[155] Calculated from Young, Beginning, and Small Farmer Report data accessed on June 17, 2022, *https://reports.fca.gov/CRS/search-institution.aspx.*

[156] Eric Groves, *Cash Strapped SMBs, While 75% Of PPP Is Still Available,* Alignable (Feb. 9, 2021), *https://www.alignable.com/forum/alignable-road-to-recovery-report-february-2021.*

[157] JPMorgan Chase Inst., *Place Matters: Small Business Financial Health in Urban Communities,* at 5 (Sept. 2019), *https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-place-matters.pdf. See also* Diana Farrell *et al.,* JP Morgan Chase Inst., *Small Business Owner Race, Liquidity, and Survival,* at 5 (July 2020), *https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-small-business-owner-race-report.pdf* (finding in a sample of firms founded in 2013 and 2014 that after one year in business white-owned firms had on average 19 cash buffer days compared to 14 for Hispanic-owned firms and 12 for Black-owned firms).

[158] Spencer Watson *et al., LGBTQ-Owned Small Businesses in 2021,* Ctr. for LGBTQ Econ. Advancement & Rsch. and Movement Advancement Project, at 8 (July 2022), *https://www.lgbtmap.org/file/LGBTQ-Small-Businesses-in-2021.pdf* (using data from the Federal Reserve's Small Business Credit Survey, which began collecting demographic data on LGBTQ small business ownership in 2021).

[159] Sara Savat, *Who you know matters, even when applying for PPP loans,* The Source, Newsroom, Wash. Univ. in St. Louis (Feb. 15, 2021), *https://source.wustl.edu/2021/02/who-you-know-matters-even-when-applying-for-ppp-loans/* (previous lender relationship increased likelihood of obtaining a Paycheck Protection Program loan by 57 percent). *See generally* 86 FR 7271, 7280 (Jan. 27, 2021) (noting that many lenders restricted access to Paycheck Protection Program loans to existing customers, which may run a risk of violating ECOA and Regulation B).

[160] Claire Kramer Mills, Fed. Rsrv. Bank of N.Y., *Double Jeopardy: COVID–19's Concentrated Health and Wealth Effects in Black Communities,* at 6 (Aug. 2020), *https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses* (arguing that a lack of strong banking relationships among Black-owned firms may have led to relatively lower rates of access to Paycheck Protection Program loans for such firms); Fed. Rsrv. Banks, *Small Business Credit Survey: 2021 Report on Firms Owned by People of Color,* at ii (Apr. 15, 2021), *https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color* (Small Business Credit Survey of Firms Owned by People of Color) (finding that ''firms owned by people of color tend to have weaker banking relationships'').

[161] *Cf.* Mariel Padilla, *'I feel like I'm drowning': Women Business Owners Keep Hitting New Barriers to Federal Loan Aid,* 19th (Apr. 23, 2021), *https://19thnews.org/2021/04/women-small-businesses-loan/* (stating that historically higher rates of loan denials for women of color than for white men result in less established banking relationships and thereby reduced access to Federal support disbursed through banks).

[162] *See* Emily Ryder Perlmeter, Fed. Rsrv. Bank of Dallas, *How PPP Loans Eluded Small Businesses of Color* (Nov. 29, 2021), *https://www.dallasfed.org/cd/communities/2021/1129* (detailing language barriers among small business owners of color seeking Paycheck Protection Program loans, particularly Hispanic and Asian owners who were not fluent in English).

[163] *See* Press Release, Rep. Judy Chu, *House Dems Urge SBA to Translate Resources into 10 Most Common Languages* (Apr. 9, 2020), *https://chu.house.gov/media-center/press-releases/house-dems-urge-sba-translate-resources-10-most-common-languages.*

[164] Greg Iacurci, *Coronavirus loan program delayed for independent contractors and self-employed workers,* CNBC (Apr. 3, 2020), *https://www.cnbc.com/2020/04/03/delays-in-sba-loans-for-independent-contractors-self-employed-workers.html;* see also Mariel Padilla, 'I feel like I'm drowning': Women Business Owners Keep Hitting New Barriers to Federal Loan Aid, 19th (Apr. 23, 2021), *https://19thnews.org/2021/04/women-small-businesses-loan/* (stating that non-employer businesses affected by restrictions on sole proprietor and independent contractor access to Paycheck Protection Program loans are disproportionately owned by women and minorities).

Applicants whose owners belong to protected categories may have received different program outcomes when applying for Paycheck Protection Program loans, although limitations in demographic information for Paycheck Protection Program loans have hindered fair lending analyses.[165] Even for such firms that did obtaining Paycheck Protection Program loans, they may have faced different outcomes with respect to loan forgiveness.[166]

As demonstrated by the impact of the COVID–19 pandemic on small businesses, small business lending data are essential to better understand the small business financing landscape to maintain and expand support for this key part of the U.S. economy.

F. The Purposes and Impact of Section 1071

The Dodd-Frank Act sets forth the Bureau's purposes and mission. It provides that a key component of the Bureau's fair lending work is to ensure fair, equitable, and nondiscriminatory access to credit for both individuals and their communities.[167] And in passing section 1071, Congress articulated two purposes for requiring the Bureau to collect data on small business credit applications and loans—to ''facilitate enforcement of fair lending laws'' and to ''enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.''[168] Although the Dodd-Frank Act does not further explain or clarify these dual statutory purposes, other Federal laws shed light on both purposes. That is, a set of existing Federal laws form the backdrop for the use of small business lending data collected and reported pursuant to section 1071 to facilitate the enforcement of fair lending laws, and to identify business and community development needs and opportunities across the United States.

1. Facilitating Enforcement of Fair Lending Laws

Congress intended for section 1071 to ''facilitate enforcement of fair lending laws,''[169] which include ECOA, the Home Mortgage Disclosure Act of 1975 (HMDA),[170] the Fair Housing Act,[171] and other Federal and State anti-discrimination laws.

i. Equal Credit Opportunity Act (ECOA)

ECOA, which is implemented by Regulation B, applies to all creditors. Congress first enacted ECOA in 1974 to require financial institutions and other firms engaged in the extension of credit to ''make credit equally available to all creditworthy customers without regard to sex or marital status.'' [172] Two years later, Congress expanded ECOA's scope to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Federal Consumer Credit Protection Act.[173]

ECOA makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex (including sexual orientation, gender identity, and sex characteristics),[174] marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Federal Consumer Credit Protection Act.[175]

Multiple Federal regulators can enforce ECOA and Regulation B and apply various penalties for violations. The enforcement provisions and penalties for those who violate ECOA and Regulation B are set forth in 15 U.S.C. 1691e(b) and 12 CFR 1002.16. Violations may also result in civil money penalties, which are governed by 12 U.S.C. 5565(c)(3). The CFPB and multiple other Federal regulators have the statutory authority to bring actions to enforce the requirements of ECOA.[176] These regulators have the authority to engage in research, conduct investigations, file administrative complaints, hold hearings, and adjudicate claims through the administrative enforcement process regarding ECOA. Regulators also have independent litigation authority and can file cases in Federal court alleging violations of fair lending laws under their jurisdiction. Like other Federal regulators who are assigned enforcement authority under section 704 of ECOA, the CFPB is required to refer matters to the Department of Justice (DOJ) when it has reason to believe that a creditor has engaged in a pattern or practice of lending

[165] Rocio Sanchez-Moyano, Fed. Rsrv. Bank of S.F., *Paycheck Protection Program Lending in the Twelfth Federal Reserve District* (Mar. 3, 2021), *https://www.frbsf.org/community-development/publications/community-development-research-briefs/2021/february/ppp-lending-12th-district/* (citing matched-pair audit studies that found discouragement and provision of incomplete information for minority business owners seeking Paycheck Protection Program loans); 86 FR 7271, 7280 (Jan. 27, 2021) (noting that facially neutral Paycheck Protection Program policies such as limiting loans to businesses with pre-existing relationships may run a risk of violating ECOA and Regulation B due to a disproportionate impact on a prohibited basis).

[166] For example, Black-owned firms applied to fintechs for Paycheck Protection Program loans at a high rate and certain fintechs or banks that partnered with fintechs have also had a high rate of unforgiven Paycheck Protection Program loans. *See* Max Reyes, *Bank Behind Fintech's Rise Reels in Billions in Pandemic's Wake,* Bloomberg (Aug. 22, 2022), *https://www.bloomberg.com/news/articles/2022-08-21/bank-behind-fintech-s-rise-reels-in-billions-in-pandemic-s-wake* (reporting that, as of July 2021, the share of unforgiven Paycheck Protection Program loans at Kabbage, a fintech, and at Cross River, a bank that partnered with fintechs, was 34 percent and 16 percent, respectively); Who Benefited from PPP Loans (showing that Black-owned firms applied to fintechs at higher rates than other firms).

[167] *See* 12 U.S.C. 5493(c)(2)(A) (directing the Office of Fair Lending and Equal Opportunity to provide ''oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau,'' including ECOA and the Home Mortgage Disclosure Act).

[168] ECOA section 704B(a).

[169] *Id.*

[170] 12 U.S.C. 2801 *et seq.*

[171] 42 U.S.C. 3601 through 3619.

[172] Public Law 93–495, tit. V, section 502, 88 Stat. 1500, 1521 (1974).

[173] *See* Equal Credit Opportunity Act Amendments of 1976, Public Law 94–239, section 701(a), 90 Stat. 251, 251 (1976).

[174] In March 2021, the CFPB issued an interpretive rule clarifying that the scope of ECOA's and Regulation B's prohibition on credit discrimination on the basis of sex encompasses discrimination based on sexual orientation and gender identity, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant's associations. 86 FR 14363 (Mar. 16, 2021). *See also* Press Release, CFPB, *CFPB Clarifies That Discrimination by Lenders on the Basis of Sexual Orientation and Gender Identity Is Illegal* (Mar. 9, 2021), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-clarifies-discrimination-by-lenders-on-basis-of-sexual-orientation-and-gender-identity-is-illegal/.* The interpretive rule states that an example of discriminatory sex-based or gender-based stereotyping occurs if a small business lender discourages a small business owner appearing at its office from applying for a business loan and tells the prospective applicant to go home and change because, in the view of the creditor, the small business customer's attire does not accord with the customer's gender. 86 FR 14363, 14365 (Mar. 16, 2021). As discussed further in the section-by-section analysis of § 1002.102(k) and (*l*), regarding the definitions of LGBTQI+ individual and LGBTQI+-owned business, respectively, the CFPB interprets ECOA's and Regulation B's prohibitions on the basis of sex to also include sex characteristics, including intersex traits.

[175] 15 U.S.C. 1601 *et seq.*

[176] These regulators include the OCC, the Board, the FDIC, the NCUA, the Surface Transportation Board, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, the Securities and Exchange Commission, the SBA, the Secretary of Transportation, the CFPB, and the FTC. *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a). Motor vehicle dealers are subject to the Board's Regulation B (12 CFR part 202); the CFPB's rules, including this rule to implement section 1071, generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

discrimination.[177] Private parties may also bring claims under the civil enforcement provisions of ECOA, including individual and class action claims against creditors for actual and punitive damages for any violation of ECOA.[178]

ii. Home Mortgage Disclosure Act (HMDA)

HMDA, implemented by the CFPB's Regulation C (12 CFR part 1003), requires lenders who meet certain coverage tests to report detailed information to their Federal supervisory agencies about mortgage applications and loans at the transaction level. These reported data are a valuable resource for regulators, researchers, economists, industry, and advocates assessing housing needs, public investment, and possible discrimination as well as studying and analyzing trends in the mortgage market for a variety of purposes, including general market and economic monitoring. There is potential overlap between what is required to be reported under HMDA and what is covered by section 1071 for certain mortgage applications and loans for women-owned, minority-owned, and small businesses.

A violation of HMDA and Regulation C is subject to administrative sanctions, including civil money penalties. Compliance is enforced by the CFPB, the U.S. Department of Housing and Urban Development (HUD), the FDIC, the Board, the National Credit Union Administration (NCUA), or the Office of the Comptroller of Currency (OCC). These regulators have the statutory authority to bring actions to enforce the requirements of HMDA and to engage in research, conduct investigations, file administrative complaints, hold hearings, and adjudicate claims through the administrative enforcement process regarding HMDA.

iii. Fair Housing Act

Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities because of race, color, religion, sex (including sexual orientation and gender identity),[179] disability,[180] familial status, or national origin.[181] The Fair Housing Act [182] and its implementing regulations specifically prohibit discrimination in the making of loans,[183] the purchasing of loans,[184] and in setting the terms and conditions for making loans available,[185] without reference to consumers, legal entities, or the purpose of the loan being made, although these prohibitions relate exclusively to dwellings.[186]

The DOJ and HUD are jointly responsible for enforcing the Fair Housing Act. The Fair Housing Act authorizes the HUD Secretary to issue a Charge of Discrimination on behalf of aggrieved persons following an investigation and a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred.[187] The DOJ may bring lawsuits where there is reason to believe that a person or entity is engaged in a ''pattern or practice'' of discrimination or where a denial of rights to a group of persons raises an issue of general public importance,[188] or where a housing discrimination complaint has been investigated by HUD, HUD has issued a Charge of Discrimination, and one of the parties to the case has ''elected'' to go to Federal court.[189] In Fair Housing Act cases, HUD and the DOJ can obtain injunctive relief, including affirmative requirements for training and policy changes, monetary damages and, in pattern or practice cases, civil penalties.[190]

Upon receipt of a complaint alleging facts that may constitute a violation of the Fair Housing Act or upon receipt of information from a consumer compliance examination or other source suggesting a violation of the Fair Housing Act, Federal executive agencies forward such facts or information to HUD and, where such facts or information indicate a possible pattern or practice of discrimination in violation of the Fair Housing Act, to the DOJ.[191] Private parties may also bring claims under the civil enforcement provisions of the Fair Housing Act.[192]

iv. Other Fair Lending Laws

Several other Federal statutes seek to promote fair lending. The CRA affirmatively encourages institutions to help to meet the credit needs of the entire community served by each institution covered by the statute, and CRA ratings take into account lending discrimination by those institutions.[193] (See part II.F.2.i below for additional discussion of the CRA.) The Americans with Disabilities Act of 1990 prohibits discrimination against persons with disabilities in the provision of goods and services, including credit services.[194] Sections 1981 [195] and 1982 [196] of the Federal Civil Rights Acts are broad anti-discrimination laws that have been applied to many aspects of credit transactions.[197]

[177] *See* 15 U.S.C. 1691e(h).

[178] 15 U.S.C. 1691e(a); Regulation B § 1002.16(b)(1).

[179] *See* U.S. Dep't of Hous. & Urban Dev., *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), *https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf*.

[180] The CFPB uses the term ''disability'' to refer to what the Fair Housing Act and its implementing regulations describe as a ''handicap'' because that is the preferred term. *See, e.g., Hunt* v. *Aimco Props., L.P.,* 814 F.3d 1213, 1218 n.1 (11th Cir. 2016) (noting the term disability is generally preferred over handicap).

[181] 42 U.S.C. 3601 through 3619, 3631.

[182] 42 U.S.C. 3605(b) (noting that for purposes of 3605(a), a ''residential real estate-related transaction'' includes the making or purchasing of loans or providing other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling, or transactions secured by residential real estate).

[183] 24 CFR 100.120.

[184] 24 CFR 100.125.

[185] 24 CFR 100.130.

[186] A ''dwelling,'' as defined by the Fair Housing Act, is any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof. 42 U.S.C. 3602(b).

[187] 42 U.S.C. 3610(g)(1) and (2).

[188] *See* 42 U.S.C. 3614(a).

[189] 42 U.S.C. 3612(o)(1).

[190] *See* 42 U.S.C. 3612, 3614.

[191] 59 FR 2939, 2939 (Jan. 17, 1994).

[192] *See* 42 U.S.C. 3613.

[193] *See* 12 U.S.C. 2901 *et seq.*

[194] *See* 42 U.S.C. 12101 *et seq.*

[195] 42 U.S.C. 1981(a).

[196] 42 U.S.C. 1982.

[197] *See, e.g., Juarez* v. *Soc. Fin., Inc.,* No. 20–CV–03386–HSG, 2021 WL 1375868, at *7 (N.D. Cal. Apr. 12, 2021) (denying motion to dismiss section 1981 claim and finding that ''the ECOA was not intended to limit any of the broad protections afforded by § 1981''); *Perez* v. *Wells Fargo & Co.,* No. 17–CV–00454–MMC, 2017 WL 3314797, at *3 (N.D. Cal. Aug. 3, 2017) (denying motion to dismiss for section 1981 claim and rejecting contention that ECOA superseded section 1981, noting that, although ECOA was a more specific statute, ECOA did not conflict with the section 1981 claims because ''[a] creditor can comply with § 1981 and the ECOA by not discriminating on the basis of any of the categories listed in the two statutes''); *Jackson* v. *Novastar Mortg., Inc.,* 645 F. Supp. 2d 636 (W.D. Tenn. 2007) (motion to dismiss claim that defendants violated sections 1981 and 1982 by racial targeting and by offering credit on less favorable terms on the basis of race denied); *Johnson* v. *Equicredit Corp.,* No. 01–CIV–5197, 2002 U.S. Dist. LEXIS 4817 (N.D. Ill. Mar. 22, 2002) (predatory lending/reverse redlining case brought pursuant to section 1981); *Hargraves* v. *Cap. City Mortg. Corp.,* 140 F. Supp. 2d 7 (D.D.C. 2000) (predatory lending/reverse redlining case brought under both sections 1981 and 1982), *reconsideration granted in part, denied in part,* 147 F. Supp. 2d 1 (D.D.C. 2001) (section 1981 claim dismissed for lack of standing, but not section 1982 claim); *Doane* v. *Nat'l Westminster Bank USA,* 938 F. Supp. 149 (E.D.N.Y. 1996) (mortgage redlining case brought under sections 1981 and 1982); *Fairman* v. *Schaumberg Toyota, Inc.,* No. 94–CIV–5745, 1996 U.S. Dist. LEXIS 9669 (N.D. Ill. July 10, 1996) (section 1981 suit over allegedly predatory credit scheme targeting African Americans and Hispanics); *Steptoe* v. *Sav. of Am.,* 800 F. Supp. 1542 (N.D. Ohio 1992) (mortgage redlining case

Continued

Many States and municipalities have also enacted fair lending, fair housing, and/or civil rights laws (often modeled on their Federal counterparts) that broadly prohibit credit discrimination, including protections for business credit.[198]

v. Facilitating Enforcement

To achieve the congressionally mandated purpose of facilitating enforcement of fair lending laws, the Bureau must collect and make available sufficient data to help the public and regulators identify potentially discriminatory lending patterns that could constitute violations of fair lending laws. Financial regulators and enforcement agencies need a consistent and comprehensive dataset for all financial institutions subject to reporting in order to also use these data in their prioritization, peer analysis, redlining reviews, and screening processes to select institutions for monitoring, examination, or investigation. Data collected pursuant to section 1071 will facilitate more efficient fair lending examinations. For example, regulators will be able to use pricing and other data to prioritize fair lending examinations—without such data, some financial institutions might face unnecessary examination burden while others whose practices warrant closer review may not receive sufficient scrutiny.

Moreover, as discussed in part V below, the Bureau believes specific aspects of the rule offer particular benefits for the enforcement of fair lending laws. For example, the inclusion of pricing data such as interest rate and fees will provide information on disparities in pricing outcomes, and data such as gross annual revenue, denial reasons, and time in business will enable a more refined analysis and understanding of disparities in both underwriting and pricing outcomes. While these data alone generally will not establish compliance with fair lending laws, regulators, community groups, researchers, and financial institutions will be able to use the data to identify potential disparities in small business lending based on disaggregated categories of race and ethnicity. Overall, the data collected and reported under the rule will allow, for the first time, for comprehensive and market-wide fair lending risk analysis that enables a better understanding of disparities in both underwriting and pricing outcomes.

2. Identifying Business and Community Development Needs and Opportunities

The second congressionally mandated purpose of section 1071 is to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[199] While section 1071 does not expressly define the phrase ''business and community development needs,'' other Federal statutes and regulations, including the CRA and the Riegle Community Development and Regulatory Improvement Act of 1994,[200] reference or define the phrases ''business development'' and ''community development'' and can help explain what it means to enable communities, governmental entities, and creditors to ''identify business and community development needs and opportunities.''

The Bureau believes, based on its consideration of these other Federal statutes and regulations, that its rule implementing section 1071 will provide more data to the public—including communities, governmental entities, and creditors—for analyzing whether financial institutions are serving the credit needs of their small business customers. In addition, with data provided under this rule, the public will be better able to understand access to and sources of credit in particular communities or industries, such as a higher concentration of risky loan products in a given community, and to identify the emergence of new loan products, participants, or underwriting practices. The data will not only assist in identifying potentially discriminatory practices, but will contribute to a better understanding of the experiences that members within certain communities may share in the small business financing market.

Increased transparency about application and lending practices across different communities will improve credit outcomes, and thus community and business development. Lenders will be able to better understand small business lending market conditions and determine how best to provide credit to borrowers, where currently they cannot conduct very granular or comprehensive analyses because the data on small business lending are limited. As reduced uncertainty helps lenders to identify potentially profitable opportunities to extend responsible and affordable credit, small businesses stand to benefit from increased credit availability. Transparency will also allow small business owners to more easily compare credit terms and evaluate credit alternatives; without these data, small business owners are limited in their ability to shop for the credit product that best suits their needs at the best price.

i. Community Reinvestment Act (CRA)

The CRA, a part of the Housing and Community Development Act, was passed by Congress in 1977, which found that ''regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.''[201] As such, one of the statutory purposes of the CRA is to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.[202]

The legislative history for the CRA suggests that the concerns motivating its passage included certain practices by banks including redlining (*i.e.,* declining to extend credit in neighborhoods populated by ethnic or racial minorities)[203] and community disinvestment (*i.e.,* taking deposits from lower-income areas, often populated by ethnic or racial minorities, without

brought under sections 1981 and 1982 and the Fair Housing Act); *Evans* v. *First Fed. Sav. Bank of Ind.,* 669 F. Supp. 915 (N.D. Ind. 1987) (section 1982 can be used in mortgage lending discrimination case); *Assocs. Home Equity Servs.* v. *Troup,* 778 A.2d 529 (N.J. 2001) (predatory lending/reverse redlining case brought pursuant to section 1981).

[198] *See, e.g.,* Cal. Civ. Code 51 and 51.5 and Cal. Gov't Code 12955; Colo. Rev. Stat. 24–34–501(3) and 5–3–210; Conn. Gen. Stat. 46a–81e, 46a–81f, and 46a–98; Del. Code Ann. tit. 6, 4604; D.C. Code 2–1402.21; Haw. Rev. Stat. 515–3 and 515–5; 775 Ill. Comp. Stat. 5/1–102, 5/1–103, 5/4–102, 5/3–102, and 5/4–103; Iowa Code 216.8A and 216.10; Me. Rev. Stat. tit. 5, 4553(5–C) and (9–C), 4595 to 4598, and 4581 to 4583; Md. Code Ann. State Gov't 20–705, 20–707, and 20–1103; Mass. Gen. Laws ch. 151B, 4(3B), (14); Minn. Stat. 363A.03 (Subd. 44), 363A.09(3), 363A.16 (Subds. 1 and 3), and 363A.17; N.H. Rev. Stat. Ann. 354–A:10; N.J. Stat. Ann. 10:5–12(i); N.M. Stat. Ann. 28–1–7; N.Y. Civ. Rights Law 40–c(2); N.Y. Exec. Law 296–A; Or. Rev. Stat. 174.100(7) and 659A.421; R.I. Gen. Laws 34–37–4(a) through (c), 34–37–4.3, and 34–37–5.4; Va. Code Ann. 6.2–501(B)(1), 15.2–853, and 15.2–965; Vt. Stat. Ann. tit. 8, 10403 and tit. 9, 2362, 2410, and 4503(a)(6); Wash. Rev. Code 49.60.030, 49.60.040 (14), (26), and (27), 49.60.175, and 49.60.222; Wis. Stat. 106.50 and 224.77. There are also a number of municipalities that have enacted credit discrimination ordinances. *See, e.g.,* Austin City Code 5–1–1 *et seq.;* N.Y.C. Admin. Code 8–101 and 8–107 *et seq.;* S.F. Police Code 3304(a) *et seq.*

[199] ECOA section 704B(a).

[200] Public Law 103–325, tit. I, section 102, 108 Stat. 2160, 2163 (1994) (12 U.S.C. 4701 through 4719).

[201] 12 U.S.C. 2901(a)(3).

[202] 12 U.S.C. 2901(b).

[203] *See* H.R. Rep. No. 561, 94th Cong., 1st Sess. 4 (1975) (''[The practice of redlining] increasingly has served to polarize elements of our society . . . . As polarization intensifies, neighborhood decline accelerates.''), *reprinted in* 1975 U.S.C.C.A.N. 2303, 2305–06.

extending credit or banking services to residents of those areas).[204] The CRA requires the ''appropriate Federal financial supervisory agency'' of a given depository institution to ''prepare a written evaluation of the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods.''[205] These requirements were first implemented by a 1978 rulemaking,[206] and were amended in 1995[207] and 2005.[208] These rulemakings, adopted by each of the agencies responsible for ensuring compliance with the CRA, established specific performance measures,[209] requiring banks to disclose information about their efforts to meet community credit needs via small business, small farm, and community development lending.[210]

The agencies tasked with ensuring compliance—including the OCC,[211] the Board,[212] and the FDIC[213]—evaluate each insured depository institution's record in helping meet the credit needs of its entire community.[214] Overall, the CRA and its regulations generate data that help agencies and the public at large identify instances of redlining, community disinvestment, and geographical areas that are ''banking deserts.''[215] The CRA regulations of the Board and the FDIC currently have the same definitions of ''community development'' that include banking and credit services that support the following: (1) affordable housing for low- and moderate-income individuals;[216] (2) community services for low- and moderate-income individuals;[217] (3) activities that promote economic development by financing small business and small farms;[218] and (4) activities that revitalize or stabilize low- and moderate-income geographies, disaster areas, and certain distressed or underserved middle-income areas based on other factors.[219]

In May 2022, the Board, FDIC and OCC issued an interagency notice of proposed rulemaking for amendments to update and expand the existing CRA regulations (2022 CRA NPRM).[220] In the 2022 CRA NPRM, these three agencies proposed a number of revisions to the agencies' CRA rules, including a number of key changes relating to how the agencies defined community development and how the agencies intended to measure the community development activity of depository institutions.[221]

In the 2022 CRA NPRM, the agencies recognized the value of data to be collected under the Bureau's small business lending rule for assessing efforts at addressing community small business and small farm credit needs, proposing to incorporate aspects of the Bureau's rule into their CRA rules. First, the agencies proposed to define the terms ''small business'' and ''small farm'' consistent with the Bureau's proposal under section 1071, *i.e.,* as those having gross annual revenues of $5 million or less in the preceding fiscal year.[222]

Further, the 2022 CRA NPRM proposed to eliminate the current CRA small business and small farm data collection and reporting requirements,[223] to be replaced in the long term by the Bureau's small business lending data collection and reporting requirements.[224] The agencies noted that this proposed approach is responsive to various stakeholders' requests that the agencies coordinate the small business and small farm definitions across the CRA and section 1071 rulemakings. The agencies also observed that their proposal would reduce burden related to data collection and reporting, particularly if institutions could submit data for CRA purposes under the format of the Bureau's small business lending rule.[225] Data collected pursuant to section 1071 would be used to measure individual bank performance in CRA assessments, and to establish the agencies' benchmarks against which bank CRA performance would be measured for purposes of the small farm and small business portions of the retail lending tests.[226]

Finally, the agencies proposed that if both the CRA and section 1071 rulemakings were finalized, the agencies would make the compliance date for the CRA amendments that hinge upon the Bureau's section 1071 rulemaking similar to the compliance date for the Bureau's final rule.[227]

ii. Community Development Financial Institution Fund (CDFI Fund)

The Riegle Community Development and Regulatory Improvement Act of 1994 authorized the CDFI Fund.[228] In passing that statute, Congress found that many of the Nation's urban, rural, and Native American communities face ''critical social and economic problems arising in part from the lack of economic growth, people living in poverty, and the lack of employment and other opportunities.''[229]

To address these problems, Congress created the CDFI Fund to ''promote economic revitalization and community development'' through investment in and assistance to CDFIs, including enhancing the liquidity of CDFIs.[230]

The concept of community development is central to the operation of the CDFI Fund. While CDFI Fund regulations do not directly define that term, any entity applying for CDFI certification must have ''promoting community development'' as its ''primary mission.''[231] In making this determination, the CDFI Fund considers whether the activities of the entity are purposefully directed toward improving the social and/or economic conditions of underserved people, which may include low-income persons or persons who lack adequate access to capital and financial services and residents of

[204] Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later,* 18 Pac. L.J. 1071, 1076–77 & n.23 (1987) (citing 123 Cong. Rec. S8958 (daily ed. June 6, 1977), which stated that Sen. Proxmire, the congressional sponsor of the Act described redlining as ''the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere, and they will actually or figuratively draw a red line on a map around the areas of their city,'' further noting that those lines are drawn ''sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black . . . .'').

[205] 12 U.S.C. 2906(a)(1).

[206] 43 FR 47144 (Oct. 12, 1978).

[207] 60 FR 22156 (May 4, 1995).

[208] 70 FR 44256 (Aug. 2, 2005).

[209] 12 CFR 228.11.

[210] *See, e.g.,* 12 CFR 25.42, 228.11.

[211] 12 CFR part 25.

[212] 12 CFR part 228.

[213] 12 CFR parts 345, 195.

[214] Most specifically, that record is taken into account in considering an institution's application for deposit facilities, including mergers and acquisitions with other financial institutions and the opening of bank branches.

[215] OCC regulations define ''CRA desert'' as an area that has ''significant unmet community development or retail lending needs'' and where: (1) Few banks have branches or non-branch deposit-taking facilities, (2) There is ''less retail or community development lending than would be expected based on demographic or other factors,'' or (3) The area ''lacks community development organizations or infrastructure.'' 12 CFR 25.03.

[216] 12 CFR 228.12(g)(1), 345.12(g)(1).

[217] 12 CFR 228.12(g)(2), 345.12(g)(2).

[218] 12 CFR 228.12(g)(3), 345.12(g)(3).

[219] 12 CFR 228.12(g)(4), 345.12(g)(4).

[220] Bd. of Governors of the Fed. Rsrv. Sys.; Fed. Deposit Ins. Corp.; and Off. of the Comptroller of the Currency, Treasury, Community Reinvestment Act, Joint Proposed Rule, 87 FR 33884 (June 3, 2022).

[221] 87 FR 33884, 33885 (June 3, 2022).

[222] *Id.* at 33890.

[223] *Id.* at 33930.

[224] *Id.* at 33997.

[225] *Id.* at 33928

[226] *Id.* at 33941.

[227] *Id.* at 33930.

[228] 12 U.S.C. 4701(b).

[229] 12 U.S.C. 4701(a)(1).

[230] 12 U.S.C. 4701(b).

[231] 12 CFR 1805.201(b)(1).

economically distressed communities.[232]

The CDFI Fund collects data from the recipients of its financial and technical assistance, shedding some light on the extent of community development in the areas where CDFIs operate.[233] The CDFI Fund also publishes the data it receives with appropriate redactions to protect privacy interests.[234] However, given that CDFIs comprise a relatively small share of the overall small business lending market, 1071 data will materially enhance understanding of the broader extent of community development outside of areas where CDFIs already operate. These data will also likely augment the data the CDFI Fund already receives.

In May 2020, the CDFI Fund issued a request for comment on several aspects of its CDFI program, including proposed changes to the application for certification, as well as proposed changes to the data collection and reporting processes of the CDFI Fund. The RFI proposed a number of other revisions to the data collection and reporting regime in May 2020, including the automation of key elements of existing reporting and improvements to data quality.[235]

In October and November 2022, the CDFI Fund announced that based on public comments, it had revised its proposed changes to the application for certification, and data collection and reporting requirements, subject to another round of public comment prior to the anticipated implementation of changes in April 2023.[236] The CDFI Fund released a preview of changes to the application requirements.[237] One change to the Primary Mission portion of the application, which asks whether an applicant is focused on the mission of community development, would be the addition of bright-line questions related to an organization's lending and financing practices.[238] Specifically, an applicant can be disqualified from CDFI certification if financial products or practices it offers are harmful to low-income and underserved communities.[239] The bright-line questions the new certification application would ask include whether, amongst other things, applicants consider a small business borrower's ability to repay a loan on its terms,[240] whether they have accommodative or concessionary policies or programs for struggling borrowers, and whether loans priced above 36 percent APR meet certain safety and consumer protection standards.

In October 2022, the CDFI Fund also published revisions to the Target Market requirements of the application for CDFI certification.[241] Currently, an applicant must demonstrate that it serves at least one eligible Target Market (either an Investment Area or a Targeted Population). The revisions, if finalized, would eliminate the geographical boundaries and mapping requirements for most Target Markets, replacing these requirements with customized investment areas. In late October 2022, the CDFI Fund published a proposed list of pre-approved methodologies to identify target markets.[242] These methodologies include determining whether most recipients of a CDFI applicant's funds—whether individuals, for-profit entities, or non-profit entities—are members of certain demographic groups (African American, Hispanic, Native American, Native Hawaiian, Native Alaskan, Other Pacific Islanders, people with disabilities, certified CDFIs, low-income targeted populations).[243] These data are collected using a variety of overlapping methods specific to each demographic status, including self-reporting,[244] in-person or photo-identification-based visual observation,[245] surname analysis,[246] government-issued or Tribal-issued identification to demonstrate affiliation,[247] and/or income and residence or business location.[248]

The most recently published amendments to the application requirements remain under consideration by the CDFI Fund.[249]

3. Impact of Small Business Lending Data Under Section 1071

The Bureau's implementation of section 1071 will provide on an annual basis application-level data on small business credit, including certain protected demographic information. This will include information on applications for credit that are originated, as well as those that are denied, withdrawn, incomplete, or approved by the financial institution but not accepted by the applicant. This information will enable stakeholders of all kinds in the small business lending market to gain insight into trends in small business lending. It will also provide insight into the interaction of supply and demand for small business credit over time.

In terms of facilitating fair lending enforcement, interested government agencies and other stakeholders will be able to use data collected and reported under this final rule to identify possible fair lending risks using statistical methods.

Regarding the identification of business and community development needs, small business lending data collected and reported under this final rule will help government entities and

[232] *Id.*

[233] 12 CFR 1805.803(e) (requiring recipients of technical and financial assistance to provide to the CDFI Fund certain information and documentation).

[234] 12 CFR 1805.803(e)(4).

[235] CDFI Fund, *Annual Certification and Data Collection Report Changes* (2020), *https://www.cdfifund.gov/sites/cdfi/files/documents/annual-certification-report-2020-final.pdf.*

[236] The CDFI Fund released a preview of the final certification application, pending OMB approval. CDFI Fund, *CDFI Certification Application Preview* (Oct. 2022), *https://www.cdfifund.gov/sites/cdfi/files/2022-10/CDFI_Certification_Application_Preview_Final_10322.pdf.*

[237] CDFI Fund, *CDFI Fund Advance Look: Preview the Revisions to the New CDFI Certification Application* (Oct. 4, 2022), *https://www.cdfifund.gov/news/487.*

[238] CDFI Fund, *Community Development Financial Institution Certification Application: Overview of Final Revisions and Modifications* (Oct. 5, 2022), *https://www.cdfifund.gov/sites/cdfi/files/2022-10/CDFI_Certification_Application_Overview_FINAL.pdf.*

[239] *Id.* at 23–31.

[240] *Id.* at 27.

[241] CDFIs must service either certain investment areas or targeted populations.

[242] CDFI Fund, *CDFI Target Market Assessment Methodologies,* Notice and Request for Comment. 87 FR 63852 (Oct. 20, 2022). Comments were due by December 19, 2022. The notice refers to a separate document with the target market methodologies. CDFI Fund, Proposed Pre-Approved Target Market Assessment Methodologies (Oct. 19, 2022), *https://www.cdfifund.gov/sites/cdfi/files/2022-10/Proposed_PreApproved_TM_Assessment_Methodologies_FINAL.pdf.*

[243] *Id.*

[244] *See, e.g., id.* at 1 (African American), 3 (Hispanic), 10 (non-Hawaiian Pacific Islander), 12 (disability status).

[245] *See, e.g., id.* at 1 (African American), 3 (Hispanic), 12 (disability status).

[246] *See, e.g., id.* at 3 (Hispanic); *see also List of Hispanic Surnames for OTP-Hispanic Pre-Approved Assessment Methodology, https://www.cdfifund.gov/sites/cdfi/files/2022-10/OTP_Hisp_HispanicSurnameList_2010Census.xlsx* (list of qualifying Hispanic surnames).

[247] *See, e.g.,* CDFI Fund, *Proposed Pre-Approved Target Market Assessment Methodologies,* at 1 (Oct. 19, 2022), *https://www.cdfifund.gov/sites/cdfi/files/2022-10/Proposed_PreApproved_TM_Assessment_Methodologies_FINAL.pdf* (reporting for African American recipients of funds).

[248] *Id.* at 14 (low-income individuals or entities).

[249] The CDFI Fund paused acceptance of new applications for CDFI certification in October 2022 and will reopen for new applications once the revisions to the application for certification and the transaction-level data collection and reporting regimes are finalized. While initially anticipating that it would finalize changes to the application process in April 2023 after receiving public comments, the CDFI Fund issued a statement in January 2023 that it had received a robust response to the request for comments on the revised application and reporting tools, and that consideration of these comments, while not requiring a lengthy delay, would require postponement of the new application and associated reporting tools beyond April 2023. CDFI Fund, *An Update on the CDFI Fund's Certification Application Review Process* (Jan. 24, 2023), *https://www.cdfifund.gov/news/501.*

public and private lenders identify and target sub-segments of the market that remain underserved, facilitating entrepreneurship and business development in those communities. By reducing uncertainty about the conditions of the small business lending market, data collected under the final rule can help creditors identify potentially profitable opportunities to extend responsible and affordable credit, potentially increasing credit availability to small businesses. Increased transparency, in turn, will also help small business borrowers to understand what credit is available and on what terms, thereby improving their ability to access the credit they need and further serving community and business development goals.

The Bureau believes that small business lending data will come to play an important role for the small business lending market, as HMDA data have done for the mortgage market. HMDA data have provided lenders, community groups, and others the tools to identify and address fair lending risks and strengthen fair lending oversight and enforcement. In a similar way, these data will allow diverse stakeholders to analyze lending patterns that are potentially discriminatory. By identifying and addressing discriminatory small business lending practices, the Bureau will help to ensure fair, equitable, and nondiscriminatory access to credit for both individuals and their communities.[250]

HMDA data have also proven effective in creating transparency in the mortgage market that improves the understanding of credit needs, where they may remain unmet, and the relationship between mortgage lending and community development. The Bureau believes that small business lending data collected and reported under this final rule will provide the Bureau and other stakeholders with critical insights into the small business lending market. The COVID–19 pandemic has shown that transparency is essential at a time of crisis, when small businesses may be in urgent need of credit in order to recover from economic shocks.

The advancement of both statutory purposes of section 1071—facilitating fair lending enforcement and identifying business and community development needs—in turn will support small businesses across all sectors of the economy, which are fundamental to the economic health of the U.S. and which have been hard hit by recent economic and financial crises. Given the critical importance of small businesses to economic growth and wealth creation, that will also help the economy as a whole.

III. Summary of the Rulemaking Process

In the years leading up to the release of the CFPB's NPRM to implement section 1071 of the Dodd-Frank Act, the CFPB held over 100 outreach meetings regarding the rulemaking with financial institutions, trade associations, community groups, researchers, governmental entities, and other stakeholders. The CFPB also took a number of other steps, beyond individual stakeholder meetings, to solicit feedback more broadly from the public on a rule to implement section 1071. Most recently, the CFPB received public comments on its NPRM. Each of these efforts are discussed in turn below.

A. Pre-Proposal Outreach and Engagement

Request for information, field hearing, and white paper on small business lending. On May 10, 2017, the CFPB published a request for information regarding the small business lending market[251] in which it sought public comment to understand more about the products that are offered to small businesses, the financial institutions that offer such credit, the small business lending data that currently are used and may be maintained by financial institutions, the potential complexity and cost of small business data collection and reporting, and privacy concerns related to the disclosure purposes of section 1071.[252] On the same date, the CFPB held a field hearing regarding section 1071 at which the request for information was announced and then-Director Richard Cordray noted the importance of a section 1071 rulemaking given the absence of systematic data on how small businesses are faring and whether or how much they are being held back by financing constraints.[253] Finally, at the same time, the CFPB also published its White Paper on small business lending,[254] which reflected the initial findings of its research providing a preliminary understanding of the small business lending environment, with a particular emphasis on lending to women-owned and minority-owned small businesses.

1071 symposium. In November 2019, the CFPB held a symposium on section 1071 to assist it in its policy development process and to receive feedback from experts, including academic, think tank, consumer advocate, industry, and government experts in the small business lending arena.[255] The symposium had two panels. The first panel focused on the evolution in the small business lending marketplace. The second panel included a discussion surrounding the implementation of section 1071, including issues raised in response to the CFPB's request for information.

Small Business Advisory Review Panel. Under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[256] which amended the Regulatory Flexibility Act (RFA), the CFPB must convene and chair a Small Business Advisory Review Panel (Panel) if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[257] The Panel considers the impact of the proposals under consideration by the CFPB and obtains feedback from representatives of the small entities that would likely be subject to the rule. The Panel is comprised of a representative from the CFPB, the Chief Counsel for Advocacy of the Small Business Administration (SBA), and a representative from the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Representatives from 20 small businesses were selected as small entity representatives for this SBREFA process. These individuals represented small businesses that are financial institutions—including community banks, credit unions, community development financial institutions (CDFIs), financial technology firms, and commercial finance companies—that

[250] *See* 12 U.S.C. 5493(c)(2)(A).

[251] 82 FR 22318 (May 15, 2017).

[252] In response to the request for information, the CFPB received over 2,000 comments in total, and over 100 unique comments offering detailed substantive responses on the topics raised in the request for information. These comments from the public helped to inform the CFPB's approach in its SBREFA Outline. *See* CFPB, *Request for Information Regarding the Small Business Lending Market,* Docket ID CFPB–2017–0011, *https://www.regulations.gov/docket/CFPB-2017-0011.*

[253] *See* CFPB, *Prepared Remarks of CFPB Director Richard Cordray at the Small Business Lending Field Hearing* (May 10, 2017), *https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-small-business-lending-field-hearing/.*

[254] CFPB, *Key dimensions of the small business lending landscape* (May 2017), *https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf* (White Paper).

[255] CFPB, *Symposium: Section 1071 of the Dodd-Frank Act* (held Nov. 6, 2019), *https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-section-1071-dodd-frank-act/.*

[256] Public Law 104–121, 110 Stat. 857 (1996).

[257] 5 U.S.C. 609(b).

would likely be directly affected by a rule implementing section 1071.

On September 15, 2020, the CFPB issued its *Outline of Proposals under Consideration and Alternatives Considered* (SBREFA Outline) for its rulemaking pursuant to section 1071, a detailed document that discusses (1) the relevant law, (2) the regulatory process, (3) the rule proposals the CFPB was considering, and (4) an economic analysis of the potential impacts of those proposals on directly affected small entities.[258]

The CFPB convened the Panel for this proposed rule on October 15, 2020 and held a total of four meetings with small entity representatives during October 19–22, 2020, conducted online via video conference (Panel Outreach Meetings). In preparation for the Panel Outreach Meetings and to facilitate an informed and detailed discussion of the proposals under consideration, discussion questions for the small entity representatives were included throughout the SBREFA Outline.[259]

In advance of the Panel Outreach Meetings, the CFPB, SBA Office of Advocacy, and OIRA held a series of video conferences with the small entity representatives to describe the Small Business Review Process, obtain important background information about each small entity representative's current business practices, and begin discussions on selected portions of the proposals under consideration.

All 20 small entity representatives participated in the Panel Outreach Meetings. Representatives from the CFPB, SBA Office of Advocacy, and OIRA provided introductory remarks. The meetings were then organized around discussions led by the CFPB about each aspect of the proposals under consideration and the potential impact on small businesses. The CFPB also invited small entity representatives to submit written feedback by November 9, 2020; most did so.

On December 15, 2020, the CFPB released the *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking* (SBREFA Panel Report).[260] This report includes a summary of the feedback received from small entity representatives during the panel process (including oral feedback received during the pre-Panel video conferences and Panel Outreach Meetings, as well as timely submitted written feedback) and findings and recommendations made by the Panel.[261] As required by the RFA, the CFPB considered the Panel's findings in its initial regulatory flexibility analysis, as set out in part VIII of the NPRM.

The CFPB also invited other stakeholders to submit feedback on the SBREFA Outline by December 14, 2020. The CFPB received approximately 60 submissions from a variety of other stakeholders, including financial institutions, trade associations, community groups, a think tank, and a government agency.[262]

The CFPB considered the feedback it received from small entity representatives, the findings and recommendations of the Panel, and the feedback from other stakeholders in preparing the NPRM. The feedback, findings, and recommendations were summarized throughout the NPRM where relevant.

One-Time Cost Survey. On July 22, 2020, the CFPB released a voluntary survey to measure the one-time costs of compliance with an eventual small business lending data collection rule.[263] The objective of the survey was to solicit, from institutions offering small business credit products that could potentially be covered by this rule, information about potential one-time costs to prepare to collect and report data. The deadline for responses was October 16, 2020. The CFPB received responses from 105 financial institutions.[264] The results of the survey inform the CFPB's analyses of the potential impacts of the rule as set out in parts IX and X below.

ECOA request for information. On July 28, 2020, the CFPB issued a request for information to seek public input on ECOA and Regulation B.[265] In this request for information, the CFPB sought public comment on a number of topics, including small business lending and the ways that the CFPB, in light of its authority under ECOA and Regulation B, might support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned.[266]

B. Ongoing Outreach and Engagement

Ongoing outreach. The CFPB conducts outreach to industry and other stakeholders to understand their experiences with the small business finance market, economic conditions, and the collection and reporting of data regarding that market. A particular near-term priority in the CFPB's recent outreach has been the impacts of the pandemic and the effectiveness of the Federal government's response. Findings from outreach activities inform the CFPB on matters affecting the small business sector.

Technical outreach. In the months before the publication of the NPRM, the CFPB began conducting technical outreach with third-party software providers that serve financial institutions and software and technology staff from financial institutions that are likely to have to report small business lending data to the CFPB. With these software vendors and technical staff, the CFPB has held and, after publication of this final rule, will continue to hold discussions concerning

[258] CFPB, *Small Business Advisory Review Panel for Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered* (Sept. 15, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf* (SBREFA Outline). *See also* CFPB, *Consumer Financial Protection Bureau Releases Outline of Proposals Under Consideration to Implement Small Business Lending Data Collection Requirements* (Sept. 15, 2020), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-outline-proposals-implement-small-business-lending-data-collection-requirements/*.

[259] These questions also appeared in a shorter Discussion Guide for Small Entity Representatives. *See* CFPB, *Small Business Advisory Review Panel for Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking, Discussion Guide for Small Entity Representatives* (Sept. 15, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_discussion-guide_2020-09.pdf*.

[260] CFPB, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking* (Dec. 14, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa-report.pdf* (SBREFA Panel Report). *See also* CFPB, *Consumer Financial Protection Bureau Releases Report on Implementing the Dodd-Frank Act's Small Business Lending Data Collection Requirement* (Dec. 15, 2020), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-report-on-implementing-the-dodd-frank-acts-small-business-lending-data-collection-requirement/*. The CFPB's SBREFA Outline and related materials, as well as the CFPB's presentation slides framing the discussion during the Panel Outreach Meetings, are appended to the SBREFA Panel Report. *See* SBREFA Panel Report at app. C through F.

[261] The written feedback from small entity representatives is appended to the SBREFA Panel Report. *See id.* at app. A.

[262] Feedback received from these stakeholders on the SBREFA Outline is available on the public docket for the NPRM. *See https://www.regulations.gov/docket/CFPB-2021-0015/document?documentTypes=Supporting%20%26%20Related%20Material*.

[263] CFPB, *Survey: Small Business Compliance Cost Survey* (July 22, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_1071-survey_2020-10.pdf*.

[264] See part VI below for additional details regarding this survey.

[265] CFPB, *Consumer Financial Protection Bureau Requests Information on Ways to Prevent Credit Discrimination and Build a More Inclusive Financial System* (July 28, 2020), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-rfi-prevent-credit-discrimination-build-more-inclusive-financial-system/*.

[266] 85 FR 46600, 46602 (Aug. 3, 2020).

the technical systems and procedures the CFPB will provide for financial institutions to submit their data. The CFPB intends to understand the technology solutions currently provided by vendors to support the small business lending activities of financial institutions, as well as their experience in providing financial institutions with technical support for previous data collection regulations. The CFPB believes this information will be helpful in informing the CFPB in its design and implementation of a platform for intake and processing of data to help the platform integrate, to the extent possible, with existing systems and data collection procedures. These discussions also serve to raise awareness of technology providers as to their potential future role in supporting the rule as well as the lead time that may be necessary for some or all affected financial institutions to come into compliance with the requirements of this final rule. This outreach process is ongoing and will continue after the publication of this final rule.

Sample data collection form usability testing. After the NPRM was released, the CFPB, after the appropriate notice in the **Federal Register**, and a 30-day comment period, sought and received OMB approval to conduct several rounds of message and user testing research related to the sample form.[267] The CFPB conducted qualitative research to learn about the experience of filling out the sample data collection form and to explore design options. The CFPB engaged a vendor to conduct interviews with small business stakeholders and listening sessions with small business owners to test different versions of the introductory language on the sample data collection form. The CFPB also conducted qualitative user interviews with small business owners to test their reactions to different versions of the sample data collection form. In addition to comments received in response to the CFPB's proposed sample data collection form as part of the NPRM, the feedback gathered as part of these testing efforts was also considered by the CFPB in finalizing the sample data collection form issued with this final rule. The CFPB is releasing a report, simultaneously with the issuance of this final rule, summarizing the findings from all three rounds of qualitative research testing.[268]

[267] 87 FR 37504 (June 23, 2022).

[268] CFPB, *User testing for sample data collection form for the small business lending final rule* (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/*.

C. Notice of Proposed Rulemaking

On September 1, 2021, the CFPB issued its proposal to implement section 1071. The NPRM was published in the **Federal Register** on October 8, 2021,[269] and the public comment period closed on January 6, 2022.[270] The CFPB received approximately 2,100 comments on the proposal during the comment period.[271] Approximately 650 of these comments were unique, detailed comment letters representing diverse interests. These commenters included lenders such as banks and credit unions, CDFIs, community development companies, Farm Credit System lenders, online lenders, and others; national and regional industry trade associations; software vendors; business advocacy groups; community groups; research, academic, and other advocacy organizations; members of Congress; Federal and State government offices/agencies; small businesses; and individuals.

The remaining comments included some duplicate submissions (*i.e.,* letters with the same content from the same commenter submitted through multiple channels, or letters with the same content submitted by multiple people on behalf of the same commenting organization) as well as comments that were part of several comment submission campaigns organized by industry or community groups. Such comment campaigns typically advocated for or against particular provisions in the NPRM and urged additional changes. These comments were considered by the CFPB along with all other comments received, including any additional remarks included in otherwise identical comment letters.

In addition, the CFPB also considered comments received after the comment period closed via approximately 17 ex parte submissions and meetings.[272] Materials on the record, including all ex parte submissions and summaries of ex parte meetings, are available on the public docket for this rulemaking.[273]

The CFPB received comments on all aspects of the proposed rule, as well as on the proposed approach to protecting privacy interests via modification or deletion of data prior to publication, and on its analyses of the proposed rule's impacts. Relevant information received via comment letters, as well as ex parte submissions, is discussed below in the section-by-section analysis and subsequent parts of this document, as applicable. The CFPB considered all the comments it received regarding the proposal, made certain modifications, and is adopting the final rule as described in part V below. Comments relevant to the CFPB's approach to privacy are discussed in part VIII and regarding its impact analyses in parts IX to XI.

[269] 86 FR 56356 (Oct. 8, 2021).

[270] The CFPB set the length of the comment period on the proposal at 90 days from the date on which it was published in the **Federal Register**. The CFPB received several written requests to extend the comment period. The CFPB believes that the 90-day comment period set forth in the NPRM (along with the 38 days that elapsed between the CFPB's issuance of the NPRM on September 1, 2021 and its publication in the **Federal Register** on October 8, 2021) gave interested parties sufficient time to consider the CFPB's proposal and prepare their responses, and thus did not extend the comment period beyond January 6, 2022.

[271] *See https://www.regulations.gov/docket/CFPB-2021-0015/comments.*

[272] CFPB, *Policy on Ex Parte Presentations in Rulemaking Proceedings,* 82 FR 18687 (Apr. 21, 2017).

IV. Legal Authorities

The Bureau is issuing this final rule pursuant to its authority under section 1071. Some aspects of this rule are also adopted under the Bureau's more general rulemaking authorities in ECOA. Congress enacted ECOA to prohibit discrimination against any applicant, regarding any aspect of a credit transaction, on the basis of, amongst other characteristics, race, color, religion, national origin, and sex.[274] The Bureau has certain oversight, enforcement, and supervisory authority over ECOA requirements and has rulemaking authority under the statute.

ECOA is implemented in Regulation B.[275] Among other things, Regulation B generally prohibits creditors from inquiring about an applicant's race, color, religion, national origin, or sex, with limited exceptions, including if it is required by law.[276]

As discussed above, in the Dodd-Frank Act Congress amended ECOA by adding section 1071, which directs the Bureau to adopt regulations governing the collection and reporting of small business lending data. Specifically, section 1071 requires financial institutions to collect and report to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses.[277] Congress enacted section 1071 for the purpose of (1) facilitating enforcement of fair lending laws and (2) enabling communities, governmental entities, and creditors to identify business and

[273] See *https://www.regulations.gov/docket/CFPB-2021-0015/comments*.

[274] 15 U.S.C. 1691(a)(1).

[275] 12 CFR part 1002.

[276] Regulation B § 1002.5(a)(2).

[277] ECOA section 704B.

community development needs and opportunities of women-owned, minority-owned, and small businesses.[278] The Bureau often refers to these as section 1071's fair lending purpose and its business and community development purpose, respectively.

To advance these statutory purposes, section 1071 grants the Bureau general rulemaking authority for section 1071, providing that the Bureau shall prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071.[279] ECOA section 704B(g)(2) also permits the Bureau to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau principally relies on its 704B(g)(1) authority in this proposed rule and relies on 704B(g)(2) when proposing specific exceptions or exemptions to section 1071's requirements. Section 704B(g)(3) directs the Bureau to issue guidance designed to facilitate compliance with the requirements of section 1071.

In addition, section 703(a) of ECOA gives the Bureau broad authority to prescribe regulations to carry out the purposes of ECOA, including provisions that in the judgment of the Bureau are necessary or proper to effectuate the purposes of ECOA, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. That section also states that the Bureau may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of ECOA, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

Section 1071 establishes requirements or obligations for financial institutions that the Bureau is implementing in this final rule. These provisions include the requirement in ECOA section 704B(b) that a financial institution shall inquire whether an applicant for credit is a women-owned, minority-owned, or small business; that a financial institution must maintain a record of responses to such inquiry, separate from the application; that an applicant may refuse to provide any information requested regarding the inquiry under 704B(b); that a financial institution must limit access of loan underwriters, or other officers or employees of the financial institution or any affiliate, to applicant responses to inquiries under 704B(b); and that if a financial institution determines that a loan underwriter or other officer or employee should have access to any information provided by the applicant pursuant to a request under 704B(b) that the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.[280]

ECOA section 704B(e)(1) directs financial institutions to compile and maintain, in accordance with regulations of the Bureau, records of the information provided by applicants for credit pursuant to a request under 704B(b). Section 704B(e)(2) requires that the information compiled and maintained under 704B(e)(1) be itemized in order to clearly and conspicuously disclose an enumerated list of data points. Section 704B(e)(2)(H) requires financial institutions to compile and maintain any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071.

Several provisions of section 1071 expressly refer to regulations to be promulgated by the Bureau to implement certain requirements, including in ECOA section 704B(e)(1) regarding how financial institutions must compile and maintain data pursuant to section 1071, and in 704B(f)(2)(B) and (C) regarding the form of information made available by financial institutions to the public and the form and manner in which the Bureau itself should make data available to the public generally.

Two provisions expressly give the Bureau discretion with respect to public availability of small business lending data. Specifically, ECOA section 704B(e)(4) states that the Bureau may, at its discretion, delete or modify data before making it available to the public if the Bureau determines that the deletion or modification of the data would advance a privacy interest. Section 704B(f)(3) gives the Bureau the discretion to compile and aggregate data for its own use, as well as to make public such compilations of aggregate data.

V. Section-by-Section Analysis

Overview

In this *Overview* of part V, the CFPB first provides some background regarding section 1071, a discussion of the Home Mortgage Disclosure Act of 1975 (HMDA), and a brief summary of the final rule. Each regulatory provision of the final rule, along with its rationale and relevant feedback received through the public comment process, is discussed in detail in the section-by-section analyses that follow. The CFPB has made several major, and a number of minor, adjustments to the rule in response to comments received on the proposal. Major changes are noted in the summary of the final rule below; all changes are discussed in detail in the section-by-section analyses that follow.

Next, the CFPB discusses the high-level and general comments received in response to the NPRM. The CFPB also addresses several issues for which there is no corresponding regulatory text or commentary. Finally, the CFPB discusses the conforming amendments it is making to existing Regulation B.

A. Introduction to Section 1071

As discussed above, section 1071 of the Dodd-Frank Act requires that financial institutions collect and report to the CFPB certain data regarding applications for credit for women-owned, minority-owned, and small businesses. Section 1071's statutory purposes are to (1) facilitate enforcement of fair lending laws, and (2) to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the CFPB to require any additional data that it determines would aid in fulfilling section 1071's statutory purposes. Section 1071 also contains a number of other requirements, including those that address restricting the access of underwriters and other persons to certain data and publication of data. In addition, section 1071 permits the CFPB to modify or delete data prior to publication if it determines that such a deletion or modification would advance a privacy interest.

Section 1071 directs the CFPB to prescribe such rules, and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. It also permits the CFPB to adopt exceptions to any requirement

[278] ECOA section 704B(a).

[279] ECOA section 704B(g)(1).

[280] ECOA section 704B(b)(1) and (2), (c), (d)(1) and (2).

or to exempt financial institutions from the requirements of section 1071 as it deems necessary or appropriate to carry out the purposes of section 1071. Section 1071 also directs the CFPB to issue guidance designed to facilitate compliance with the requirements of section 1071. As discussed in part IV above and throughout the section-by-section analyses in this part V, the CFPB's rule implements these statutory provisions.

B. Section 1071 and HMDA

HMDA is a data collection and reporting statute that requires certain depository institutions and for-profit nondepository institutions to collect, report, and disclose data about originations and purchases of mortgage loans, as well as mortgage loan applications that do not result in originations (for example, applications that are denied or withdrawn).[281] The CFPB's Regulation C, 12 CFR part 1003, implements HMDA. In light of certain similarities between section 1071 and HMDA as data collection and reporting statutes with different markets but similar fair lending enforcement and community development purposes, the CFPB's section-by-section analyses in this part V sometimes discusses how similar provisions are addressed in the context of HMDA. Of course, the markets to which HMDA and section 1071 apply are also different in significant respects, and those differences are reflected between the present rule and Regulation C, as discussed further in the section-by-section analyses in this part V.

HMDA and Regulation C's purposes are: (1) to help determine whether financial institutions are serving their communities' housing needs; (2) to assist public officials in distributing public investment to attract private investment; and (3) to assist in identifying potential discriminatory lending patterns and enforcing antidiscrimination statutes.

A covered institution for purposes of HMDA reporting is a depository or nondepository institution that meets the relevant coverage criteria set forth in the regulation. A covered transaction under HMDA is generally a loan or line of credit secured (or, for applications, proposed to be secured) by a lien on a dwelling, that is not specifically excluded under Regulation C § 1003.3(c). The data points generally required to be reported about each covered transaction can be grouped into four broad categories: [282] information about the applicants, borrowers, and underwriting process, information about the property securing the loan or proposed to secure the loan, information about the features of the loan, certain unique identifiers.

Covered institutions are required to submit their HMDA data by March 1 following the calendar year for which data are collected. Covered institutions with larger volumes of covered loans and applications are required to submit their HMDA data for each of the first three quarters of the year in addition to their annual submission.

Following the calendar year in which HMDA data are collected, a covered institution's disclosure statement [283] and modified loan/application register become publicly available on the FFIEC's HMDA Platform.[284] Aggregate reports for each Metropolitan Statistical Area and Metropolitan Division that show lending patterns by property location, age of housing stock, and income level, sex, ethnicity, and race are also publicly available on the same platform, which also allows users to create custom datasets, reports, and visualizations from the HMDA data.

HMDA data are the primary source of information for regulators, researchers, economists, industry, and advocates analyzing the mortgage market both for HMDA's purposes and for general market monitoring. HMDA data are used by the Federal supervisory agencies to support a variety of activities. For example, Federal supervisory agencies use HMDA data as part of their fair lending [285] examination process, and also use HMDA data in conducting CRA [286] performance evaluations. HMDA data provide the public with information on the home mortgage lending activities of particular reporting entities and on activity in their communities. These data are used by local, State, and Federal officials to evaluate housing trends and issues and by community organizations to monitor financial institution lending patterns.

C. Summary of the Final Rule

The CFPB is adding a new subpart B to Regulation B to implement the requirements of section 1071. The CFPB is also making some conforming amendments to existing Regulation B. The CFPB's final rule is summarized below, in the order of the section-by-section analyses in this part V that follow.

1. General Provisions (§§ 1002.5(a)(4), 1002.101, and 1002.102)

Changes to existing Regulation B. The CFPB is amending existing § 1002.5(a)(4) to expressly permit voluntary collection and reporting of information regarding the ethnicity, race, and sex of applicants' principal owners, or whether the applicant is a minority-owned, women-owned, or LGBTQI+-owned business, in certain circumstances.

The Bureau is also making other nonsubstantive conforming edits in existing Regulation B to maintain consistency and avoid confusion.

Authority, purpose, and scope (§ 1002.101). Section 1002.101 sets forth the authority, purpose, and scope for subpart B. Among other things, this section states section 1071's two statutory purposes of facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Definitions (§ 1002.102). Section 1002.102 includes a number of definitions for terms used in subpart B, which generally fall into several categories. First, some definitions refer to terms defined elsewhere in subpart B—specifically, terms of particular importance including business, covered application, covered credit transaction, covered financial institution, financial institution, and small business. Second,

[281] 12 U.S.C. 2801 *et seq.*

[282] Under the Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law 115–174, 132 Stat. 1296 (2018), as implemented in Regulation C § 1003.3(d), certain HMDA-covered institutions may be eligible for partial exemptions from some of the HMDA reporting requirements and only certain covered loans and applications are covered under partial exemptions. If a covered loan or application is covered under a partial exemption, the covered institution is not required to collect, record, and report certain data points.

[283] A disclosure statement contains aggregated data derived from loan-level data.

[284] A HMDA loan/application register contains the record of information required to be collected and the record submitted annually or quarterly, as applicable. A modified loan/application register is a covered institution's loan/application register modified by the CFPB, on its website, to protect applicant and borrower privacy. The CFPB interprets HMDA, as amended by the Dodd-Frank Act, to call for the use of a balancing test to determine whether and how HMDA data should be modified prior to its disclosure to the public in order to protect applicant and borrower privacy while also fulfilling HMDA's public disclosure purposes. *See* 80 FR 66127, 66133–34 (Oct. 28, 2015). In December 2018, the CFPB issued final policy guidance describing the modifications the CFPB intends to apply to the loan-level HMDA data that covered institutions report before the data are disclosed publicly. *See* 84 FR 649 (Jan. 31, 2019).

[285] *See* ECOA (15 U.S.C. 1691 through 1691f), Regulation B (12 CFR part 1002), and the Fair Housing Act (42 U.S.C. 3605, 24 CFR part 100).

[286] 12 U.S.C. 2901 through 2908, and 12 CFR parts 25, 195, 228, and 345.

some definitions refer to terms defined elsewhere in existing Regulation B (*i.e.,* business credit, credit, and State) or other regulations (*i.e.,* a portion of the definitions of small business and affiliate reference an SBA regulation). Finally, the remaining terms are defined in § 1002.102, including applicant, closed-end credit transaction, LGBTQI+ individual, LGBTQI+-owned business, minority-owned business, open-end credit transaction, principal owner, small business lending application register, women-owned business, and a portion of the definition of affiliate.

2. Coverage (§§ 1002.103 Through 1002.106)

Covered applications (§ 1002.103). Section 1002.103 defines what is, and is not, a covered application under subpart B; this definition triggers data collection and reporting requirements under subpart B for covered financial institutions. The CFPB is defining a covered application in § 1002.103(a) as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. A covered application does not include (1) reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests.

Covered credit transactions and excluded transactions (§ 1002.104). The CFPB is requiring that covered financial institutions collect and report data for all covered applications from small businesses for transactions that meet the definition of business credit under existing Regulation B, with certain exceptions. Section 1002.104(a) defines the term covered credit transaction as an extension of business credit that is not an excluded transaction under § 1002.104(b). Loans, lines of credit, credit cards, and merchant cash advances (including credit transactions for agricultural purposes) all fall within the scope of the rule. Section 1002.104(b) excludes from the requirements of subpart B trade credit, HMDA-reportable transactions, insurance premium financing, public utilities credit, securities credit, and incidental credit. Factoring, leases, consumer-designated credit used for business or agricultural purposes, and credit transaction purchases, purchases in a pool of credit transactions, and purchases of a partial interest in a credit transaction also are not covered credit transactions.

Covered financial institutions and exempt institutions (§ 1002.105). The CFPB is defining in § 1002.105(a) the term financial institution, consistent with the definition in section 1071, as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. Under this definition, subpart B's requirements apply to a variety of entities that engage in small business lending, including depository institutions (*i.e.,* banks, savings associations, and credit unions), online lenders, platform lenders, CDFIs, Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit nondepository lenders. Subpart B does not cover motor vehicle dealers.[287] Section 1002.105(b) defines the term covered financial institution as a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. Only financial institutions that meet this loan-volume threshold are required to collect and report small business lending data under subpart B.

Business and small business definitions (§ 1002.106). Section 1002.106 adopts the SBA's definitions of ''business concern or concern'' and ''small business concern'' as set out in the Small Business Act and SBA regulations. Notwithstanding the small business size standards established by SBA regulations, for purposes of subpart B, a business is a small business if its gross annual revenue is $5 million or less for its preceding fiscal year. The SBA Administrator has approved the CFPB's use of this alternate small business size standard pursuant to the Small Business Act. Every five years after January 1, 2025, the need to adjust the gross annual revenue threshold for inflation or deflation will be determined using the Consumer Price Index for all Urban Consumers.

3. Compiling, Maintaining, and Reporting Small Business Lending Data (§§ 1002.107 Through 1002.111)

Compilation of reportable data (§ 1002.107). Section 1002.107 addresses several aspects of collecting data on covered applications from small businesses. Section 1002.107(a) requires financial institutions to compile and maintain the data points enumerated in § 1002.107(a)(1) through (20). These data points must be collected and reported in accordance with the rule and the Filing Instructions Guide that the CFPB will provide for the appropriate filing year. Certain of these data points are or could be collected from the applicant (or otherwise determined based on information from appropriate third-party sources); other data points are based on information within the financial institution's control. Appendix E provides a sample data collection form for requesting protected demographic information. Although the form reflects a number of legal requirements applicable to collection, use of the form itself is not mandatory. It is intended as an available implementation resource for lenders, who can make use of it if they so choose.

Section 1002.107(c)(1) provides that covered financial institutions must not discourage an applicant from responding to requests for applicant-provided data and must otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. Where data are collected directly from the applicant, § 1002.107(c)(2) identifies certain minimum provisions that must be included within financial institutions' procedures in order for them to be considered ''reasonably designed.'' The rule also addresses what financial institutions should do if, despite having such procedures in place, they are unable to obtain certain data from an applicant. Pursuant to § 1002.107(b), financial institutions are permitted to rely on information from the applicant or appropriate third-party sources, although for most data points if the financial institution verifies the information provided it must report the verified information. Section 1002.107(d) permits financial institutions to reuse certain previously collected data in certain circumstances.

Firewall (§ 1002.108). Section 1002.108 implements section 1071's requirement that certain data collected pursuant to section 1071 be shielded from certain persons if feasible; the CFPB refers to this as the ''firewall.'' Pursuant to § 1002.108(b), if an employee or officer of a covered financial institution or a covered financial institution's affiliate is involved in making any determination concerning a covered application from a small business, that employee or officer is prohibited from accessing the applicant's responses to regarding

[287] Regulation B does not apply to a person excluded from coverage by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 2004 (2010).

protected demographic information requested under this final rule.

However, pursuant to § 1002.108(c), this prohibition does not apply to an employee or officer if the financial institution determines that employee or officer should have access to the applicant's responses to the financial institution's inquiries regarding the applicant's protected demographic information, and the financial institution provides a notice to the applicant regarding that access. The notice must be provided to each applicant whose information will be accessed or, alternatively, the financial institution may also provide the notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants or all applicants for a specific type of product. The CFPB is providing sample language that a financial institution can, but is not required to, use for this notice.

Reporting of data to the Bureau (§ 1002.109). Section 1002.109 addresses several aspects of covered financial institutions' obligations to report small business lending data to the CFPB. First, § 1002.109(a) provides that data must be collected on a calendar year basis and reported to the CFPB on or before June 1 of the following year. Section 1002.109(a) also addresses collection and reporting requirements of subsidiaries of financial institutions and reporting requirements of financial institutions where multiple financial institutions are involved in a transaction. Second, the CFPB lists in § 1002.109(b) the information that financial institutions are required to provide about themselves when reporting data to the CFPB, including the financial institution's name, headquarters address, contact person, Federal prudential regulator, institutional identifiers, parent entity information, as well as information on the type of financial institution it is, and whether it is reporting covered applications voluntarily. Finally, § 1002.109(c) addresses technical instructions for the submission of data to the CFPB, including information about the Filing Instructions Guide, which the CFPB will provide for the appropriate year.

Publication of data and other disclosures (§ 1002.110). Section 1002.110 addresses several issues regarding the publication of small business lending data. Section 1002.110(a) provides that the CFPB will make available to the public, on an annual basis, the data submitted to it by financial institutions. These data will be made available subject to deletions or modifications made by the CFPB, if the CFPB determines that such deletions or modifications would advance a privacy interest. Part VIII below discusses the CFPB's preliminary assessment of how best to determine appropriate pre-publication modifications and deletions, particularly in light of re-identification risk to small businesses and their owners. Section 1002.110(b) provides that the CFPB may compile and aggregate data submitted by financial institutions and may publish such compilations or aggregations.

Section 1002.110(c) requires a covered financial institution to publish on its website a statement that its small business lending data, as modified by the CFPB, are or will be available from the CFPB. Section 1002.110(d) sets forth when a covered financial institution shall make this statement available and how long the financial institution shall maintain the statement on its website. These requirements satisfy financial institutions' statutory obligation to make data available to the public upon request.

Finally, § 1002.110(e) prohibits a financial institution or third party from disclosing protected demographic information, except in limited circumstances. Section 1002.110(e)(1) prohibits a financial institution from disclosing or providing to a third party the protected demographic information it collects pursuant to the rule, except to further compliance with ECOA or Regulation B or as required by law. Section 1002.110(e)(2) prohibits a third party that obtains protected demographic information for the purpose of furthering compliance with ECOA and Regulation B from any further disclosure of such information, except to further compliance with ECOA and Regulation B or as required by law.

Recordkeeping (§ 1002.111). Section 1002.111 addresses several aspects of the recordkeeping requirements for small business lending data. First, § 1002.111(a) requires a covered financial institution to retain evidence of compliance with subpart B, which includes a copy of its small business lending application register, for at least three years after the register is required to be submitted to the CFPB pursuant to § 1002.109. Second, § 1002.111(b) requires a covered financial institution to maintain, separately from the rest of an application for credit and accompanying information, an applicant's responses to a financial institution's inquiries regarding the applicant's protected demographic information. Finally, § 1002.111(c) requires that, in compiling, maintaining, and reporting its small business lending application register, as well as the separately maintained protected demographic information pursuant to § 1002.111(b), a financial institution may not include any personally identifiable information concerning any individual who is, or is connected with, an applicant.

4. Other Provisions (§§ 1002.112 Through 1002.114)

Enforcement (§ 1002.112). Section 1002.112 addresses several issues related to the enforcement of subpart B. First, § 1002.112(a) states that a violation of section 1071 or subpart B is subject to administrative sanctions and civil liability as provided in sections 704 and 706 of ECOA. Second, § 1002.112(b) provides that a bona fide error in compiling, maintaining, or reporting data with respect to a covered application is an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. Such an error is presumed not to violate ECOA or subpart B if the number of such errors do not exceed the thresholds set forth in appendix F. Third, § 1002.112(c) identifies four safe harbors under which certain errors—specifically those regarding the application date, census tract, and NAICS code data point, along with incorrect determinations of small business status, covered transaction, and covered application—do not constitute violations of ECOA or subpart B. Relatedly, in part VII below, the CFPB discusses its intention to consider, for financial institutions subject to the CFPB's jurisdiction, good faith efforts to comply with the rule and will not generally assess penalties for errors in data reporting. The CFPB will conduct examinations on data during the grace period to assist institutions in diagnosing compliance weaknesses.

Severability (§ 1002.113). Section 1002.113 provides that any provision of subpart B, or any application of a provision, is stayed or determined to be invalid, it is the CFPB's intent that the remaining provisions shall continue in effect.

Effective date, compliance date, and special transitional rules (§ 1002.114). Section 1002.114 addresses several issues related to the rule's effective date, when covered financial institutions are required to comply with the rule, and associated transitional rules. Section 1002.114(a) provides that this final rule will become effective 90 days after publication in the **Federal Register**. However, pursuant to § 1002.114(b) compliance with the final rule is based on a tiered compliance date schedule.

Compliance with the rule beginning October 1, 2024 is required for covered financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026. Next, § 1002.114(c) provides certain transitional provisions that permit covered financial institutions to begin collecting protected applicants' demographic information beginning 12 months prior to their applicable compliance dates. Finally, § 1002.114(c) also permits financial institutions that do not have ready access to sufficient information to determine their compliance tier (or whether they are covered by the rule at all) to use any reasonable method to estimate their volume of originations to small businesses for this purpose.

D. High-Level and General Comments

1. High-Level and General Comments on the NPRM

High-level and general comments received on the NPRM are discussed here, followed by a discussion of comments specifically addressing implementation issues and comments regarding section 1071's overlap with other data reporting regimes. Comments received on specific aspects of the Bureau's proposed rule are discussed in the section-by-section analyses that follow in this part V. Comments regarding the privacy analysis are addressed in part VIII below, and regarding the Bureau's analysis of impacts in parts IX through XI.

Comments Received

Support for section 1071's statutory purposes was nearly universal amongst commenters, at least at a high level of generality. (See also the section-by-section analysis of § 1002.101 below.) The vast majority of industry commenters praised the purposes of the rule, and the intentions behind section 1071 and ECOA generally, while offering criticisms of specific provisions of the proposed rule.

Broad support. A number of commenters offered general support for the rule, including its scope and its purposes. For example, a trade association stated its appreciation for the comprehensive nature of the proposed rule, noting that the Bureau conducted extensive outreach and worked at ensuring proper and effective rulemaking consistent with legislative intent while allowing for technical improvements and practical considerations. A community group stated that to achieve the community development and fair lending purposes of the statute, the data collected and reported under the rule needs to be comprehensive in its coverage of lenders and must capture key credit underwriting factors as controls for analyses of gender and racial disparities in lending. The commenter also stated that the Bureau recognized that annual disclosure of lending data by the vast majority of small business lenders is a prerequisite for adequate oversight, given that existing data are insufficient. The commenter further explained that existing data consist of periodic surveys that are not usually lender specific and that are inconsistent in the amount of detail provided on key underwriting variables needed for analyses of community needs and fair lending compliance.

A number of commenters offered more specific support for the rule's purposes. One trade association noted that its members have been active in the development of policy supporting section 1071, including participation as small entity representatives during the SBREFA process. A number of banks, a credit union, and several trade associations expressed support for the statutory purposes of section 1071 and the Bureau's proposed rule. One trade association stated that the NPRM was a key opportunity to explore lending data and expand responsible small business lending, which was important to the financial well-being in the communities served by its members, as well as stability of the overall financial system.

A cross-sector group of lenders, community groups, and small business advocates stated that it is critical to require lenders to collect and report applicant data for as many small minority-owned and small women-owned businesses as possible, to uphold congressional intent and establish a comprehensive database.

Several commenters focused on the importance of the fair lending purpose of section 1071. One trade association stated its unequivocal agreement with the purpose of preventing discrimination on the basis of ethnicity, race, and sex, and noted that CDFI lenders share the Bureau's core value of protecting consumers by providing fair and transparent financial products and services to all customers.

A number of commenters, including community banks, credit unions, and trade associations, offered their appreciation for the stated intentions of the rule in the NPRM—to support fair lending and business and community development—but expressed concern about the effect of the rule as proposed on lending and compliance costs. A bank stated that, while it supported the statutory goals of section 1071, the proposed rule would result in restricted, higher-priced credit for the groups the proposal is meant to benefit. A trade association for community banks likewise supported the proposed rule and the congressional intent behind section 1071, but asserted it was necessary to fine-tune specific proposed provisions to mitigate costs and ensure small business lenders remain active, particularly those serving the most underserved markets. Another trade association supported the goals of the NPRM, but worried that the proposed would unduly burden credit unions and would discourage them from offering business credit.

Broad criticisms. Some industry commenters expressed disagreement with the enactment of section 1071 and therefore opposed the rule in its entirety. One lender opposed the rule on the grounds that it already complies with fair lending laws, and that the rule would force a choice between compliance and market exit. Another argued that the Dodd-Frank Act may have intended that section 1071 create a HMDA-like data reporting mechanism, but warned that small business lending is not "cookie-cutter," is not automated, and is highly relationship driven. Another commenter claimed that it would be impossible to derive any meaningful or statistically valid conclusions from a comparison of small business loans.

A credit union stated that the publication of data collected and reported pursuant to section 1071 would not permit it to better identify its members' unmet small business lending needs aside from confirming if there is a significant difference in the number of business borrowers that are female or of a specific race.

One trade association noted that credit unions may only serve their members and are limited by Federal statute in their ability to offer business loans; as a result, data collected from them would not be comparable to data collected from lenders without similar limitations in who they may serve.

Other commenters, without specifically opposing the enactment of section 1071, expressed more general concerns about the NPRM. Trade associations for online lenders supported the policy goals of the NPRM and also believed that modifications should be made to support responsible innovation in banking without unintentionally stifling the efficiency and innovation that digital lending

platforms can provide. A bank supported the enforcement of fair lending laws and appreciated the Bureau's dedication to better supporting small businesses, but was concerned about aspects of the NPRM. A One commenter inquired as to why the Bureau, in charge of consumer financial protection, was concerned with business loans, and claimed that the Bureau was engaged in overreach.

The role of online lenders. Two trade associations suggested that online and "fintech" lenders were important to expanding access to financing, particularly for Black- and Hispanic-owned businesses. These commenters expressed their support for greater transparency and expanding access to sustainable and fair credit in small business lending. They also asserted that women-owned and minority-owned small businesses were disadvantaged in applying for small business lending at traditional banks, and that nontraditional online lenders play a crucial role in modernizing financial services and improving access and outcomes for small businesses. One of the commenters noted that, in particular, the use of artificial intelligence, machine learning, and alternative data would expand lending to minority-owned small businesses.

Uniqueness of small business lending. One bank stated that it was hard to perform comparative analysis on small business loans because they are unique and manually unwritten. Further, the commenter stated that the absence of certain credit criteria or metrics—such as collateral, loan-to-value, debt-to-income, debt service coverage ratio and the like—in the data points to be collected by the rule could cause reviewers of published data, such as consumer groups and agency examiners, to draw incorrect conclusions on variances in rates and terms of loans.

Data accuracy. A bank and a trade association asserted that the Bureau's final rule should focus on ensuring the collection and reporting of high-quality data that maximizes data accuracy and reliability. These commenters noted that inaccurate, unreliable, and poor-quality data could undermine the statutory purposes of section 1071, which the commenters said were to promote access to credit for minority-owned and women-owned small businesses. They further stated that poor data quality could also lead to misguided and factually unsupported fair lending allegations, which could damage the reputations of responsible lenders and subject them to unnecessary investigative burdens and lawsuits, all of which could undermine the Bureau's credibility and waste the Bureau's time and resources. Based on these premises, the commenters sought the elimination of certain provisions which they believed would undermine the collection of accurate, reliable, high-quality data (discussed in the applicable section-by-section analyses that follows).

Specific uses of small business lending data. Two trade associations urged the Bureau to explain how it would use the data collected under this rule, including how it would analyze data collected by the rule. One claimed that the NPRM did not outline potential uses for small business lending data, and asserted that the Bureau should provide notice and comment on potential uses of the rule, even after the issuance of the final rule. The commenter stated that it is important for the Bureau to issue guidance on how it plans to analyze data reported under the rule, including how it will assess whether lenders appropriately serve relevant markets, which can vary significantly by lending product.

The other commenter stated that the Bureau should clearly indicate how implementing the proposed framework will advance fairness and understanding of small business credit needs, that requirements should tie to satisfying stated objectives and designed no more broadly than necessary to reduce unnecessary costs to small business lenders. The commenter stated its belief that by clearly indicating how it will use data it collects, including whether and how it will make such information public, the Bureau will allow stakeholders to assess better the costs and benefits of the overall framework. Additionally, the Bureau should carefully consider potential unintended consequences—especially related to data publication—that could reduce small business credit access and chill further innovation aimed at better serving small businesses.

Responses to Comments Received

The Bureau agrees with the general comments made in favor of keeping the scope of the proposed rule broad. In general, the Bureau believes that broad coverage of institutions and products as requested by a number of commenters is consistent with the statutory purposes of section 1071. The Bureau does not believe that a more limited approach to scope—including the various limitations on the coverage of certain types of financial institutions and products—would be consistent with the statutory purposes of section 1071. The Bureau addresses these issues directly in the section-by-section analyses of proposed §§ 1002.104 and 1002.105 below.

Broad support. Regarding the comment on the scope of the rule, that the Bureau should continue to monitor U.S. Census data to ensure that its definition of small business in this rule continues in the future to be inclusive enough such that the proportion of non-small minority-owned businesses do not exceed 1 percent of all businesses, the Bureau believes that its adoption of an inflation-adjustment for the gross annual revenue threshold in the definition of small business under § 1002.106(b) should help ensure that, over time, the proportion of businesses covered by the rule does not decline. In any case, the Bureau will monitor data concerning the prevalence of small businesses in the context of the economy at large.

Broad criticism. Regarding the comment of a lender that it already complies with fair lending laws, the Bureau notes that continuing enforcement of fair lending laws, and tools such as this data collection rule that facilitate such enforcement, remains necessary because while the commenter may comply with fair lending laws, some lenders may not and a subset of those may repeatedly violate fair lending laws. Additionally, enabling identification of business and community development needs and opportunities is an independent purpose of the statute. Compliance with fair lending laws does not necessarily permit creditors, communities, and governmental entities to identify business and community development needs and opportunities. As to the assertion that the rule would force a choice between compliance and market exit, the Bureau's decision to increase the originations threshold from 25 to 100 transactions will mitigate any risk of such disruptions, even if slight or speculative. Regarding the comment that small business lending is more individualized and highly relationship driven, the Bureau agrees this is true for much small business lending and the final rule is crafted to acknowledge this, as discussed in the section-by-section analyses that follow. But that does not prevent small business lending data from facilitating fair lending enforcement and identifying business and community development needs and opportunities.

As to comments that quarrel with the statutory mandate and question the utility of the data in general terms, the Bureau is bound by the statute and congressional intent. Additionally, many described potentially helpful uses of the data.

Regarding the assertion that the Dodd-Frank Act was only intended to regulate larger institutions, and that smaller lenders should be exempted from the rule to avoid harming those the Act was intended to protect, the Bureau notes that while much of the Dodd-Frank Act explicitly addresses larger entities, section 1071 does not contain such limitations. Nonetheless, Bureau has made changes in the final rule in response to public comment that will have the effect of reducing compliance burden on small lenders. For example, the Bureau has raised the coverage threshold from 25 to 100 originations for purposes of determining which financial institutions must comply with the rule, provided longer compliance periods for lenders with lower volumes of small business lending, and provided for a variety of safe harbors and a good faith error provision which will provide some leeway to smaller-volume lenders. The Bureau implemented these changes in the final rule to limit its impact on institutions with lower volumes of lending to small businesses. The Bureau has also complied with the Dodd-Frank Act requirements under SBREFA and the RFA to assess and mitigate any impact on smaller financial institutions.

The Bureau addresses the effect of the rule on lending and compliance costs, in its impact analyses in parts IX and X below. Regarding the commenter that stated that the rule would not meet its purposes and would result in restricted, higher-priced credit to the very groups the proposal is meant to benefit, the Bureau's analysis suggests that any changes in the cost of credit would be small and unlikely to lead to a significant change in the per-unit cost of loans to individual applicants even from the smallest lenders. The Bureau has made various changes from the proposal in finalizing this rule intended to mitigate costs for smaller-volume lenders serving small businesses in response to comments expressing concern that credit unions and other financial institutions remain active small business lenders.

Regarding the concern that data from credit unions would not be comparable to data collected from other kinds of lenders, the Bureau observes that, under § 1002.109(b), lenders must provide information on financial institution type. Credit unions thus must self-identify themselves in submitting data to the Bureau, and the various limitations on lending by credit unions can be taken into account in analyses of data collected and reported under this rule.

Regarding the comment that the rule should be modified to support responsible innovation in banking without unintentionally stifling the efficiency and innovation that online lenders may provide, the Bureau agrees that it does not wish to stifle responsible innovation. The Bureau has endeavored to be responsive to these concerns in the final rule; to the extent that specific concerns were raised, they are addressed in other provisions of this preamble. Regarding the comment that the rule as proposed was too complex even for most forward-leaning, technologically adept financial institutions, the Bureau disagrees, noting that while this rule is new, it is not dissimilar to other similar data collection regulations in complexity, such as those for HMDA, CRA, and the CDFI Fund. Further, the Bureau has made a number of changes to this final rule to make compliance easier for smaller-volume lenders, or to exclude them from reporting requirements entirely.

Regarding the comment asserting that the Bureau was overreaching by regulating business loans, the Bureau notes that section 1071 explicitly requires the Bureau promulgate a rule to collect data on applications for business credit.

The role of online lenders. Regarding assertions made that nonbank online lenders were important to expanding access to financing for Black- and Hispanic-owned businesses in particular, that traditional lenders provided fewer loans to women-owned and minority-owned small businesses, and that technology improved access and outcomes for small businesses, the Bureau believes that the broader conclusion to draw from these assertions is that the data that will be collected under this rule is needed to assess and further analyze such claims.

Uniqueness of small business lending. Regarding the comment that it is not possible to perform comparative analysis on small business loans because they are unique and manually unwritten, the Bureau disagrees. Other commenters, as set out in the section-by-section analysis of § 1002.101, stated that the data points proposed in the NPRM are fulsome and can contribute to sophisticated analysis and comparison of small business loans. Regarding the comment that the Bureau cannot make comparisons absent additional credit metrics beyond those it proposed to collect and that other reviewers of published data could draw incorrect conclusions, the Bureau does not agree that additional credit metrics are necessary in order to draw meaningful analyses from the data. While the Bureau believes, all things equal, that additional data points would enrich the analysis for users of the data, the Bureau also believes that certain of these metrics can be derived, at least in part, from other data points, and it notes that other commenters varyingly opposed any data points proposed pursuant to ECOA section 704B9(e)(2)(H) or requested that the Bureau collect as few data points as possible. Industry comments were also contradictory on this point; while many commenters suggested the Bureau had proposed too many data points, commenters also asserted that the Bureau was not collecting enough data to draw proper conclusions. The Bureau believes its final rule strikes an appropriate balance between comprehensiveness and minimizing burden and complexity to financial institutions.

Data accuracy. Regarding comments that the final rule should focus on ensuring the collection and reporting of high-quality data, the Bureau agrees. To this end, it has adjusted various provisions in the final rule in response to comments received. In addition, other changes, while made for other reasons, render moot certain comments on accuracy concerns. For example, the decision not to finalize the proposed visual observation and surname requirement, discussed in the section-by-section analysis of § 1002.107(a)(19)), moots the relevance of comments about the accuracy of visual observation.

Specific uses of small business lending data. Regarding the comment that the Bureau should have explained and provided an opportunity for notice and comment for its intended uses of the data collected under this rule, the Bureau disagrees, both that it did not explain what the data would be used for, and that it is obligated to identify specific uses of the data or to provide the public an opportunity to comment on proposed specific uses of the data. Initially, section 1071 itself establishes the intended purposes and uses of the collection and publication of the data—namely, the facilitation of fair lending enforcement and the identification of business and community development needs and opportunities. Next, while section 1071 requires the Bureau to collect and publish data on small business lending applications, it does not require the Bureau to identify its intended uses of the data. Moreover, even if the Bureau articulates specific uses of the data, as the statute explicitly provides, the Bureau is not the only intended user of the data. Enforcement of fair lending laws includes ECOA, which is enforced not only by the Bureau but by many other Federal

agencies.[288] Further, for purposes of identifying business and community development needs and opportunities, the statute specifically names communities, governmental entities, and creditors as potential users of the data collected under this rule. Thus, even if the Bureau disclosed its intended uses—which could change over time depending on the data received and the needs identified—other stakeholders could make different use of the data.

Regarding comments about how the Bureau intends to make the data public, including whether and how it will make such information public, and that the Bureau should carefully consider potential unintended consequences especially related to data publication, the Bureau describes its intended privacy analysis in part VIII below. Regarding concerns that the Bureau might reduce small business credit access and chill further innovation aimed at better serving small businesses, the Bureau has considered various comments concerning access to credit and innovation, which it addresses throughout the section-by-section analyses below.

2. Comments Regarding Implementation

Comments Received

Several commenters said that the Bureau should provide additional implementation or guidance resources about the final rule, specific parts of the rule, or regarding how the rule applies in specific situations. Some of these commenters requested specific forms of guidance or specific resources, such as frequently asked questions, guides, or templates. One commenter said that the final rule should have a table of contents. Some commenters said that the Bureau should provide training on collecting and reporting data or training on how to comply with the rule generally. One commenter said the Bureau should develop a data literacy program. Another commenter said that the Bureau should use all of its available tools to educate and support lenders and their vendors, including no-action letters, advisory opinions, webinars, guides, and other materials.

Some commenters requested specific content in implementation and guidance resources. Many commenters requested additional guidance on specific requirements or data points, and those comments generally are addressed in the relevant section-by-section analyses later in this part V. Additionally, one commenter said that the Bureau should develop materials showing how to do the research needed to find appropriate regulation sections and related commentary. The same commenter said that implementation and guidance resources should provide examples. Another commenter said that implementation resources should address matters not typically addressed in supervision guides. A few other commenters said that implementation materials should be detailed and/or comprehensive.

A few commenters said that implementation materials and guidance should be provided at specific points in time. Two commenters requested that the Filing Instructions Guide be provided at least six months before data collection is required, and another commenter said that the Filing Instructions Guide should be provided early in the implementation process. This commenter also said that the compliance date should take into account the delayed availability of the Filing Instructions Guide. A different commenter said that guidance should be provided before, during, and after the compliance date.

A few commenters said that the Bureau should develop outreach programs or provide additional access to Bureau staff to address questions or issues that arise during implementation of the rule. One commenter said that the Bureau should commit to a formal request for comments on all facets of implementation and compliance with the rule. This commenter also said that the Bureau should dedicate staff to provide definitive answers to industry members that contact the Bureau and that it should not be possible for community banks to be criticized or penalized for following the instructions or answers obtained from Bureau staff. Another commenter said that, during the implementation period, the Bureau should regularly communicate with vendors and covered financial institutions and consider reasonable extensions of the rule's compliance date if issues that could affect industry preparedness arise.

Another commenter said that the Bureau should create a compliance liaison office that has the primary goal of supporting industry in their regulatory submissions and fair lending analyses. This commenter said that this liaison office would require multiple types of specialists in order to function properly and would need ties to other teams so that feedback loops work properly. This commenter further said that questions on specific data entry topics should be saved and communicated to the Office of Regulations and others at the Bureau. The commenter said that Bureau guidance provided to individual industry members should be converted into frequently asked questions and tagged for purposes of amending existing regulations. The commenter further said providing verbal guidance is helpful, but slow, and potentially inconsistent. This commenter also alleged that the Bureau does not track data related to questions received and asserted that such lack of tracking limits the responsiveness of the Bureau in adapting regulations to properly include current industry practices. A different commenter said that the Bureau should consider holding a series of public meetings or hearings to take testimony from small businesses, lenders, and trade associations regarding the impact that implementation of the proposed rule will have on each group as well as on the privacy risks inherent in the proposed data collection and public reporting by the Bureau.

Finally, there were two comments on supervision and enforcement related issues. These commenters said that the Bureau should coordinate with other Federal agencies to develop model examination procedures in advance of the Bureau publishing a final rule. One of these commenters further predicted that, absent a clear description of the methodologies that might be employed to perform fair lending analysis, there would likely be a period where prudential regulators' examination expectations are in flux and, perhaps, materially inconsistent.

Responses to Comments Received

The CFPB aims to provide a wide variety of guidance about the legislative rules it issues pursuant to the Administrative Procedure Act. Although this guidance may include materials such as advisory opinions, interpretive rules, and general statements of policy, the CFPB's guidance more often includes other materials and activities that generally reiterate requirements or positions that previously have been announced in a legislative rule or elsewhere (hereinafter ''implementation resources''). These implementation resources include such documents and materials as rule summaries, compliance guides, checklists, factsheets, frequently asked questions, institutional and transactional coverage charts, webinars, and other compliance aids directed to regulated entities, the general public, or agency staff (*e.g.,* staff manuals). In recent years, the CFPB has

[288] *See* 15 U.S.C. 1691c (listing Federal agencies with authority to enforce ECOA), 1691e (providing private attorneys, the Department of Justice, and the Department of Housing and Urban Development the authority to bring civil suits to enforce ECOA).

developed a process for preparing and releasing these implementation resources. For rules such as this one, the CFPB generally engages in a phased approach and attempts to provide various implementation resources throughout the implementation period and for some period after the compliance date.

The CFPB has provided, simultaneously with this rule's release, a Filing Instructions Guide, an executive summary, and other resources to help financial institutions understand and comply with the final rule. These materials are available on the CFPB's website.[289]

Additionally, the CFPB is planning to release a Small Entity Compliance Guide. This Small Entity Compliance Guide will provide a detailed and comprehensive summary of the rule's requirements, will include examples, and will be separate from and different than any examination manuals or other supervisory materials. The CFPB also anticipates providing other written implementation resources to assist industry, vendors, and others. When providing implementation resources, the CFPB will consider all of its available tools and select the tool that it believes is best suited to the content that the CFPB is addressing in the guidance as well as the timing of the guidance. Individuals who would like to be notified when the CFPB releases additional implementation resources or other guidance can sign up to receive notifications. However, with regard to one commenter's request, the CFPB does not anticipate developing materials attempting to show members of industry how to conduct research. The CFPB believes that such materials are outside the scope of the CFPB's implementation and guidance function and are regularly provided by other sources.

With regard to the comments addressing outreach, the CFPB notes that it has and anticipates that it will continue to engage in ongoing outreach related to this rulemaking. As discussed in part III above, the CFPB engaged in considerable outreach to industry and other stakeholders in the years leading up to issuing this final rule, and intends to continue to engage with industry, along with vendors and other stakeholders, as they prepare to comply with the rule. With regard to one commenter's request that the CFPB hold a series of public meetings or hearings to take testimony from small businesses, lenders, and trade associations regarding the impact that implementation of the proposed rule will have on each group prior to issuance of the final rule, the CFPB did not believe this was needed given the number of substantive comment letters it received and the opportunity provided to stakeholders to submit comments on the proposed rule and its potential impact. Nonetheless, as described in part III.B above, the CFPB has been conducting technical outreach with third-party software providers that serve financial institutions and software and technology staff from financial institutions that are likely to have to report small business lending data to the CFPB. With these software vendors and technical staff, the CFPB has held and, after publication of this final rule, will continue to hold discussions concerning the technical systems and procedures the CFPB will provide for financial institutions to submit data. The CFPB expects that its outreach efforts will provide a channel of communication for industry, vendors, and other parties to constructively provide feedback on the CFPB's existing implementation resources as well as provide direction for future implementation resources.

As set out in more detail above, some commenters said that the CFPB should provide staff to address questions or issues that arise during implementation of the rule. One commenter suggested that the CFPB develop a compliance liaison office. Similar to what it has done with inquiries about HMDA/Regulation C, the CFPB anticipates that it will use its regulatory inquiries function to assist individual inquirers who have specific questions about the rule or how to submit data pursuant to the rule. This function is designed to provide inquirers with brief, informal assistance on regulatory or technical issues. However, in part because of Administrative Procedure Act constraints, the CFPB cannot provide binding or official interpretations through this informal function. In addition, there are other limits on the regulatory inquiries function and on the CFPB's other implementation resources. For example, the CFPB does not provide legal advice through the regulatory inquiries function.

In addition, the CFPB already reviews the inquiries it receives and uses information gleaned from those reviews to help the CFPB prioritize provision of various other types of guidance. Thus, when the CFPB receives multiple individual inquiries about the same topic, the CFPB often prioritizes that topic for webinars and various forms of written guidance, potentially culminating in revisions to the Official Interpretations or the regulatory text after a notice-and-comment process. Thus, as requested by one commenter, the CFPB already tracks data regarding the inquiries it receives and, as appropriate given the nature of the inquiries and the CFPB's resources, uses them as a basis for frequently asked questions, other implementation resources, or other action. The CFPB anticipates doing the same with inquiries received about this rule.

With regard to the comments related to supervision, the CFPB notes that it will coordinate with other Federal agencies to develop examination procedures in connection with the rule, and anticipates publishing such procedures in advance of the rule's first compliance date.

3. Comments Regarding Overlaps With Other Data Reporting Regimes

Comments Received

General comments. Several commenters cast the overlap between this rule and other Federal data collection rules in a positive light. A community group and a CDFI lender observed that small business lending data are collected piecemeal and haphazardly across multiple agencies—including the Federal bank agencies, the SBA, and the CDFI Fund—and that this rule could be used to consolidate small business lending data reporting across agencies to reduce administrative burden by satisfying requirements across programs for various CRA and fair lending uses.

Two commenters noted that the existence of other data collection regimes, including Federal reporting requirements and private-sector reporting (such as HMDA; the SBA 7(a), 504, and Community Advantage Loan programs; CDFI Fund reporting; the Wells Fargo Diverse Community Capital Program; and the Paycheck Protection Program) suggested that compliance with this rule is feasible because these other data collections make this rule well-understood in conceptual, technological, and procedural terms. One commenter noted that these other data collections cover all but three of the data points in the NPRM (application method, application recipient, and denial reasons).

Several commenters stated their appreciation for the Bureau's attempts to harmonize this rule with others and avoid duplicative data reporting. One bank noted that avoiding duplicative reporting was critical for community banks, for which even slight differences in reporting rules would be

[289] See *https://www.consumerfinance.gov/compliance/compliance-resources/small-business-lending-resources/small-business-lending-collection-and-reporting-requirements.*

burdensome, taking away from time that could be spent with customers.

Many other commenters, including lenders, trade associations, a business advocacy group, and a group of State banking regulators, noted the overlap between this rule and other data collection regimes, and requested that the Bureau harmonize this rule with other similar data reporting regulations, with which lenders were familiar, to minimize challenges, complexity, duplication, potential burden on lenders, and potential errors in the data. These commenters named HMDA/Regulation C, CRA, FFIEC Call Reports, Regulation B/ECOA, and FinCEN's Beneficial Ownership Rule as specific examples of other rules that the required harmonization with this rule and that, in many cases, the Bureau itself identified as overlapping.

Commenters argued that, by borrowing from existing frameworks or systems, the Bureau could reduce complexity and facilitate industry compliance, allowing financial institutions to leverage existing processes, training and institutional knowledge. For instance, some commenters suggested that the thresholds in this rule be aligned with those of HMDA and CRA. Other commenters suggested that the Bureau could adopt the framework in FinCEN's beneficial ownership rule for this rule's method of determining minority-owned and women-owned status, rather than layering on a new definition of ''primary owners,'' which they suggested would add unneeded complexity to the loan origination process.

Industry commenters also asserted that by aligning this rule with existing rules, such as HMDA and CRA, the Bureau could avoid imposing inconsistent or duplicative reporting requirements to avoid errors from regulatory confusion and urged the Bureau to avoid requiring lenders to report different data for the same transaction.

Several other commenters identified other concerns with overlapping reporting. One bank noted that, while the Bureau tried to harmonize its requirements with other rules, even slight deviations between rules cause problems, which may confuse customers and make them more likely to refuse to provide data. Another bank noted that some HMDA and CRA data aggregation and submission systems rely upon identifiers to separate and process these different datasets, which the bank suggested was another reason to keep loans reportable under this rule separate from those reportable under HMDA.

A number of industry commenters and a group of State banking regulators requested that the Bureau not require financial institutions that already report data to duplicate their work. One stated that banks already report a significant amount of data to prudential regulators, and that the Bureau should eliminate duplicative reporting. Other commenters asked that the Bureau work with Federal agencies to align this rule with the FFIEC Call Report, and CRA and HMDA regulations to avoid duplication, reduce compliance burden, and reduce the potential for data errors. Two banks urged the Bureau to exempt loans reportable under other data reporting regimes, such as HMDA- and CRA-reportable loans. Another noted that its staff is trained on the established requirements of HMDA and CRA, and that removing duplicative or inconsistent requirements would reduce compliance costs, providing savings that could be passed on to the borrowers. Two community-oriented lenders suggested that the Bureau exempt all credit applications under Federal agency programs, as the data points proposed in this rule are already collected by that loan program's oversight agency (*i.e.,* SBA, USDA, etc.).

Two industry commenters suggested that the Bureau should first use existing small business lending data published by the government and private sector before collecting additional data, thereby assessing the small business finance market without negatively impacting providers of capital to entrepreneurs. One bank asserted that the Bureau itself admitted it had enough data to analyze the small business lending market, and that the rule should focus on collecting data from non-depository institutions, as it would be duplicative to collect data from depositories, which provide data via the FFIEC and NCUA Call Reports and already have a history of being regulated.

Some industry commenters generally requested that the Bureau work out inconsistencies between this rule and other data collection regimes. Some offered more specific requests for harmonization. One suggested more alignment in terms of scope, coverage and exemptions between this rule, HMDA and CRA. Another commenter identified inconsistencies with existing Regulation B, citing the difference between its small business definition ($1 million or less in revenue) and the NPRM's proposed definition ($5 million or less). A CDFI lender observed that CDFIs report lending activity to the CDFI Fund, SBA, CRA, Opportunity Finance Network's annual member survey, and credit reporting agencies, and requested that the Bureau standardize data formats to match those used in CDFI Fund reporting to streamline data collection and minimize burden on CDFIs.

HMDA. A number of commenters identified overlap between this rule and HMDA/Regulation C, and noted that duplicative data would published in two places. Some industry commenters requested that the Bureau avoid inconsistent and duplicative reporting by excluding from HMDA reporting transactions reportable under this rule. Two trade association suggested a parallel rulemaking to amend Regulation C, timed with the release of this final rule.

On the other hand, other commenters suggested that HMDA-reportable loans should be excluded from this rule to avoid duplicative reporting, undue compliance burden, and regulatory confusion. A business advocacy group noted that the Bureau itself identified the overlap between HMDA-reportable loans and loans covered by this rule. A trade association suggested the Bureau could narrowly tailor an exemption by apply the rule only to financial institutions that report data under HMDA, without an exclusion for HMDA-reportable loans by lenders that are not HMDA reporters, arguing that a narrowly tailored exclusion would serve the statutory purposes of the rule because commercial mortgage loans for small businesses would be captured under HMDA or this rule. A bank believed that duplicative reporting of HMDA-reportable applications did not serve the statutory purposes of the rule. A large bank disagreed with the Bureau's assertion that excluding HMDA-reportable transactions from this rule would add complexity to the analysis of data by requiring lenders to find and delete HMDA-reportable transactions from its submission to the Bureau; the bank argued that duplicative reporting was more complex. One lender stated that farm credit data are already collected from Farm Credit System lenders subject to HMDA.

A number of commenters identified, generally, inconsistencies between the proposed requirements for this rule and those of HMDA/Regulation C. Many industry commenters pointed out that many proposed data points in the NPRM would be similar to data points in Regulation C, and expressed concern that any differences in reporting requirements for these data points would lead to confusion and data errors. Two trade associations asserted that the overlap in data would create significant

and needless complexities for covered lenders, and noted that there were inconsistencies between the rules despite the Bureau's attempts to limit them.

Several lenders requested that the Bureau harmonize this rule with Regulation C to the extent possible if no exemptions were possible. A large bank asked that the Bureau harmonize several data points—action taken, application date, and ethnicity, race, and sex of principal owners—because lenders would be able to collect these data just once for each small business applicant, increasing efficiency in the application process and facilitating compliance.

Some commenters addressed overlap between specific data points proposed in the NPRM and existing data point requirements under Regulation C. A number of industry commenters noted that for census tract, HMDA uses the tract where collateral is located while the Bureau proposed to use a waterfall approach of several addresses. Two lenders pointed out that HMDA does not have the firewall requirement proposed for this rule in the NPRM; one of these commenters suggested that the final rule follow the HMDA approach (no firewall) for HMDA-reportable loans.

On the reporting of ethnicity, race, and sex of principal owners, two lenders noted that this rule and HMDA offer different answer choices. One of the commenters noted that lenders would provide two separate questionnaires regarding ethnicity, race, and sex for a single loan application, which could confuse applicants and make them decline to answer either one.

Several lenders noted that the proposed visual observation and surname provision, which does not require its use to determine the sex of a principal owner, was not aligned with the visual observation and surname requirement under Regulation C, which does require its use to determine the sex of a mortgage applicant. One stated that this disparity would cause confusion and errors in data collection. Another stated that for a loan application covered by both rules, the disparity would mean complying with one rule and violating the other.

Regarding credit purpose, a bank noted that a loan to a small business to purchase, improve, or refinance an apartment building would require different information to be collected and reported under both rules.

On action taken, one bank noted a disparity between the approaches of the proposed rule (one option for ''incomplete'' as an action taken) and of Regulation C (two different incompleteness options—one for a loan denial and the other for file closure) that it believed would cause difficulty, despite agreeing with the proposed rule's approach. Another bank noted that the proposed rule would require collection of gross annual revenue for the past fiscal year, while Regulation C requires the income used for the credit decision.

Community Reinvestment Act. A number of commenters noted the similarities between the small business and small farm data collected under CRA and this rule and suggested eliminating duplication. One community group stated that the data for this rule should replace CRA data, noting that this rule could replace the inconsistent, duplicative and inefficient collection of small business lending data with a comprehensive database. The commenter stated that lenders and community groups both would prefer to consult with one database than to contend with two or more that are collected annually, and that this rule is likely to capture more data than the current CRA system. A bank suggested eliminating CRA reporting requirement as data collected under this rule would duplicate and surpass the CRA data points, but would not be interoperable as each rule would require different formatting, rounding, or coding. A minority business advocacy group and a joint letter from community and business advocacy groups requested that 1071 data be used for CRA examinations, just as HMDA data are. These commenters noted that current small business small farm data for CRA examinations is limited and not a good indication of whether lenders serve the most vulnerable businesses, and that the more robust dataset to be collected under this rule would be a better indicator.

One bank asked that the Bureau work with other Federal regulators to eliminate duplication with CRA data reporting, noting that CRA data already provides a good picture of lending to small business including agriculture. Another bank suggested that the Bureau, rather than create a new data collection requirement, exempt federally insured depositories and work with other Federal regulators to enrich existing CRA reporting to include the data the Bureau wants to collect under section 1071. The commenter noted that insured depositories already have robust CRA reporting systems, and generally already collect and report data required by the NPRM to meet CRA obligations. The bank stated that the use of CRA systems to report 1071 data would result in the faster delivery of information the Bureau needs at lower cost to reporters. The bank also suggested that the CFPB should focus this rule on non-depository institutions that do not now have robust reporting requirements. The commenter also stated that institutions are already comfortable with CRA reporting and understand how regulators use such information, but noted that they did not understand how data collected pursuant to section 1071 would be used and was concerned the Bureau would use it to retaliate and micromanage lenders, as it did in the consumer lending space.

A number of lenders asked that the Bureau work collaboratively with the prudential regulators to eliminate inconsistencies and duplication with CRA data reporting. A CDFI lender asserted that successful implementation of this rule would necessitate coordination of data requirements and encouraged the Bureau to coordinate with the CRA agencies to align rules to ensure that lenders covered by CRA continue to meet credit and community development needs of small businesses, particularly those owned by women and minorities. One bank noted that duplicate and inconsistent requirements would increase the compliance burden on lenders as well as data errors, and that inconsistent data reporting would require more resources without adding value. A bank stated that inconsistent definitions could cause community stakeholders to misinterpret data and draw incorrect conclusions regarding a lender's performance.

One bank supported a more streamlined approach taking advantage of existing CRA processes and definitions to reduce costs and burdens related to this rule, which in turn would ease burdens on lenders and reduce costs that would ultimately be passed on to the borrower. Another commenter suggested that the Bureau work closely with the agencies working on the modernization of CRA rules to reduce duplication and the friction caused by differences between the rules.

A number of commenters identified specific areas of inconsistency between the CRA and this rule. Several banks and a trade association noted that the small business definition proposed in the NPRM, businesses with gross annual revenue greater than $5 million, was inconsistent with the CRA definition, which included an asset threshold and originated loans less than $1 million. One bank stated that this discrepancy was likely to cause staff confusion and possible data integrity issues. A trade association requested that the Bureau adopt the CRA's small business definition using a loan size of $1 million

and other Federal laws to create alignment for those lenders that already comply with existing regulations, and that a focus on businesses with $1 million in revenues would support the Bureau's goal of promoting small business lending in underserved areas to underserved small businesses, that are more likely to be closer to $1 million rather than $5 million in revenue. Two banks stated that banks may receive more CRA credit for small business loans originated to businesses with $1 million or less in gross annual revenues.

Several commenters noted that the rule proposed a waterfall approach to using addresses to determine census tract, while CRA regulations inquire only about where loan funds are used. One bank commented that this meant that a single loan could result in the reporting of different census tracts for purposes of the two rules. Another bank suggested that a better way to achieve consistency with CRA was to allow lenders reporting under this rule to choose which of the three addresses to use and require the institution to report which address type it used.

Some industry commenters noted that the Bureau reduce its gross annual revenue threshold for its small business definition under this rule from $5 million to $1 million to align with CRA. A trade association noted that the $1 million threshold would align with the threshold for FFIEC Call Reports and for existing Regulation B, which requires tracking of loans to businesses with $1 million or less in revenue for purposes of sending adverse action notices under § 1002.9(a)(3). The commenter also stated that using this threshold would also mean that other data from this rule could be compared with CRA data, leading to a better evaluation of a bank's small business lending performance.

One bank stated that a discrepancy between this rule and CRA on the revenue threshold could lead to errors, given the many manual processes still used. Another bank asserted that a $5 million threshold would capture applications from businesses it did not consider small.

Several trade associations claimed that the proposed rule did not treat renewals and extensions the way CRA regulations do.

SBA. Several commenters stated that SBA-reportable loans should be exempt from the rule, including loans under the SBA 7(a) and 504 programs. One commenter stated that the Bureau should work with SBA to select reportable data elements and then obtain them from the SBA on loans and application denials to ease the reporting burden of SBA lenders, and that the majority of applications are already captured by third-party lending partners in the 504 program.

One bank stated that the Bureau's proposed small business definition is too broad and may capture entities that are not true small businesses. The commenter originated many multi-family loans to entities formed for the sole purpose of investing in real estate, not to run a small business, and asserted that the proposed definition would capture entities not consistent with SBA's definition of small business based on number of employees by industry and would be consistent with the spirit of section 1071, and that this would skew data.

FinCEN. One bank stated that data reported under this rule would be better provided through other means, such as FinCEN's recent business database and registry.

CDFI Fund. Some commenters, including a number of community-oriented lenders and community groups, stated that the Bureau should work with the CDFI Fund to streamline integrating the data from this rule with that of the CDFI Fund. Several commenters stated that new requirements from the CDFI Fund will likely expand transaction level reporting requirements to all certified CDFIs. One CDFI lender noted that the CDFI Fund's review and improvement to its current annual reporting process could create an opportunity to harmonize its definition, types of data collection, and timing of reporting with the Bureau. Another CDFI lender stated that the Bureau should work with the CDFI Fund to ensure that reporting requirements are aligned; CDFIs are currently required by Federal law to collect, maintain, and report specific demographic data about small businesses and consumers to ensure they serve their target communities. Several others stated that the Bureau should work with the CDFI Fund and loan software providers to streamline the process of integrating new data collection processes into existing systems. Some commenters noted that certain CDFIs must report data points such as interest rate, origination, points and fees, amortization type, loan term, and payment dates to the CDFI Fund. Several also pointed out that some CDFIs also report on loans to the SBA, to Federal prudential banking regulators pursuant to the CRA, and to a non-profit's annual member survey.

One lender stated that CDFIs have long sought guidance from the Bureau on compliance with overlapping statutory requirements from the CDFI Fund, ECOA, and Regulation B, and recommended that the Bureau use this rulemaking process to clarify data collection requirements in coordination with the CDFI Fund to avoid potential conflicts.

Several commenters said that some CDFIs will have to adjust processes and systems to comply with this rule, that the CDFI industry uses several different loan software products, and providers continually modify systems to comply with the CDFI Fund's reporting requirements.

One commenter stated that the Bureau should collect credit score, as CDFI Fund does, because it permits an ''apples-to-apples'' comparison of loans to help determine if small businesses that have historically struggled to access responsible loans receive credit on identical terms as white-owned businesses. The commenter also said that the burden to collect this would be minimal, as many CDFIs already report it to the CDFI Fund.

Farm Credit. An agricultural lender stated that a lack of understanding of the Farm Credit System by the Bureau would have unintended and detrimental consequences for those lenders' customers. The lender noted that these lenders institutions already report lending on Young, Beginning and Small lending efforts and volume (12 CFR 614.4165) to the Farm Credit Administration.

Agency cooperation. One bank suggested that the Bureau work with SBA to create more women-owned and minority-owned business programs, such as diversity loan programs to help the underserved, noting that the Dodd-Frank Act was passed as a reaction to the practices of larger lenders but would affect smaller lenders disproportionately.

A State financial regulator requested that the Bureau work with State regulators to provide them data. The commenter noted that the NPRM proposed modifications or deletions to protect privacy interests but was silent on whether the Bureau would share unredacted data with State regulators, and urged the Bureau to include in the final rule express language permitting the Bureau to share data collected under this rule with State regulators in accordance with information sharing agreements. The commenter noted that such data will help State regulators identify fair lending violations and enforce anti-discrimination laws.

Responses to Comments Received

General comments on overlap. The CFPB acknowledges the general comments concerning the overlap between this rule and other data

collection regimes, and general requests that the Bureau harmonize this rule with other similar data reporting regulations. The CFPB recognizes the overlap with other rules and in this final rule has made attempts to minimize the challenges, complexity, and duplication of effort, as well as potential errors in the data. In some instances, duplicate reporting will be eliminated—this rule will not require the reporting of any HMDA-reportable applications, and proposed amendments to CRA regulations would eliminate reporting on small business and small farm reporting to be replaced exclusively by data from this rule. In addition, the CFPB attempted wherever possible (*i.e.,* consistent with its statutory authorities under this rule) to borrow concepts or structures from other rules, such as FinCEN's customer due diligence rule. The CFPB also intends to continue to coordinate with other agencies to further harmonize this final rule with other similar regulations.

Regarding the requests that the Bureau not require financial institutions that already report data to duplicate their work, or that the Bureau exempt all loan applications under Federal agency programs, the CFPB has made certain adjustments in the final rule. As noted above, duplicate reporting will be eliminated for HMDA-reportable loans and, pursuant to proposed amendments to CRA regulations, under the CRA. However, other data reporting regulations have purposes sufficiently different from those of this rule such that the regulations are not completely overlapping, and that the simple elimination of one of the two reporting requirements would not advance both regulations. For instance, data reported via FFIEC Call Reports are not motivated only by considerations of fair lending and community development. In addition, such other reporting requirements address only originations, while section 1071 requires reporting on applications.

Regarding the comment that the Bureau should first use existing small business lending data generated by the government and private sector before collecting additional data, Congress disagreed when it passed section 1071 calling for data on small business lending applications. Existing data capture only limited application-level data on lending to small businesses by depository institutions, and hardly any application-level data on lending to small businesses by non-depository institutions.

Regarding requests that the CFPB work out inconsistencies between this rule and other data collection regimes, and that the Bureau standardize data formats to match those used in other data reporting, especially for CDFIs, the CFPB has attempted to do so in this final rule where consistent with section 1071's statutory purposes. In addition, the CFPB intends to work with agencies and other sources of small business lending data to explore other possible avenues for additional standardization.

HMDA. Regarding the identification of overlap between this rule and HMDA/Regulation C, and the requests to avoid duplicative reporting, the CFPB is exempting HMDA-reportable transactions from the requirements of this rule. This new provision would have the effect of eliminating inconsistencies between the two rules, the duplication of data collection and reporting, and potential data errors. However, the Bureau is not adopting a more narrowly tailored exclusion that would not apply to HMDA-reportable loans by financial institutions that are not HMDA reporters. For the reasons set out in the section-by-section analysis of § 1002.104(b)(2), the CFPB has determined that trying to close all potential data gaps would defeat the purpose of trying to alleviate concerns from commenters about having to implement and maintain two separate reporting systems. The CFPB's decision to exempt HMDA-reportable transactions also renders moot comments concerning inconsistencies between specific data points in Regulation C and those proposed for this rule, along with the firewall requirement.

Community Reinvestment Act. Regarding the comments identifying the similarities between the data required by this rule and the requirements of the CRA, and the request that the data of this rule replace the data for the CRA, the CFPB notes that, as stated in part II.F.2.i above, the CRA agencies have issued a proposed rule that, amongst other things, would exclusively rely on 1071 data for its assessment of the small business and small farm lending activities of banks, replacing the existing CRA data requirements based on Call Reports and other sources. The CFPB believes that when the final rule amending the CRA requirements is issued, duplication between the CRA and this rule will be eliminated, as requested by numerous commenters, including industry and community groups. As some community groups suggested, the CRA proposal contemplates using 1071 data for CRA examinations in the manner that HMDA data are currently used in CRA examinations. The CFPB agrees with these commenters that 1071 data would be more robust than the data currently collected under existing CRA rules.

Regarding the various request that the Bureau work with other Federal regulators to eliminate duplication, the CFPB observes that the CRA agencies appear to intend with their proposed rule to eliminate duplicative reporting by both relying on the Bureau's small business lending data and eliminating any independent data collection requirement. The CFPB intends to continue cooperating with the CRA agencies to ensure coordination between this rule and amendments to the CRA regulations, especially those concerning potentially duplicative reporting.

Regarding the comments that the Bureau should exempt lenders that report under the CRA, the CFPB does not believe such an exemption would be appropriate. In addition, in light of the CRA's proposal to use data collected and reported pursuant to section 1071, the result of such an exemption might be that no small business lending data would be collected for such institutions.

Regarding the comments that identified specific inconsistencies between the CRA and this rule, the CFPB does not disagree that the inconsistencies identified exist but notes that the CRA's proposal that the CRA agencies rely exclusively on 1071 data for their analysis of small business and small farm lending would render these inconsistencies moot because only 1071 data would exist. Regarding the comment that the Bureau should reduce its gross annual revenue threshold for its small business definition under this rule from $5 million to $1 million to align with FFIEC Call Reports and for Regulation B, the CFPB is not doing so for the reasons set out in the section-by-section analysis of § 1002.106(b). The CFPB believes that a small business definition with a lower threshold would not further the statutory purposes of the rule because it would reduce the amount of data collected concerning lending to many businesses that, according to other metrics would still be considered small though above $1 million in revenue. In addition, the Bureau believes that analyses seeking to match or compare data from this rule that are interoperable with small business lending data from FFIEC need only screen this rule's data for gross annual revenue of less than $1 million, which this rule requires as a data point. For instance, the CRA NPRM proposes screening the 1071 data for loans to small businesses and small farms under $1 million revenue for purposes of certain parts of CRA examinations.

SBA. The CFPB is not exempting SBA-guaranteed loans from reporting

under this rule. For its 7(a) and 504 programs, the SBA only collects and publishes a subset of the data required by this rule for originations. Still, the CFPB intends to coordinate with SBA to try to reduce duplicative reporting.

FinCEN. Regarding the comment that the data reported under this rule would be better provided through other means, such as via FinCEN's recent business database and registry, the CFPB understands that database is not set up to receive small business lending data.

CDFI Fund. Regarding comments that the Bureau should work with the CDFI Fund to harmonize reporting under the CDFI Fund's Transaction Level Report requirements with this rule, the CFPB agrees to coordinate with the CDFI Fund to determine where it is possible to avoid duplicative or inconsistent reporting of data and how to resolve any overlapping statutory requirements. The CFPB observes that it may not be possible to simply eliminate duplicate reporting, as with HMDA or CRA reporting, given the differences in purposes and the requirements of the CDFI Fund compared to those of this rule. Regarding comments that the Bureau should work with loan software providers, the CFPB agrees and intends to meet with software providers as it develops the small business lending data submission platform to determine how reporting can be streamlined for CDFIs that must report small business lending data to various agencies, such as the CFPB under this rule, the SBA, and the CDFI Fund.

Regarding the comment that the Bureau should collect credit score, as CDFI Fund does, the CFPB notes that, as stated in the section-by-section analysis of § 1002.107(a), the CFPB believes that this data point—which the CFPB would also have to collect from other financial institutions that may have operations quite different from CDFIs—could be quite complicated and involve complex sub-fields, which could pose operational difficulties for financial institutions in collecting and reporting this information.

Farm Credit. Regarding the comments that the Bureau's lack of understanding of the Farm Credit System would have unintended and detrimental consequences for FCS customers, and that the FCS lenders already report data to the Farm Credit Administration, the CFPB has consulted with FCS lenders, and believes that its approach will result in consistency across the data collected under this rule, more robust fair lending analyses and transparency into opportunities for small farms, and a more even playing field for compliance across all financial institutions.

Agency cooperation. Regarding the comment that the Bureau work with SBA to create more women-owned and minority-owned business programs, the CFPB regularly engages with other Federal regulators on a range of work that implicates its statutory mission; that includes, as appropriate, the SBA. Regarding the request that the Bureau provide small business lending data to State regulators, the CFPB agrees that doing so would likely be consistent with the statutory purposes of the rule. The CFPB will engage with State and Federal regulators regarding their access to small business lending data collected under this final rule, while ensuring that data security and data privacy are appropriately protected.

E. Cross-Cutting Interpretive Issues

1. The Bureau's Approach to Non-Small Women-Owned and Minority-Owned Businesses in This Rulemaking

ECOA section 704B(b) states that ''in the case of any application to a financial institution for credit for [a] women-owned, minority-owned, or small business,'' the financial institution must ''inquire whether the business is a women-owned, minority-owned or small business. . . .'' As explained below, the Bureau proposed to require financial institutions to collect and report data regarding applications for credit for small businesses; the Bureau did not, however, propose to require financial institutions to collect and report data with respect to applicants that are *not* small businesses.

The Bureau believed that section 1071 was ambiguous with respect to its coverage of applications for credit for non-small women- or minority-owned businesses, and the Bureau therefore proposed to interpret this ambiguity pursuant to ECOA section 704B(g)(1). The Bureau acknowledged that the plain language of 704B(b) could be read to require financial institutions to collect information from all women-owned and minority-owned businesses, including those that are not small businesses. But based on a close consideration of the text, structure, and purpose of the statute, and the interactions between section 1071 and other provisions of ECOA and Regulation B, the Bureau believed that the statute's coverage of, and Congress's intent with respect to, data regarding non-small businesses was ambiguous. The Bureau proposed this approach as an interpretation of the statute pursuant to its authority under 704B(g)(1), and, in the alternative, pursuant to both its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 as the Bureau deems necessary or appropriate to carry out the purposes of section 1071 and its implied *de minimis* authority.

The Bureau sought comment on its proposed approach to limiting the scope of data collection pursuant to subpart B to covered applications for small businesses, but not women- or minority-owned businesses that are not small.

Several commenters, including industry and community groups, supported limiting the scope of data collection as the Bureau proposed. In particular, a cross-sector group of lenders, community groups, and small business advocates stated that the Bureau had taken a reasonable and adequately comprehensive approach in proposing to include only minority- and women-owned businesses that are ''small,'' as this would cover 99.9 percent of all minority- and women-owned businesses. The group further noted that the Bureau should continue to monitor the U.S. Census Bureau's Annual Business Survey and adjust this requirement if minority- or women-owned businesses that are not considered ''small'' exceed 1 percent. In contrast, a State financial regulator commented that data collection on non-small women- or minority-owned businesses was important for fair lending enforcement purposes and would provide for better consistency with States pursuing similar information collection requirements. In response to the latter comment, the Bureau notes that such data collection would be of limited utility in light of section 1071's statutory purposes because, as discussed below, the lack of a control group (*i.e.,* data on non-small businesses that are neither women-owned nor minority-owned) would limit such data's utility for fair lending enforcement purposes. For the reasons set forth herein, the Bureau is finalizing the approach to non-small women-owned and minority-owned businesses as proposed.

The Bureau interprets ECOA section 704B(b) and (b)(1) to require that financial institutions first determine whether an applicant is a small business within the scope of the rule's data collection before making the required inquiries that would otherwise be prohibited by existing Regulation B. There is a general prohibition in existing Regulation B (in § 1002.5(b)) which states that a ''creditor shall not *inquire* about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, except if expressly permitted to do so by law or regulation.

In the introductory language to ECOA section 704B(b), Congress instructed that section 1071's data collection regime applies only ''*in the case of* any application to a financial institution for credit for women-owned, minority-owned, or small business'' (emphasis added). The Bureau believes that ''in the case of'' indicates Congress's intent to limit application of section 1071 to these types of businesses, rather than requiring financial institutions to make 1071-related inquiries of all business applicants for credit.[290] The next paragraph (704B(b)(1)) does not use the conditional phrase ''in the case of'' used in 704B(b); rather, it instructs a financial institution to ''inquire.'' The Bureau believes that the instruction to ''inquire'' in 704B(b)(1) is intended to provide the necessary exception to Regulation B's general prohibition against ''inquir[ing]'' as to protected demographic information in connection with a credit transaction.[291] Indeed, absent section 1071's lifting of the prohibition, generally, a financial institution could not determine, or even ask about, an applicant's women- or minority-owned business status, because doing so would necessarily constitute ''inquir[ing] about the race, color, religion, national origin, or sex of an applicant'' in violation of existing § 1002.5(b). The Bureau believes that Congress likely intended to ensure that financial institutions could determine whether section 1071's data collection and reporting requirements apply to an applicant without risking a violation of other provisions of ECOA and Regulation B.

However, unlike with women- and minority-owned business status, there is no legal impediment to a financial institution determining whether an applicant is a small business, and financial institutions can make that determination as a threshold matter without risking running afoul of ECOA and Regulation B. Therefore, the Bureau believes that the scope of the introductory ''in the case of'' language in ECOA section 704(b) is ambiguous as to coverage of non-small women- and minority-owned businesses. To resolve this ambiguity, the Bureau applies its expertise to interpreting the language and structure of section 1071 within the context of the general prohibition on inquiring into protected demographic information in existing § 1002.5(b), and concludes that ECOA section 704B(b)(1) is best read as only referring to questions about applicants' protected demographic information (*i.e.,* women- and minority-owned business status as well as the ethnicity, race, and sex of the principal owners of the business). The Bureau believes 704B(b)'s more general ''in the case of'' language should be understood to indicate the conditions under which data collection should take place, and requires financial institutions to make a threshold determination that an applicant is a small business before proceeding with an inquiry into the applicant's protected demographic information.

A requirement to collect and report data on applications for women-owned and minority-owned businesses that are not small businesses could affect all aspects of financial institutions' commercial lending operations while resulting in limited information beyond what would already be collected and reported about women-owned and minority-owned small businesses. Indeed, as a cross-sector group of lenders, community groups, and small business advocates highlighted, approximately 99.9 percent of women- and minority-owned business are small.[292] In addition, financing for large businesses can be much more varied and complex than are the products used for small business lending The Bureau will continue to observe the market on this issue.

The Bureau also notes that the collection of data on applications for non-small women- or minority-owned businesses would not carry out either of section 1071's statutory purposes because the data would be of only limited usefulness for conducting the relevant analyses of non-small businesses. Such analyses would necessitate comparing data regarding non-small women-owned and minority-owned business applicants to data regarding non-small non-women-owned and non-minority-owned business applicants, in order to control for lending outcomes that result from differences in applicant size. But section 1071 does not require or otherwise address the collection of data for non-small business applicants that are not women- or minority-owned. Therefore, the resulting dataset will lack a control group, arguably the most meaningful comparator for any data on non-small women- or minority-owned businesses. It is unlikely that Congress intended, and the statute is reasonably read not to require, the collection of data that would be of limited utility.[293]

Finally, the Bureau notes that the title of section 1071 is ''Small Business Data Collection,'' and section 1071 amends ECOA to add a new section titled ''Small Business Loan Data Collection.'' In the presence of ambiguity, these titles provide some additional evidence that Congress did not intend the statute to authorize the collection of data on businesses that are not small.[294]

For these reasons, the Bureau interprets ECOA section 704B(b) to cover the collection only of data with respect to small businesses, including those that are women- and minority-owned. Likewise, as discussed immediately below in E.2 of this *Overview* to part V, the Bureau is clarifying that the 704B(b)(1) inquiry, when applicable, pertains to an applicant's minority-owned business status and women-owned business status, as well as an applicant's LGBTQI+-owned business status, along with the ethnicity, race, and sex of its principal owners. For the same reasons, the Bureau believes that not requiring the collection of data with respect to applications for non-small businesses would be necessary or appropriate to carry out the purposes of section 1071; in the alternative, the Bureau exercises its exception authority in 704B(g)(2) to effectuate this outcome. Finally, because

[290] Merriam-Webster defines ''case'' as meaning ''a set of circumstances or conditions,'' ''a situation requiring investigation or action (as by the police),'' or ''the object of investigation or consideration,'' *https://www.merriam-webster.com/dictionary/case* (last visited Mar. 20, 2023).

[291] As discussed in greater detail in the next section, the fact that the language of ECOA section 704B(b)(1) is designed to expressly permit inquiry into protected demographic information, which would otherwise be prohibited by existing § 1002.5(b), is also evidenced by the statute's three provisions creating special protections for responses to the inquiry: 704B(b)(2) requires that responses to inquiries about protected demographic information remain separate from the application and accompanying information; 704B(c) requires that applicants have a right to refuse to answer the inquiry about protected demographic information; and 704B(d) requires that certain underwriters or other employees involved in making determinations on an application not have access to the responses to inquiries about protected demographic information.

[292] In the U.S. Census Bureau's 2018 Annual Business Survey, 5.7 million firms (99.6 percent of all employer firms) are small, as defined within that survey as having fewer than 500 employees. That same definition covers one million minority-owned employer firms (99.9 percent of all minority-owned firms) and 1.1 million women-owned employer firms (99.9 percent of all women-owned firms). *See* U.S. Census Bureau, *2018 Annual Business Survey (ABS)—Company Summary* (2018), *https://www.census.gov/data/tables/2018/econ/abs/2018-abs-company-summary.html.*

[293] *See, e.g., Pub. Citizen* v. *U.S. Dep't of Just.,* 491 U.S. 440, 454 (1989) (''Where the literal reading of a statutory term would 'compel an odd result,' *Green* v. *Bock Laundry Machine Co.,* 490 U.S. 504, 509 (1989), we must search for other evidence of congressional intent to lend the term its proper scope.'').

[294] *Almendarez-Torres* v. *United States,* 523 U.S. 224, 234 (1998) (''[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.'') (quoting *Bhd. of R.R. Trainmen* v. *Balt. & Ohio R.R.,* 331 U.S. 519, 529 (1947)).

the Bureau believes that the collection of data on non-small women- and minority-owned businesses would ''yield a gain of trivial or no value,'' in the alternative the Bureau exercises its implied *de minimis* authority to create this exception.[295]

2. The Meaning of ''Information Requested Pursuant to Subsection (b)''

Four different provisions of section 1071 refer to or rely on ''information requested pursuant to subsection (b)'' or similar language. First, ECOA section 704B(b)(2) provides that financial institutions must ''maintain a record of the responses to such inquiry'' and keep those records separate from the application and information that accompanies it. Second, 704B(c) states that applicants for credit ''may refuse to provide any information requested pursuant to subsection (b).'' Third, 704B(d) requires financial institutions to limit the access of certain employees to ''information provided by the applicant pursuant to a request under subsection (b),'' with certain exceptions. Fourth, 704B(e) instructs financial institutions that ''information provided by any loan applicant pursuant to a request under subsection (b) . . . shall be itemized in order to clearly and conspicuously disclose'' data including the loan type and purpose, amount of credit applied for and approved, and gross annual revenue.

In light of these four disparate provisions, the Bureau believes that section 1071 is ambiguous with respect to the meaning of ''any information provided by the applicant pursuant to a request under subsection (b).''[296] On the one hand, ECOA section 704B(b)(1) directs financial institutions to inquire whether a business is ''a women-owned, minority-owned, or small business,'' so the phrase could be interpreted as referring only to those three data points. Section 704B(e), however, indicates that the scope of 704B(b) could be much broader; it suggests that all of the information that financial institutions are required to compile and maintain—not simply an applicant's status as a women-owned, minority-owned, or small business—constitutes information provided by an applicant ''pursuant to a request under subsection (b).'' But as noted above, information deemed provided pursuant to subsection (b) is subject to the notable protections of separate recordkeeping under 704B(b)(2), a right to refuse under 704B(c), and the firewall under 704B(d). Applying these special protections to many of the data points in 704B(e), such as gross annual revenue or amount applied for, would be extremely difficult to implement, because this information is critical to financial institutions' ordinary operations in making credit decisions. Additionally, 704B(e) describes as ''provided by any loan applicant'' under 704B(b) data points that plainly must come from the financial institution itself, such as application number and action taken, further suggesting that Congress viewed this term as encompassing more information than lies within the four corners of 704B(b)(1). Finally, as noted above, the circular structure of 704B(b) complicates the question of what constitutes information provided ''pursuant to a request under subsection (b).'' Read together, the introductory language in 704B(b) and (b)(1) direct financial institutions, ''in the case of'' a credit application ''for [1] women-owned, [2] minority-owned, or [3] small business,'' to ''inquire whether the business is a [1] women-owned, [2] minority-owned, or [3] small business.'' The Bureau believes that this circularity further demonstrates the ambiguity of the phrase ''pursuant to a request under subsection (b).''

The Bureau believes that it is reasonable to resolve these ambiguities by giving different meanings to the phrase ''any information provided by the applicant pursuant to a request under subsection (b)'' (or similar) with respect to ECOA section 704B(e) as opposed to 704B(b)(2), (c), and (d).[297] With respect to 704B(e), the Bureau interprets the phrase to refer to all the data points now articulated in proposed § 1002.107(a). Section 704B(e) is the source of financial institutions' obligation to ''compile and maintain'' data that they must then submit to the Bureau, so it would be reasonable to interpret this paragraph as referring to the complete data collection Congress devised in enacting section 1071.

But with respect to the three statutory provisions creating special protections for certain information—the firewall in ECOA section 704B(d), separate recordkeeping in 704B(b)(2), and the right to refuse in 704B(c)—the Bureau interprets the phrase to refer to the data points in § 1002.107(a)(18) (women-owned and minority-owned business statuses, along with the new LGBTQI+-owned business status), and (a)(19) (ethnicity, race, and sex of principal owners).[298] Each of these data points requests protected demographic information that has no bearing on the creditworthiness of the applicant, about which existing § 1002.5(b) would generally prohibit the financial institution from inquiring absent section 1071's mandate to collect and report that information, and with respect to which applicants are protected from discrimination. The Bureau accordingly believes that it is reasonable to apply section 1071's special-protection provisions only to this information, regardless of whether the statutory authority to collect it originates in 704B(b)(1) (women-owned and minority-owned business statuses), 704B(e)(2)(H) (LGBTQI+-owned business status), or 704B(e)(2)(G) (ethnicity, race, and sex of principal owners). The Bureau similarly believes that it would have been unreasonable for Congress to have intended that these special protections would apply to any of the other data points now proposed in § 1002.107(a), which the financial institution is permitted to request regardless of coverage under section 1071 which are not the subject of Federal antidiscrimination law, and many of which financial institutions currently use for underwriting and other purposes.

The Bureau implements these interpretations of ''information requested pursuant to subsection (b),'' and any relevant comments received, in several different section-by-section analyses. With respect to ECOA section 704B(e), the Bureau discusses its interpretation of the phrase in the section-by-section analysis of § 1002.107(a). The Bureau's interpretation of 704B(d)'s firewall requirement is addressed at greater length in the section-by-section analysis of § 1002.108, and the Bureau's interpretation of the separate recordkeeping requirement in 704B(b)(2) is addressed in the section-

[295] *Waterkeeper All.* v. *EPA,* 853 F.3d 527, 530 (D.C. Cir. 2017) (quoting *Pub. Citizen* v. *FTC,* 869 F.2d 1541, 1556 (D.C. Cir. 1989)); *see Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360–61 (D.C. Cir. 1979).

[296] The Bureau does not believe that the minor linguistic variations in these four provisions themselves have significance.

[297] While there is a presumption that a phrase appearing in multiple parts of a statute has the same meaning in each, ''this is no more than a presumption. It can be rebutted by evidence that Congress intended the words to be interpreted differently in each section, or to leave a gap for the agency to fill.'' *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA,* 846 F.3d 492, 532 (2d Cir. 2017) (citing *Env't Def.* v. *Duke Energy Corp.,* 549 U.S. 561, 575 (2007)). Here, the Bureau believes Congress indicated such an intention by using the same phrase in the substantially different contexts of providing special protections for protected demographic information on the one hand and ''itemiz[ing]'' all collected data on the other.

[298] The Bureau's interpretations with respect to a separate data point for small business status are discussed in the next section.

by-section analysis of § 1002.111(b). The right to refuse in 704B(c) is discussed in the section-by-section analyses of the data points that the Bureau deems subject to the right to refuse: § 1002.107(a)(18) (women-owned, minority-owned, and LGBTQI+-owned business statuses) and (19) (ethnicity, race, and sex of principal owners).

3. No Collection of Small Business Status as a Data Point

The Bureau notes that neither of its interpretations of ''information requested pursuant to subsection (b)'' reference a specific data point for an applicant's status as a small business, nor did the Bureau otherwise include in proposed § 1002.107(a) that financial institutions collect, maintain, or submit a data point whose sole function is to state whether the applicant is or is not a small business.

The Bureau's definition of small business in final § 1002.106, which is based on an applicant's gross annual revenue, renders redundant any requirement that financial institutions collect a standalone data point whose sole purpose is to state whether an applicant is a small business. Indeed, under the definition of small business, when a financial institution asks an applicant its gross annual revenue, that question is functionally identical to asking, ''are you a small business?'' The Bureau believes that it is a reasonable interpretation of ECOA section 704B(b)'s query as to small business status for that question to take the form of, ''what is your gross annual revenue?'' [299] Furthermore, as discussed above with respect to the Bureau's approach to non-small women- and minority-owned businesses, the Bureau interprets financial institutions' data collection obligations as attaching only in the case of applications from small businesses; if a financial institution determines that an applicant is not a small business, none of the obligations under this rule would apply. As such, a standalone data point that serves only to designate whether a business qualifies as small for purposes of the rule would be redundant with the mere fact that the data collection occurs at all, as well as with the collection of gross annual revenue.

The Bureau sought comment on whether a standalone data point solely dedicated to small business status might nonetheless be useful and, if so, how it might be implemented. The Bureau received no comments on this issue.

The Bureau acknowledges that the plain language of ECOA section 704B(b) could be read to require financial institutions to ask applicants subject to the data collection the precise question, ''are you a small business?'' Upon further analysis, however, the Bureau believes that Congress's intended treatment of small business status as a standalone data point is ambiguous. As described in more detail above with respect to the rulemaking's coverage of women- and minority-owned businesses that are not small, 704B(b)'s introductory language and 704B(b)(1) appear to require financial institutions to know the answer to whether an applicant is women-owned, minority-owned, or small before they make their inquiry; to resolve this ambiguity, the Bureau interprets 704B(b)'s introductory language and 704B(b)(1) to require that financial institutions first straightforwardly assess whether an applicant is a small business before proceeding to inquire into the applicant's protected demographic information that would otherwise be prohibited by existing § 1002.5(b).

Pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules as may be necessary to carry out, enforce, and compile data pursuant to section 1071, the Bureau interprets 704B(b) and (b)(1) to obviate the need for financial institutions to collect a standalone data point whose sole purpose is to note an applicant's small business status. For the same reasons, the Bureau believes that not requiring the collection of a separate data point on small business status would be necessary or appropriate to carry out the purposes of section 1071; therefore, in the alternative, the Bureau is exercising its exception authority in 704B(g)(2) to effectuate this outcome. Finally, because the Bureau believes that the collection of a standalone data point on small business status would ''yield a gain of trivial or no value,'' in the alternative, the Bureau exercises its implied *de minimis* authority to create this exception.[300]

F. Conforming Amendments to Existing Regulation B

As discussed above, the Bureau is implementing section 1071 in a new subpart B of Regulation B. The content of existing Regulation B is becoming subpart A of Regulation B. This change does not affect the current section numbering in Regulation B. The Bureau believes it is appropriate to make this rule a part of Regulation B, as section 1071 is a part of ECOA.

The Bureau sought comment on whether it should instead codify its rule to implement section 1071 as a free-standing regulation with its own CFR part and, if so, why. A bank commenter supported the location of this rule within a new subpart B to Regulation B, noting that lenders often overlook that Regulation B applies to business as well as consumer credit. The commenter also noted that the intent of section 1071, to provide all credit applicants fair and equitable treatment and credit, makes Regulation B the natural place for this rule, rather than a free-standing regulation, which would generate unnecessary confusion.

As noted above and as discussed in more detail below, the Bureau is amending existing § 1002.5(a)(4) and commentary for existing § 1002.5(a)(2) and (4) to expressly permit under certain circumstances voluntary collection of minority-owned, women-owned, and LGBTQI+-owned business status, and the ethnicity, race, and sex of applicants' principal owners in accordance with the requirements of subpart B.

In addition, the Bureau is revising certain references to the entire regulation (which use the terms ''regulation'' or ''part'') in existing Regulation B to instead refer specifically to subpart A. The Bureau is likewise adding additional specificity in certain provisions in existing Regulation B to avoid confusion. The Bureau does not intend to make any substantive changes with these revisions, but rather intends to maintain the status quo. The Bureau is making the following changes:

In § 1002.1(a), regarding authority and scope, the Bureau is changing two references to ''part'' to instead refer to ''subpart,'' regarding the application of what is now subpart A to creditors.

In § 1002.2, regarding definitions, the introductory text states that definitions contained therein apply to Regulation B, unless the context indicates otherwise. The Bureau is adding ''or as otherwise defined in subpart B'' for clarity.

In § 1002.12(b)(1) introductory text, (b)(2) introductory text, (b)(3) through (5) and (7), regarding record retention, the Bureau is adding ''or as otherwise provided in subpart B'' to indicate that subpart B may provide different record retention requirements than what is set forth in those paragraphs for business credit. The Bureau is also changing a reference to ''this rule'' in comment

[299] The financial institution could ask, in order to make an initial determination as to whether the rule applies, whether the applicant's gross annual revenue in its last full fiscal year was $5 million or less. If it was, the financial institution would need to request the specific revenue amount to comply with final § 1002.107(a)(14), along with the other applicant-provided data points specified in final § 1002.107(a).

[300] *Waterkeeper All.,* 853 F.3d at 530 (quoting *Pub. Citizen,* 869 F.2d at 1556); *see Alabama Power,* 636 F.2d at 360–61.

12(b)(7)–1 to instead refer to existing § 1002.12(b)(7) regarding retention of prescreened credit solicitations, to avoid confusion with subpart B's treatment of solicitations.

Finally, § 1002.13 addresses information for monitoring purposes for credit secured by an applicant's dwelling. The Bureau is revising comment 13(b)–5, which addresses applications made through unaffiliated loan shopping services, to refer to subpart A of Regulation B instead of the entirety of Regulation B, for clarity. The existing comment also refers to applications received by creditors subject to HMDA and associated data collection requirements; the Bureau is also adding to the end of the comment an additional sentence noting that creditors that are covered financial institutions under subpart B of this regulation may also be required to collect, report, and maintain certain data, as set forth in subpart B of Regulation B.

Subpart A—General

Section 1002.5 Rules Concerning Requests for Information

5(a) General Rules

5(a)(4) Other Permissible Collection of Information

Background

ECOA prohibits creditors from discriminating against applicants, with respect to any aspect of a credit transaction, on the basis of—among other characteristics—race, color, religion, national origin, sex, marital status, or age.[301] It also states that making an inquiry under 15 U.S.C. 1691c–2 (that is, section 1071), in accordance with the requirements of that section, shall not constitute discrimination for purposes of ECOA.[302] Regulation B, in existing § 1002.5(b), generally prohibits a creditor from inquiring about certain protected demographic information in connection with a credit transaction. Existing § 1002.5(a)(2), however, expressly permits collection of such otherwise prohibited information if required by a regulation, order, or agreement to monitor or enforce compliance with Regulation B, ECOA, or other Federal or State law or regulation.

In 2017, the Bureau amended Regulation B, adding § 1002.5(a)(4) to expressly permit creditors to collect ethnicity, race, and sex from mortgage applicants in certain cases where the creditor is not required to report under HMDA and Regulation C.[303] For example, existing § 1002.5(a)(4) expressly permits the collection of ethnicity, race, and sex information for certain transactions for which Regulation C permits optional reporting. However, nothing in existing Regulation B (or in ECOA) expressly permits collection and reporting of protected demographic data for financial institutions that are not required to report certain data under section 1071.

During the SBREFA process, some small entity representatives, primarily small CDFIs and mission-oriented community banks, stated that they would be inclined to collect and report small business lending data to the Bureau even if not required to do so, such as if they fell under loan-volume thresholds. These small entity representatives expressed an intent to report data even if not required to out of a belief in the importance and utility of these data.

Proposed Rule

The Bureau proposed to amend existing § 1002.5(a)(4) to add three provisions (in proposed § 1002.5(a)(4)(vii), (viii), and (ix)) that would permit certain creditors that are not covered financial institutions under the rule to collect small business applicants' protected demographic information under certain circumstances. The Bureau also proposed to add comment 5(a)(2)–4 and to revise existing comment 5(a)(4)–1 to provide guidance on these proposed exemptions.

Proposed § 1002.5(a)(4)(vii) would have permitted a previously covered financial institution to collect demographic information pursuant to subpart B for covered applications for up to five years after it fell below the loan-volume threshold of proposed § 1002.105(b), provided that it does so in accordance with the relevant requirements of proposed subpart B.

Proposed § 1002.5(a)(4)(viii) would have provided that a creditor in its first year of exceeding the covered financial institution loan-threshold in § 1002.105(b) may, in the second year collect demographic information pursuant to subpart B for covered applications, provided that it does so in accordance with the relevant requirements of proposed subpart B.

Proposed § 1002.5(a)(4)(ix) would have permitted a financial institution not covered by the rule that wishes to voluntarily report small business lending data to collect applicants' protected demographic information without violating Regulation B. Unlike creditors subject to proposed § 1002.5(a)(4)(vii) or (viii), a creditor seeking to voluntarily collect applicant's protected demographic information under proposed § 1002.5(a)(4)(ix) would also be required to report it to the Bureau.

Existing comment 5(a)(4)–1 addresses recordkeeping requirements for ethnicity, race, and sex information that is voluntarily collected for HMDA under the existing provisions of § 1002.5(a)(4). The Bureau proposed revising this comment by adding to it a parallel reference to proposed subpart B, along with a statement that the information collected pursuant to proposed subpart B must be retained pursuant to the requirements set forth in proposed § 1002.111.

Proposed comment 5(a)(2)–4 would have explained that proposed subpart B of Regulation B generally requires creditors that are covered financial institutions as defined in proposed § 1002.105(a) to collect and report information about the ethnicity, race, and sex of the principal owners of applicants for certain small business credit, as well as whether the applicant is a minority-owned business or a women-owned business as defined in proposed § 1002.102(m) and (s), respectively. The Bureau proposed this comment for parity with existing comment 5(a)(2)–2, which addresses the requirement to collect and report information about the ethnicity, race, and sex of applicants under HMDA. Existing comment 5(a)(2)–3 explains that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection.

The Bureau sought comment on its three proposed provisions to be added to existing § 1002.5(a)(4), and associated commentary, including whether there were other specific situations to add to the list of provisions in § 1002.5(a)(4) to permit the collection of applicants' protected demographic information pursuant to section 1071, and whether any similar modifications to other provisions were necessary. In particular, the Bureau sought comment on whether it should add another provision to § 1002.5(a)(4) relating to proposed § 1002.114(c)(1), wherein the Bureau proposed to permit financial institutions to collect, but would not require them

[301] 15 U.S.C. 1691(a).

[302] 15 U.S.C. 1691(b)(5).

[303] *Equal Credit Opportunity Act (Regulation B) Ethnicity and Race Information Collection,* 82 FR 45680, 45684 (Oct. 2, 2017).

to report, applicants' protected demographic information prior to the compliance date.

Comments Received

The Bureau received comments on this provision from several industry commenters, a business advocacy group, and a community group. The community group supported the reasoning and approach of the proposed provisions. The commenter inquired whether the provisions would allow for voluntary reporting of only the protected demographic data, or all data points, noting that if the Bureau intended only to permit voluntary data collection of demographic information that it would not make sense to permit publication of these data points, and that the usefulness of such incomplete data would be limited. A business advocacy group applauded the Bureau for the proposed provisions and recommended that the Bureau add incentives for voluntary disclosure of data for those financial institutions, but asked that the incentives not distort the purposes of the regulation by encouraging lenders to report inaccurate or untrue data to reap the benefits of the incentive to report.

A community group commented that the Bureau should permit voluntary collection not only by financial institutions not covered by the rule, but also should permit covered financial institutions to collect data on consumer credit used to fund small businesses.[304]

Two agricultural lenders requested that the Bureau exempt Farm Credit System (FCS) lenders entirely from coverage under the rule while also adding a provision to the proposed voluntary reporting provisions stating that FCS lenders may submit a supplemental voluntary collection of data that is not otherwise already being provided to the public.

Final Rule

For the reasons set forth herein, the Bureau is finalizing amendments to existing § 1002.5(a)(4) introductory text and three provisions (in final § 1002.5(a)(4)(vii), (viii), and (ix)) that permit certain creditors that are not covered financial institutions under the rule to collect small business applicants' protected demographic information under certain circumstances. The Bureau is also adopting new § 1002.5(a)(4)(x) to similarly address information collected about multiple co-applicants. The Bureau is finalizing comment 5(a)(2)–4 along with its revision to existing comment 5(a)(4)–1 providing guidance on these new exemptions. The Bureau is additionally revising existing comment 5(a)(2)–3, as discussed below. These provisions contain updated cross-references to other sections in the final regulatory text and commentary, as well as addition of LGBTQI+-owned business status to accompany references to women- and minority-owned business statuses.

Final § 1002.5(a)(4)(vii) provides that a creditor that was required to report small business lending data pursuant to final § 1002.109 for any of the preceding five calendar years but is not currently a covered financial institution under final § 1002.105(b) may collect protected demographic information pursuant to subpart B for covered applications from small businesses as defined in final §§ 1002.103 and 1002.106(b) if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to final §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for those applications. Final § 1002.5(a)(4)(vii) also states that such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110.

The Bureau anticipates that some creditors that are no longer covered financial institutions and thus no longer required to report data in a given reporting year may prefer to continue to collect applicants' protected demographic information in the event they become a covered financial institution again, in order to maintain consistent compliance standards from year to year. As it did in a similar context for HMDA reporting, the Bureau believes that permitting such collection for five years provides an appropriate time frame under which a financial institution should be permitted to continue collecting the information without having to change its compliance processes. The Bureau believes that a five-year period is sufficient to help an institution discern whether it is likely to have to report small business lending data in the near future but not so long as to permit it to collect such information in a period too attenuated from previous reporting.

Final § 1002.5(a)(4)(viii) provides a creditor that exceeded the loan-volume threshold in the first year of the two-year threshold period provided in final § 1002.105(b) may, in the second year, collect protected demographic information pursuant to subpart B for covered applications from small businesses as defined in final §§ 1002.103 and 1002.106(b) if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to final §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for that application. Final § 1002.5(a)(4)(viii) also states that such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110. The Bureau believes that this provision will benefit creditors when the creditor has not previously reported small business lending data but expects to be covered in the following year and wishes to prepare for that future reporting obligation. For example, where a creditor surpasses the loan-volume threshold of final § 1002.105(b) for the first time in a given calendar year, it may wish to begin collecting applicants' protected demographic information for covered applications received in the next calendar year (second calendar year) so as to ensure its compliance systems are fully functional before it is required to collect and report information pursuant to subpart B in the following calendar year (third calendar year).

Final § 1002.5(a)(4)(ix) provides that a creditor that is not currently a covered financial institution under final § 1002.105(b), and is not otherwise a creditor to which final § 1002.5(a)(4)(vii) or (viii) applies, may collect protected demographic information pursuant to subpart B for covered applications from small businesses as defined in final §§ 1002.103 and 1002.106(b) for a transaction if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to final §§ 1002.107 through 1002.112 for that application. Voluntarily reported data pursuant to final § 1002.5(a)(4)(ix) may add some information that otherwise would not be collected and reported, and which would further both the statutory purposes of section 1071 without requiring reporting from very low-volume financial institutions that may find it difficult or costly to report data.

The Bureau is finalizing § 1002.5(a)(4)(ix) in response to feedback from some small entity

[304] The Bureau addresses comments regarding the reporting of non-covered products in the section-by-section analysis of § 1002.104(b), under the heading *Voluntary Reporting.* While the final rule does not permit the voluntary reporting of non-covered products, the Bureau has implemented a safe harbor in § 1002.112(c)(4) for financial institutions that collect data on applications for products that turn out not to be covered credit transactions.

representatives and other stakeholders at SBREFA, as well as several NPRM commenters, that indicated lenders might want to collect and report small business lending data even if they were not required to do so.

New § 1002.5(a)(4)(x) provides that a creditor that is collecting information pursuant to subpart B or as described in §§ 1002.5(a)(4)(vii) through (ix) for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners may also collect that same information for any co-applicants provided that it also complies with the relevant requirements of subpart B of this part or as described in paragraphs (a)(4)(vii) through (ix) of this section with respect to those co-applicants.

The Bureau is adding § 1002.5(a)(4)(x) to permit creditors to collect information pursuant to subpart B regarding co-applicants for a covered application for a small business. Existing § 1002.5(a)(4) does not explicitly address whether creditors have permission to collect demographic information for co-applicants for a covered application for a small business, and the Bureau implements new § 1002.5(a)(4)(x) to remove any doubt that creditors that are permitted to collection information pursuant to subpart B on an applicant for covered applications for a small business pursuant to §§ 1002.5(a)(4)(vii) through (ix) is also permitted to collect such information for co-applicants as well, even if the financial institution will only report information regarding a single designated applicant per new comment 103(a)–10. As described below, final comment 103(a)–10 provides that if a covered financial institution receives a covered application from multiple businesses that are not affiliates, it shall compile, maintain, and report data for only a single applicant that is a small business. The Bureau believes that it may be easier and more efficient for financial institutions to request the same information of all co-applicants—new § 1002.5(a)(4)(x) will enable financial institutions to collect small business lending data from unreported co-applicants without violating ECOA and Regulation B's general prohibition against collecting protected demographic information.

The Bureau believes that it is an appropriate use of its statutory authority under sections 703(a) and 704B(g)(1) of ECOA to permit creditors to collect, and for § 1002.5(a)(4)(ix) report, protected demographic information in the manner set out in § 1002.5(a)(4)(vii) through (x). These provisions will effectuate the purposes of and facilitate compliance with ECOA and is necessary to carry out, enforce, and compile data pursuant to section 1071. Section 1002.5(a)(4)(vii) will permit creditors to collect information without interruption from year to year, thereby facilitating compliance with the rule's data collection requirements and improving the quality and reliability of the data collected. Section 1002.5(a)(4)(viii) improves the quality and reliability of the data collected by financial institutions that may be transitioning into being required to collect and report 1071 data, and will provide a creditor assurance of compliance with existing § 1002.5 regardless of whether it actually becomes subject to subpart B reporting at the end of the two-year threshold period. Section 1002.5(a)(4)(ix) will potentially increase the collection of additional information and amount of data available for analysis, thereby advancing the purposes of section 1071. Finally, § 1002.5(a)(4)(x) will permit collection of demographic information for co-applicants, thereby reducing operational complexity to allow creditors to focus on data quality and reliability. The Bureau also believes that these provisions are narrowly tailored and preserves and respects the general limitations in existing § 1002.5(b) through (d).

The Bureau is also revising existing comment 5(a)(2)–3, which explains that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection. The Bureau stated its belief in the NPRM that the reference to ''another Federal statute or regulation'' adequately encompassed section 1071 and subpart B, and thus did not propose to amend this existing comment. However, upon further reflection, the Bureau has determined to revise the provision specifically to reference subpart B for the sake of further clarity and the avoidance of doubt that loan brokers and other persons collecting applicants' protected demographic information on behalf of covered financial institutions pursuant to this final rule are not violating ECOA or Regulation B by doing so. The Bureau believes that it is an appropriate use of its general authority under ECOA sections 703(a) and 704B(g)(1) to permit such persons to collect protected demographic information on behalf of covered financial institutions, as such collection will effectuate the purposes of and facilitate compliance with ECOA and is necessary to carry out, enforce, and compile data pursuant to section 1071.

The Bureau is finalizing comment 5(a)(2)–4, which defines the phrase ''information required by subpart B,'' with revisions to add cross-references to LGBTQI+-owned businesses, as defined in § 1002.102(*l*). Final comment 5(a)(2)–4 addresses the requirement under this final rule that creditors that are covered financial institutions as defined in § 1002.105(a) collect and report information about the ethnicity, race, and sex of the principal owners of applicants for certain small business credit, as well as whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, as defined in § 1002.102(m), (s), and (*l*), respectively. The Bureau is finalizing this comment for parity with existing comment 5(a)(2)–2, which addresses the requirement to collect and report information about the ethnicity, race, and sex of applicants under HMDA. The Bureau believes that it is an appropriate use of its general authority under ECOA sections 703(a) and 704B(g)(1) to specify the meaning of ''information required by subpart B,'' by adding comment 5(a)(2)–4 and that the clarity and certainty this provision adds will effectuate the purposes of and facilitates compliance with ECOA and is necessary to carry out, enforce, and compile data pursuant to section 1071.

Finally, the Bureau is finalizing its revisions to existing comment 5(a)(4)–1 as proposed. The existing comment establishes recordkeeping requirements for ethnicity, race, and sex information that is voluntarily collected for HMDA under the existing provisions of § 1002.5(a)(4). The revisions to comment 5(a)(4)–1 likewise provide that protected demographic information that is not required to be collected pursuant to subpart B may nevertheless be collected under the circumstances set forth in § 1002.5(a)(4) without violating existing § 1002.5(b), and that the information collected pursuant to this final rule must be retained pursuant to the requirements set forth in final § 1002.111. The Bureau is revising this comment to provide for parity between this final rule and existing references to voluntary collection of data pursuant to HMDA. The Bureau believes that these

revisions are an appropriate use of its general authority under ECOA sections 703(a) and 704B(g)(1) as these revisions provide clarity and certainty to financial institutions in their voluntary collection of applicants' protected demographic information. Such clarity and certainty effectuate the purposes of and facilitates compliance with ECOA and these revisions are necessary to carry out, enforce, and compile data pursuant to section 1071.

Regarding a commenter's request to clarify whether these amendments permit voluntary reporting only as to data points concerning protected demographic data, the Bureau observes that nothing prohibits creditors from collecting any of the information set forth in final § 1002.107, other than the protected demographic information in § 1002.107(a)(18) and (19). Creditors that choose to collect protected demographic information pursuant to final § 1002.5(a)(4)(ix) must comply with § 1002.109 (along with other specified provisions), which means that they must collect and report all the required data specified in final § 1002.107.

The Bureau is not adding incentives for voluntary disclosure of data for creditors that are not covered financial institutions, as suggested by one commenter. It appears, based on SBREFA and NPRM comments, that some creditors already have an incentive to collect and report small business lending data pursuant to section 1071 even if they are not covered financial institutions under the rule; it is unclear what additional incentives the Bureau could offer to encourage other creditors to do the same. Regarding ensuring that reported data are not distorted, however, the Bureau notes that voluntary reporters must identify themselves as such pursuant to final § 1002.109(b)(10) and, a creditor voluntarily collecting and reporting data pursuant to final § 1002.5(a)(4)(ix) must do so in compliance with §§ 1002.107 through 1002.112 and 1002.114.

Regarding the comment that the visual observation and surname requirement would cause certain covered institutions to violate the prohibition in 12 CFR 202.5(b) from inquiring about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, the Bureau notes that the concern is moot because the Bureau is not finalizing its proposed provisions for collecting principal owners' ethnicity and race via visual observation or surname in certain circumstances. (See the section-by-section analysis of § 1002.107(a)(19) for a detailed discussion of this change.) In any case, a creditor is permitted to make such inquiries under existing § 1002.5(a)(2), given that the provision permits the collection of demographic information when required to do so by another law or regulation (which includes this rule).

The Bureau addresses potential voluntary collection and reporting of data regarding non-covered products, including consumer-designated credit used for small business purposes, in the section-by-section analysis of § 1002.104(b) below. Based on its determination not to permit voluntary collection of data for such non-covered products, the Bureau is not adding an additional provision to § 1002.5(a)(4) to address such collection.

As discussed in the section-by-section analyses of §§ 1002.104(a) and 1002.105(b), the Bureau is not excluding agricultural lending or FCS lenders from coverage under this final rule. The commenter's request to permit supplemental voluntary collection and reporting of data by exempt FCS lenders if such data are not otherwise already being provided to the public is thus moot. Of course, any FCS lenders that are not covered financial institutions could nonetheless voluntarily collect and report data pursuant to final § 1002.5(a)(4)(ix).

Subpart B—Small Business Lending Data Collection

Section 1002.101 Authority, Purpose, and Scope

Proposed § 1002.101 would have set forth the authority, purpose, and scope for proposed subpart B. The Bureau sought comment on its proposed approach to this section, including whether any other information on the rule's authority, purpose, or scope should be addressed herein.

The Bureau did not receive any comments specifically regarding its recitation of the authority, purpose, and scope of subpart B. Comments addressing the authority, purpose, and scope of section 1071 and this final rule as a general matter are addressed in D.1 in the *Overview* to this part V above.

The Bureau is finalizing § 1002.101 as proposed. Final § 1002.101(a) provides that subpart B is issued by the Bureau pursuant to section 704B of ECOA (15 U.S.C. 1691c–2), and states that, except as otherwise provided therein, subpart B applies to covered financial institutions, as defined in § 1002.105(b), other than a person excluded from coverage of this part by section 1029 of the Dodd-Frank Act. Final § 1002.101(b) sets out section 1071's two statutory purposes of facilitating fair lending enforcement and enabling the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses.

Section 1002.102 Definitions

The Bureau is finalizing a number of definitions for terms used in subpart B, in § 1002.102.[305] These definitions generally fall into several categories. First, some definitions in final § 1002.102 refer to terms defined elsewhere in subpart B—specifically, the terms business, covered application, covered credit transaction, covered financial institution, financial institution, and small business are defined in final §§ 1002.106(a), 1002.103, 1002.104, 1002.105(b), 1002.105(a), and 1002.106(b), respectively. These terms are of particular importance in subpart B, and the Bureau is defining them in separate sections, rather than in § 1002.102, for ease of reading.

Second, some terms in final § 1002.102 are defined by cross-referencing the definitions of terms defined in existing Regulation B—specifically, business credit, credit, and State are defined by reference to existing § 1002.2(g), (j), and (aa), respectively. Similarly, a portion of the small business and affiliate definitions refer to the SBA's regulation at 13 CFR 121.103. These terms are each used in subpart B, and the Bureau believes it is appropriate to incorporate them into the subpart B definitions in this manner.

Finally, the remaining terms are defined directly in final § 1002.102. These include applicant, closed-end credit transaction, LGBTQI+ individual, LGBTQI+-owned business, minority-owned business, open-end credit transaction, principal owner, small business lending application register, and women-owned business, as well as a portion of the definition of affiliate. Some of these definitions draw on definitions in existing Regulation B or elsewhere in Federal laws or regulations.

The Bureau believes that basing this rule's definitions on previously defined terms (whether in Regulation B or regulations promulgated by another agency), to the extent possible, will

[305] The Bureau notes that there are certain terms defined in subpart B outside of final § 1002.102. This occurs where a definition is relevant only to a particular section. For example, the firewall provisions in final § 1002.108 use the phrases ''involved in making any determination concerning a covered application'' and ''should have access.'' Those phrases are defined in § 1002.108(a). Such definitions are discussed in detail in the section-by-section analyses of the provisions in which they appear.

minimize regulatory uncertainty and facilitate compliance, particularly where the other regulations are likely to apply to the same transactions. As discussed further below, in certain instances, the Bureau is deviating from the existing definitions for purposes of this rule.

These definitions are each discussed in detail below. The Bureau is finalizing these definitions pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. In addition, the Bureau is finalizing certain of these definitions to implement particular definitions in section 1071 including the statutory definitions set out in 704B(h). Any other authorities that the Bureau is relying on to finalize certain definitions are discussed in the section-by-section analyses of those specific definitions.

102(a) Affiliate

Proposed Rule

The Bureau proposed § 1002.102(a) to define ''affiliate'' based on whether the term is used to refer to a financial institution or to an applicant.

Proposed § 1002.102(a) would have defined ''affiliate'' with respect to a financial institution as any company that controls, is controlled by, or is under common control with, another company, as set forth in the Bank Holding Company Act of 1956.[306] Existing Regulation B does not define affiliate. This proposed definition would have provided a consistent approach with the Bureau's Regulation C, which applies the term to financial institutions, as defined in Regulation C, for certain reporting obligations.[307]

Proposed § 1002.102(a) would have defined ''affiliate'' with respect to a business or an applicant as having the same meaning as described in 13 CFR 121.103, which is an SBA regulation titled ''How does SBA determine affiliation?'' The proposed definition would have provided consistency with the Bureau's proposed approach to what constitutes a small business for purposes of section 1071 in proposed § 1002.106(b). Proposed § 1002.107(a)(14) would have permitted, but not required, a financial institution to report the gross annual revenue for the applicant in a manner that includes the revenue of affiliates as well. In proposed § 1002.107(a)(16), workers for affiliates of the applicant would be counted in certain circumstances for the number of workers data point.

[306] 12 U.S.C. 1841 *et seq.*

[307] *See* Regulation C comment 4(a)(11)–3.

The Bureau sought comment on its proposed approach to this definition.

Comments Received

Several industry commenters provided feedback on the Bureau's proposed definition of ''affiliate.'' A joint letter from several trade associations asked the Bureau to provide clarification on how the definition of ''affiliate'' applies in the context of commercial real estate lending. Two other commenters objected to the Bureau's proposed reference to the SBA definition to determine affiliate of a small business because it can be changed by the SBA and the commenters recommended that the Bureau simplify the definition.

The Bureau did not receive comments on the proposed definition of ''affiliate'' with respect to a financial institution.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.102(a) as proposed. The Bureau believes it is appropriate to define ''affiliate'' with respect to financial institutions to be consistent with the approach in the Bureau's Regulation C, and received no comments suggesting it should do otherwise. The consistency with an existing regulatory definition may help provide clarity for financial institutions when determining their responsibilities under this final rule.

Regarding commenters' suggestions to simplify the definition of ''affiliate,'' the Bureau does not believe it would be appropriate to deviate from the SBA's definition for determining who is an affiliate with respect to a business or an applicant. ECOA section 704B(h)(2) defines the term ''small business'' as having the same meaning as ''small business concern'' in section 3 of the Small Business Act.[308] Consistent with the statute, the Bureau's definitions of business and small business in final § 1002.106 refer to definitions in the SBA's regulations, of which the SBA's definition of affiliate in 13 CFR 121.103 is a part. The Bureau believes that defining ''affiliate'' in this manner is appropriate and necessary to maintain consistency with the SBA's definitions. In addition, the Bureau believes that using a commonly known existing regulatory definition will facilitate compliance with reporting obligations under this final rule. Finally, the Bureau believes the SBA's definition of affiliate is sufficiently broad to afford financial institutions flexibility in the small business size determination process, as discussed below in the section-by-section analysis of § 1002.106(b).

[308] 15 U.S.C. 632.

The Bureau addresses the comment regarding how the definition of ''affiliate'' applies in the context of commercial real estate lending in the section-by-section analysis of § 1002.106(b)(1) below.

102(b) Applicant

Proposed § 1002.102(b) would have defined ''applicant'' to mean any person who requests or who has received an extension of business credit from a financial institution. The term ''applicant'' is undefined in section 1071. Proposed § 1002.102(b) was based on the definition of applicant in existing Regulation B, though for consistency with other parts of the proposed rule, it added a limitation that the credit be business credit and uses the term financial institution instead of creditor. It also omitted the references to other persons who are or may become contractually liable regarding an extension of credit such as guarantors, sureties, endorsers, and similar parties. The Bureau acknowledged that including other such persons could exceed the scope of the data collection anticipated by section 1071. Including them could also make the data collection more difficult as financial institutions might need to report data points (such as gross annual revenue, NAICS code, time in business, and others) regarding multiple persons in connection with a single application. The Bureau believed that collecting such information on guarantors, sureties, endorsers, and similar parties would likely not support section 1071's business and community development purpose.

The Bureau sought comment on its proposed approach to this definition and received one comment in response. The commenter requested that the Bureau clarify that loans jointly made to multiple borrowers, where one or more of the borrowers may qualify as a small business under the rule but are not the primary business(es) seeking the funding, are not subject to the reporting requirements.

For the reasons discussed herein, the Bureau is finalizing § 1002.102(b) as proposed. The Bureau believes it is appropriate to base the definition of applicant for purposes of new subpart B on the definition of applicant in existing Regulation B, with the limitation that the credit be business credit and using the term financial institution instead of creditor. The Bureau likewise believes that it is appropriate to limit the definition of applicant in subpart B to only those persons who request, or have

received, an extension of business credit from a financial institution. As such, the definition of applicant in final § 1002.102(b) does not include other persons who are or may become contractually liable regarding an extension of business credit such as guarantors, sureties, endorsers, and similar parties. As stated in final comment 102(b)–1, in no way are the limitations to the term applicant in § 1002.102(b) intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term applicant in existing § 1002.2(e) as applicable to existing Regulation B.

In response to the comment regarding loans jointly made to multiple borrowers, the Bureau does not believe that a modification to the definition of applicant is necessary. Rather, the Bureau is adding comment 103(a)–10 to address data collection and reporting if a covered financial institution receives a covered application from co-applicant businesses that are not affiliates, as defined in final § 1002.102(a). Final comment 103(a)–10 provides that if a covered financial institution receives a covered application from multiple businesses that are not affiliates, as defined by final § 1002.102(a), it shall compile, maintain, and report data pursuant to final §§ 1002.107 through 1002.109 for only a single applicant that is a small business, as defined in final § 1002.106(b). A covered financial institution shall establish consistent procedures for designating a single small business for purposes of collecting and reporting data under subpart B in situations where there is more than one small business co-applicant, such as reporting on the first small business listed on an application form. In addition, the Bureau notes that—if the applicants are affiliated entities—the rule already permits consideration of affiliates' revenues in determining whether a business qualifies as small. See the section-by-section analyses of §§ 1002.106(b) and 1002.107(a)(14) for additional discussion of affiliate revenue.

102(c) Business

Final § 1002.102(c) refers to § 1002.106(a) for a definition of the term ''business.'' See the section-by-section analysis of § 1002.106(a) for a detailed discussion of that definition.

102(d) Business Credit

Proposed § 1002.102(d) would have referred to existing § 1002.2(g) for a definition of the term ''business credit.'' The term ''credit'' is undefined in section 1071. Section 1071 does not use the term ''business credit,'' though it does define ''small business loan'' as a loan made to a small business. Existing § 1002.2(g) defines ''business credit'' as ''refer[ring] to extensions of credit primarily for business or commercial (including agricultural) purposes, but excluding extensions of credit of the types described in § 1002.3(a)–(d),'' *i.e.,* public utilities credit, securities credit, incidental credit, and government credit.

The Bureau received two comments specific to its proposed definition of business credit. These two commenters, both credit union trade associations, expressed support for the proposed definition, stating that it was familiar to credit unions and encompasses the most common business credit products aimed at small business borrowers. The Bureau also received numerous comments related to its proposed coverage of agricultural credit, parts of which also touched on the proposed definition of ''business credit''; these comments are discussed below in the section-by-section analysis of § 1002.104(a).

The Bureau is finalizing § 1002.102(d) as proposed. Final § 1002.102(d) points to existing § 1002.2(g) in defining the term ''business credit.'' The Bureau believes it is appropriate to define business credit by reference to the existing definition in Regulation B, which incorporates by reference the meaning of ''credit,'' as defined in existing § 1002.2(j). For clarity and completeness, as discussed below, the Bureau is also adopting existing Regulation B's definition of credit. The Bureau's final rule uses the term business credit principally in defining a covered credit transaction in § 1002.104(a).

The Bureau notes that existing § 1002.2(g) excludes public utilities credit, securities credit, incidental credit, and government credit (that is, extensions of credit made *to* governments or governmental subdivisions, agencies, or instrumentalities—not extensions of credit made *by* governments), as defined in existing § 1002.3(a) through (d), from certain aspects of existing Regulation B.[309] For the purpose of subpart B, the Bureau is both incorporating existing § 1002.2(g)—which already includes partial carveouts for public utilities credit, securities credit, and incidental credit—and also finalizing complete exclusions for these types of credit from the definition of a covered credit transaction in § 1002.104(b). For clarity, the Bureau is separately defining these terms in § 1002.104(b) and explains the rationales for excluding each of them in the section-by-section analysis of § 1002.104(b) below. The Bureau is not adopting an exclusion for extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities, because governmental entities do not constitute small businesses under the final rule.[310]

102(e) Closed-End Credit Transaction

Proposed § 1002.102(e) would have stated that a closed-end credit transaction means an extension of credit that is not an open-end credit transaction under proposed § 1002.102(n). The term ''closed-end credit transaction'' is undefined in section 1071. The Bureau's proposal would have specified different requirements for collecting and reporting certain data points based on whether the application is for a closed-end credit transaction or an open-end credit transaction. The definition of open-end credit transaction was addressed in proposed § 1002.102(n).

The Bureau sought comment on its proposed approach to the definition of a closed-end credit transaction. The Bureau received no comments and is finalizing § 1002.102(e) with one revision for clarity. The Bureau is revising the definition of a closed-end credit transaction to mean an extension of business credit that is not an open-end credit transaction under § 1002.102(n). The Bureau believes this definition is reasonable as it aligns with the definition of ''open-end credit transaction'' in final § 1002.102(o), and that such alignment will minimize confusion and facilitate compliance.

102(f) Covered Application

Final § 1002.102(f) refers to § 1002.103 for a definition of the term ''covered application.'' See the section-by-section analysis of § 1002.103 for a detailed discussion of that definition.

102(g) Covered Credit Transaction

Final § 1002.102(g) refers to § 1002.104 for a definition of the term ''covered credit transaction.'' See the section-by-section analysis of § 1002.104 for a detailed discussion of that definition.

[309] As explained in existing comment 3–1, under § 1002.3, procedural requirements of Regulation B do not apply to certain types of credit. The comment further states that all classes of transactions remain subject to § 1002.4(a) (the general rule barring discrimination on a prohibited basis) and to any other provision not specifically excepted.

[310] Government entities are not ''organized for profit'' and thus are not a ''business concern'' under final § 1002.106(a).

102(h) Covered Financial Institution

Final § 1002.102(h) refers to § 1002.105(b) for a definition of the term ''covered financial institution.'' See the section-by-section analysis of § 1002.105(b) for a detailed discussion of that definition.

102(i) Credit

Proposed § 1002.102(i) would have referred to existing § 1002.2(j) for a definition of the term ''credit.'' The term ''credit'' is undefined in section 1071. Existing § 1002.2(j), which largely follows the definition of credit in ECOA,[311] defines ''credit'' to mean the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. The Bureau sought comment on its proposed approach to this definition.

The Bureau received several comments regarding its proposed definition of ''credit.'' A few community groups expressed general support for a broad definition of credit. To ensure adequate coverage for future products, one commenter suggested defining credit to also cover situations where money is transmitted to a recipient but the money still effectively belongs to the transmitter and is to be repaid according to certain terms. Another commenter advocated for a credit definition that included as many lenders (and financing companies that are not technically lenders) as possible within the scope of this rulemaking, even when such companies are providing financing in a format that, according to the commenter, is not technically credit (the commenter offered cash advance and factoring companies as examples).

For the reasons set forth herein, the Bureau is finalizing § 1002.102(i) as proposed. Section 1002.102(i) refers to existing § 1002.2(j) for a definition of the term ''credit.'' The Bureau believes that aligning to the implemented definition of credit in ECOA[312] for purposes of subpart B will help to foster consistency with existing Regulation B. The term credit in subpart B is used in the context of what constitutes a covered credit transaction—that is, whether the application is reportable under this final rule. See the section-by-section analysis of § 1002.104 below for a detailed discussion of what does, and does not, constitute a covered credit transaction for purposes of this final rule.

102(j) Financial Institution

Final § 1002.102(j) refers to § 1002.105(a) for a definition of the term ''financial institution.'' See the section-by-section analysis of § 1002.105(a) for a detailed discussion of that definition.

102(k) LGBTQI+ Individual and 102(l) LGBTQI+-Owned Business

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of this section.'' In the NPRM, the Bureau sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer plus (LGBTQ+)-owned business status, similar to its proposal for collecting minority-owned business status and women-owned business status under proposed § 1002.107(a)(18) and (19). The Bureau also sought comment on whether including this question, along with others, would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for industry.[313]

This section-by-section analysis of § 1002.102(k) and (*l*) discusses the Bureau's definition of LGBTQI+ individual and the related definition of LGBTQI+-owned business, respectively. Collection of LGBTQI+-owned business status is addressed in the section-by-section analysis of § 1002.107(a)(18).

Comments Received

The Bureau received comments from several lenders, individual commenters, and community and advocacy groups as to whether the Bureau should adopt a data point to collect an applicant's ''LGBTQ+-owned business'' status.[314] As explained further in the section-by-section analysis of § 1002.107(a)(18), some of these commenters did not support including such a data point in the final rule (and thus did not make any suggestions for how an LGBTQ+-owned business should be defined). One commenter opposed collecting LGBTQ+ data without a corresponding proposal to modify the definition of minority-owned business.

In contrast, other commenters supported requiring the collection and reporting of applicants' LGBTQ+-owned business status information. As discussed further in the section-by-section analysis of § 1002.107(a)(18), commenters generally explained that collecting such data would enhance fair lending enforcement and identify credit needs for these small businesses.

Most of these commenters generally echoed the Bureau's use of the term ''LGBTQ+-owned business'' status in expressing their support for the data point. Several recommended that the Bureau require financial institutions' inquiries about such status to include a definition of the status and give applicants response options specifically indicating that they are or are not such a business, similar to the Bureau's proposed approach for requesting information about applicants' minority-owned and women-owned business status.

One commenter suggested that the Bureau use the phrase ''LGBTQI+-owned business'' and include a definition in the final rule. The commenter recommended that the Bureau define the term as a business where (1) more than 50 percent of the ownership or control of which is held by one or more individuals self-identifying as lesbian, gay, bisexual, transgender, queer, or intersex and (2) more than 50 percent of the net profit or loss accrues to one or more individuals self-identifying as lesbian, gay, bisexual, transgender, queer, or intersex. The commenter stated that this definition is similar to the definitions of minority-owned and women-owned businesses and consistent with other Federal government and expert practice and recommendations as well as the definition of ''LGBTQ-owned business'' in Federal legislation that was pending at that time.[315]

Final Rule

As discussed further in part II above and the section-by-section analysis of § 1002.107(a)(18) below, the Bureau believes that the collection of an applicant's LGBTQI+-owned business status will aid in fulfilling the purposes of section 1071, by facilitating evaluations of potential discriminatory

[311] *See* 15 U.S.C. 1691a. Existing Regulation B uses the term ''applicant'' instead of ''debtor.''

[312] *See id.* Existing Regulation B closely aligns with the definition of credit in ECOA, with some technical revisions and use of the term ''applicant'' instead of ''debtor.''

[313] 86 FR 56356, 56482 (Oct. 8, 2021).

[314] The terms ''LGBT,'' ''LGBTQ,'' ''LGBTQ+,'' and ''LGBTQIA+'' are used in this preamble to reflect the specific terms used by commenters, the conditions or titles of any cited research, or (particularly for ''LGBTQ+'') the Bureau's request for comment in the NPRM.

[315] The commenter cited the *LGBTQ Business Equal Credit Enforcement and Investment Act,* H.R. 1443, 117th Cong. (2021), *https://www.congress.gov/bill/117th-congress/house-bill/1443/text* (which would have amended ECOA section 704B to, among other things, require financial institutions to inquire whether a business is a ''LGBTQ-owned'' business).

lending practices on the basis of sex in violation of fair lending laws and helping communities, governmental entities, and creditors identify needs and opportunities of small businesses. Thus, the Bureau is adopting § 1002.102(k) and (*l*) pursuant to its authority under ECOA section 704B(e)(2)(H) to require financial institutions to compile and maintain any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071 and its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to the statute. The Bureau is not, as suggested by one commenter, including LGBTQI+ status in the definition of minority-owned business, but is, as requested by multiple commenters, adopting a definition of LGBTQI+ owned business that largely parallels the definition of a minority-owned business.

For the reasons set forth herein, the Bureau is defining ''LGBTQI+ individual'' in final § 1002.102(k) as including an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex. The Bureau is defining the term ''LGBTQI+-owned business'' in final § 1002.102(*l*) as ''a business for which one or more LGBTQI+ individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.'' Both definitions are being included to facilitate the requirement in final § 1002.107(a)(18) that financial institutions collect an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses.

The Bureau agrees with a commenter's suggestion to use the term ''LGBTQI+-owned business''—including an ''I'' to capture intersex individuals—instead of ''LGBTQ+-owned business.'' [316] The Bureau believes that the term ''LGBTQI+-owned business'' better reflects the Bureau's intent to be broadly inclusive.

The Bureau notes that in user testing it conducted to assist its understanding of small business applicants' potential experience using the sample data collection form in the summer and fall of 2022, a few users were confused by the term ''LGBTQI+-owned business.'' [317] Therefore, and consistent with commenters' suggestions, final comments 102(*l*)–2 and 107(a)(18)–2 explain that a financial institution must provide the definition of LGBTQI+-owned business when inquiring as to the applicant's business ownership status pursuant to final § 1002.107(a)(18). A financial institution may use the definition as set forth on the sample data collection form at appendix E. Final comment 102(*l*)–2 also clarifies that a financial institution must provide the definition of LGBTQI+ individual under final § 1002.102(k) if asked by the applicant, but does not need to do so unless asked.

Final comment 102(*l*)–2 clarifies that the definition of LGBTQI+-owned business is used only when an applicant determines if it is such a business for purposes of final § 1002.107(a)(18). The financial institution is not permitted or required to make its own determination as to whether an applicant is a LGBTQI+-owned business.

In line with commenters' suggestions, the definition for LGBTQI+-owned business in final § 1002.102(*l*) parallels concepts in the Bureau's definitions for minority-owned business and women-owned business in final § 1002.102(m) and (s), respectively. The final rule's LGBTQI+-owned business definition incorporates the same two-prong approach as the other business status definitions, with more than 50 percent ownership or control as the first prong and more than 50 percent of net profits or losses as the second prong.

The commentary for final § 1002.102(*l*) generally mirrors the commentary for the minority-owned business and women-owned business definitions in the final rule.[318] Final comment 102(*l*)–1 explains that a business must satisfy both prongs of the definition to be a LGBTQI+-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more LGBTQI+ individuals, and (B) more than 50 percent of the net profits or losses accrue to one or more LGBTQI+ individuals. Final comment 102(*l*)–1 clarifies that the first prong of the definition can be met through either the control or ownership requirements (as do final comments 102(m)–1 and 102(s)–1).

Final comments 102(*l*)–3 through –6 mirror the corresponding commentary for the definitions of minority-owned business and women-owned business and provide clarifications of terms used and the concepts of ownership, control, and accrual of net profits or losses.

102(m) Minority-Owned Business

Proposed Rule

As discussed further herein, the final rule combines proposed § 1002.102(*l*) (minority individual) into final § 1002.102(m) to streamline the rule and facilitate compliance.

ECOA section 704B(b)(1) requires financial institutions to inquire whether applicants for credit are minority-owned businesses. For purposes of the financial institution's inquiry under 704B(b), 704B(h)(5) defines a business as a minority-owned business if (A) more than 50 percent of the ownership or control is held by one or more minority individuals, and (B) more than 50 percent of the net profit or loss accrues to one or more minority individuals. Section 1071 does not expressly define the related terms of ''ownership'' or ''control,'' nor does it describe what it means for net profits or losses to accrue to an individual. Section 704B(h)(4) defines the term ''minority'' as having the same meaning as in section 1204(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[319] That statute defines ''minority'' to mean any Black American, Native American, Hispanic American, or Asian American.[320] While section 1071 uses the term ''minority individual'' in 704B(h)(5), it does not define that term.

Proposed § 1002.102(l)—definition of minority individual. Proposed § 1002.102(*l*) would have clarified that the term ''minority individual'' means a natural person who is American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and/or Hispanic or Latino. As explained in the NPRM, the Bureau believed that these categories represent contemporary, more specific delineations of the categories described in section 1204(c)(3) of FIRREA. Proposed comment 102(*1*)–2

[316] Explicit inclusion of intersex individuals within the scope of the definitions for LGBTQI+ individual and LGBTQI+-owned business is consistent with the prohibitions against discrimination on the basis of ''sex'' under ECOA and Regulation B. Sex characteristics including intersex traits are ''inextricably bound up with'' sex,'' *Bostock* v. *Clayton Cty.,* 140 S. Ct. 1731, 1742 (2020), and ''cannot be stated without referencing sex,'' *Grimm* v. *Gloucester Cty. Sch. Bd.,* 972 F.3d 586, 608 (4th Cir. 2020) (quoting *Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1051 (7th Cir. 2017)).

[317] CFPB, *User testing for sample data collection form for the small business lending final rule* at app. C, at 3, 8 (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.*

[318] For discussion of comments as to the concepts of ownership and control in the LGBTQI+-owned business definition, the Bureau refers to discussion of these concepts in the section-by-section analyses of § 1002.102(m) and (s) regarding the definitions for minority-owned business and women-owned business.

[319] Public Law 101–73, section 1204(c)(3), 103 Stat. 183, 521 (1989) (12 U.S.C. 1811 note).

[320] *Id.*

would have clarified that a multi-racial or multi-ethnic person is a minority individual. Proposed comment 102(*1*)–1 would have clarified that this definition would be used only when an applicant determines whether it is a minority-owned business pursuant to proposed §§ 1002.102(m) (definition of minority-owned business) and 1002.107(a)(18) (data point for minority-owned business status). Proposed comment 102(*1*)–3 would have clarified the relationship of the definition of minority individual to the disaggregated subcategories used to determine a principal owner's ethnicity and race.

The Bureau sought comment on its proposed approach to this definition, including its proposed clarification of the definition of minority individual, and requested comment on whether additional clarification was needed. The Bureau also sought comment on whether the definition of minority individual should include a natural person who is Middle Eastern or North African, and whether doing so should be dependent on whether Middle Eastern or North African is added as an aggregate category for purposes of proposed § 1002.107(a)(20).[321]

Proposed § 1002.102(m)—definition of minority-owned business. Proposed § 1002.102(m) would have defined a minority-owned business as a business for which more than 50 percent of its ownership or control is held by one or more minority individuals, and more than 50 percent of its net profits or losses accrue to one or more minority individuals. Proposed comment 102(m)–1 would have explained that a business must satisfy both prongs of the definition to be a minority-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more minority individuals, and (B) more than 50 percent of the net profits or losses accrue to one or more minority individuals.

Proposed comment 102(m)–2 would have clarified that the definition of minority-owned business is used only when an applicant determines if it is a minority-owned business for purposes of proposed § 1002.107(a)(18). A financial institution would provide the definition of minority-owned business when asking the applicant to provide minority-owned business status pursuant to proposed § 1002.107(a)(18), but a financial institution would not be permitted or required to make its own determination regarding whether an applicant is a minority-owned business for this purpose.

Proposed comment 102(m)–3 would have further noted that a financial institution would be permitted to assist an applicant when determining whether it is a minority-owned business but would not be required to do so, and could provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in proposed comments 102(m)–4 through –6. Additionally, for purposes of reporting an applicant's minority-owned business status, a financial institution would rely on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

The Bureau proposed to clarify ''ownership'' and ''control'' using concepts from the beneficial ownership requirements in FinCEN's customer due diligence rule.[322] Proposed comment 102(m)–4 would have clarified that a natural person owns a business if that natural person directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Proposed comment 102(m)–4 would have also provided examples of ownership and clarified that, where applicable, ownership would need to be traced or followed through corporate or other indirect ownership structures for purposes of proposed §§ 1002.102(m) and 1002.107(a)(18). Proposed comment 102(m)–5 would have clarified that a natural person controls a business if that natural person has significant responsibility to manage or direct the business, and would have provided examples of natural persons who control a business. Proposed comment 102(m)–6 would have clarified that a business's net profits and losses accrue to a natural person if that natural person receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

The Bureau sought comment on the proposed definition of minority-owned business and possible alternatives that may clarify the term in order to help ensure that small business applicants can determine whether they are minority-owned businesses for purposes of data collection pursuant to section 1071.

Comments Received

Proposed § 1002.102(l)—definition of minority individual. The Bureau received comments regarding the definition of minority individual from several industry commenters and community groups.

One community group stated that the Bureau's proposal to mirror HMDA with respect to the definition of minority individual is desirable because HMDA's racial and ethnic categories are reasonably comprehensive, and using the same categories eases reporting requirements and creates consistency for applicants. A group of trade associations and a bank supported the Bureau's proposal to define a minority individual using only aggregate ethnicity and race categories, stating that doing so will help lessen confusion. Another bank requested clarification on who is considered multi-racial or multi-ethnic for purposes of the rule.

Proposed § 1002.102(m)—definition of minority-owned business. The Bureau received comments regarding the definition of minority-owned business from lenders, trade associations, and community groups.

One community group stated that the collection of data on minority-owned businesses, along with the collection of data on women-owned businesses, will help illustrate the experience of firms owned by women of color who likely face even higher barriers to accessing small business credit than those firms not owned by women of color. The commenter noted that these firms comprise a significant portion of small businesses and there are a greater proportion of women of color who own businesses than the share of white-owned businesses owned by women. Another requested that the Bureau add an ''I don't know'' response to the list of possible responses, as there may be applicants who cannot make a legal conclusion as to whether the small business is minority-owned. A trade association asserted that inquiring about the ethnicity (or gender) of business owners is contrary to the expectations of financial institutions and applicants alike.

[321] The Bureau received a number of comments regarding whether Middle Eastern or North African should be added as an aggregate category. Those comments are discussed in the section-by-section analysis of § 1002.107(a)(19).

[322] *See* 31 CFR 1010.230 (describing the beneficial ownership requirements for legal entity customers). The Department of the Treasury's Financial Crimes Enforcement Unit (FinCEN) recently issued a final rule to implement requirements regarding reporting of beneficial ownership information pursuant to the Corporate Transparency Act, 31 U.S.C. 5336. *See* 87 FR 59498 (Sept. 30, 2022). While FinCEN's final rule does not include changes to the current customer due diligence rule, FinCEN has indicated its intent to revise the customer due diligence rule in a future rulemaking. *See id.* at 59507. FinCEN's final rule includes definitions for beneficial owner that will be different from what currently exists in the customer due diligence rule, as to both control and ownership, when the rule goes into effect on January 1, 2024. *See id.* at 59594. However, the final rule does not change the 25 percent threshold for determining ownership. *See id.*

Regarding the proposed requirement that in order to be considered a minority-owned business, one or more minority individuals must hold more than 50 percent of the ownership or control of the business, the Bureau received comments from several community groups and lenders in support. Conversely, a trade association and a bank urged the Bureau to revise the requirement such that one or more minority individuals must hold ''50 percent or more'' of the ownership or control because the statutory definition may result in underreporting for equal partnerships with mixed race partners and this would, they said, slant the statistical picture.

Regarding the proposed requirement that in order to be considered a minority-owned business, more than 50 percent of the net profit or loss must accrue to one or more minority individuals, a community group stated that the definition is appropriate to prevent illusory ''ownership'' by a minority individual. Several other commenters also supported the definition.

Several industry commenters requested that the Bureau not include the requirement that more than 50 percent of the net profits or losses must accrue to one or more minority individuals. Some of these commenters stated that the initial prong of the definition requiring more than 50 percent of ownership or control by a minority individual is sufficient for determining ownership and would reduce complexity for borrowers. A CDFI lender stated that defining ownership based on a profit and loss calculation may not fully serve the objectives of the statute, and asked the Bureau to consider the CDFI Fund definition of minority-owned business.[323] Several commenters also argued that the net profits or losses prong complicates the definition, could result in inaccurate data collection, implicates the limited understanding of many small business owners regarding the meaning of net profits and losses as well as the sensitive nature of these issues, and concluded that many small business owners will not understand the definition as provided and will, as a result, decline to answer the question.

A bank asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections. Specifically, the commenter gave an example of an applicant that provides demographic information for one application, and then chooses not to provide information for a subsequent application, and asking which collection should be reported.[324] A trade association stated that it is possible in certain states for a third party non-owner to act as trustee of a trust, and that the Bureau should change a comment example to clarify whether it is the Bureau's intent to presume that the trustee of a trust is the owner. Another bank also asserted that requiring banks to collect such information is costly to banks, customers, and communities. A group of trade associations asserted that the commentary should be revised to explicitly state that a financial institution must provide an applicant with the applicable definition.

Several industry commenters supported the proposal to rely solely on the data provided by the applicant and that financial institutions should not be required to verify any such information provided by the applicant. With respect to self-certification of minority-owned business status, two trade associations supported permitting credit applicants to self-certify that 50 percent or more of the net profit or loss accrues to one or more minority individuals, rather than lenders needing to verify this information. Another trade association asserted that the applicant should solely determine whether the individual owners are multi-ethnic or multi-racial individuals and the financial institution should not be required to otherwise verify or report any information other than that supplied by the applicant.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.102(m) with a number of revisions to the regulatory text and commentary to incorporate the definition of minority individual. The Bureau has made these changes to streamline the rule and facilitate compliance. The Bureau is otherwise finalizing the associated commentary with a minor adjustment for clarity.

Final § 1002.102(m) defines a minority-owned business as a business for which one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals hold more than 50 percent of its ownership or control and for which more than 50 percent of the net profits or losses accrue to one or more such individuals. Final comment 102(m)–1 explains that a business must satisfy both prongs of the definition to be a minority-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more such individuals, and (B) more than 50 percent of the net profits or losses accrue to one or more such individuals. Final comment 102(m)–1 includes an additional sentence to clarify that a business that is controlled by an individual with the characteristics listed in the regulatory text satisfies this prong of the definition even if none of the individuals with ownership in the business satisfies those characteristics.

Final comment 102(m)–2 clarifies that the definition of minority-owned business is used only when an applicant determines if it is a minority-owned business for purposes of final § 1002.107(a)(18), and is finalized with an adjustment made for clarity. Final comment 102(m)–3 is finalized as proposed and notes that a financial institution is permitted to assist an applicant when determining whether it is a minority-owned business but is not required to do so, may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in final comments 102(m)–4 through –6, and that, for purposes of reporting an applicant's minority-owned business status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

Final comment 102(m)–4, finalized with minor edits for consistency and clarity, provides examples of ownership and clarifies that, where applicable, ownership needs to be traced through corporate or other indirect ownership structures. With regard to a commenter's assertion that, in certain states, a trustee could act as a third party non-owner trustee of a trust, the Bureau believes the trustee would be considered an owner for purposes of this definition. Final comment 102(m)–4 also clarifies (as it did in the Bureau's proposal) that a trustee is considered the owner of a trust.

Final comment 102(m)–5 clarifies that an individual controls a business if that individual has significant responsibility

[323] The community group cited to the September 2021 CDFI Transactional Level Report Data Point Guidance, which provides guidance on providing transactional level report data. Under ''Minority Owned or Controlled,'' the guidance states to ''[r]eport whether the investee/borrower is more than 50% owned or controlled by one or more minorities. If the business is a for-profit entity, report whether more than 50% of the owners are minorities. If the business is a nonprofit entity, report whether more than 50% of its Board of Directors are minorities.'' CDFI Fund, *CDFI Transactional Level Report Data Point Guidance,* at 33 (Sept. 2021), *https://www.cdfifund.gov/sites/cdfi/files/2021-08/CDFITLRGuidance_Final_Sept2021.pdf.*

[324] See the section-by-section analysis of § 1002.107(d) regarding the use of previously collected data.

to manage or direct the business, while final comment 102(m)–6 clarifies that a business's net profits and losses accrue to an individual if that individual receives the net profits, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes. Both comments are finalized with minor edits for consistency and clarity.

Final comments 102(m)–7 and –8 are adopted from the commentary to proposed § 1002.102(*l*) (respectively, proposed comments 102(*l*)–2 and –3). Final comment 102(m)–7 clarifies that an individual who is multi-racial or multi-ethnic constitutes an individual for which the definition of minority-owned business may apply, depending on whether the individual meets the other requirements of the definition. Final comment 102(m)–8 clarifies that the relationship of the ethnicity and race categories used in this section are aggregate ethnicity and race categories and are the same aggregate categories (along with Not Hispanic or Latino for ethnicity, and White for race) to collect an applicant's principal owners' ethnicity and race pursuant to final § 1002.107(a)(19). Final comment 102(m)–8 is revised from proposed comment 102(*l*)–3 to more clearly state the relationship of the ethnicity and race disaggregated subcategories in this comment to those used in final § 1002.107(a)(19). Proposed comment 102(*l*)–1 was not finalized because it was no longer relevant once the definition of minority individual was incorporated into the minority-owned business definition.

With respect to the categories of persons that constitute minorities for purposes of determining minority-owned business status, the Bureau believes its clarified terminology in final § 1002.102(m), which uses the aggregate ethnicity and race categories set forth in existing § 1002.13(a)(1)(i) and appendix B to Regulation C, will avoid the potentially confusing situation where an applicant is presented one set of aggregate ethnicity and race categories when answering questions about the principal owners' ethnicity and race pursuant to final § 1002.107(a)(19) (which also uses the same aggregate ethnicity and race categories) [325] but is asked to use a different set of aggregate categories when indicating whether the business is a minority-owned business. It also avoids creating a situation where a financial institution is required to use different aggregate ethnicity and race categories when complying with different portions of Regulation B and, if applicable, Regulation C. This consistency across ethnicity and race data collection regimes will also allow for better coordination among data users when reviewing data.[326] Further, the Bureau believes that these categories represent contemporary, more specific delineations of the categories described in section 1204(c)(3) of FIRREA.[327]

The Bureau does not believe it would be appropriate to deviate from the statutory definition of a minority-owned business in the various ways some commenters suggested, and the Bureau's authority to deviate from the statutory language is limited. The Bureau also believes that many small business applicants already respond to questions about who owns and who controls a business entity when completing customer due diligence forms or otherwise responding to questions related to that rule and thus will be familiar with these concepts. Although the customer due diligence rule does not address the second prong of the definition regarding accrual of net profits or losses, final comment 102(m)–6 provides a comprehensive explanation of this prong of the definition.

With regard to comments urging the Bureau to remove the prong requiring that more than 50 percent of its net profits or losses accrue to one or more minority individuals in order to be considered a minority-owned business, aside from the Bureau's limited authority to deviate from the statutory language, the Bureau finds that this prong is necessary to prevent illusory ''ownership'' claims by ''straw'' owners.

Finally, with regard to commenters' requests for further clarification, in accordance with ECOA section 704B(g)(3), the Bureau may release material, as part of its regulatory implementation strategy, to assist both financial institutions with complying with the requirements of § 1002.102(m) and small businesses in understanding this definition.

102(n) Open-End Credit Transaction

Proposed § 1002.102(n) would have stated that an open-end credit transaction means an open-end credit plan as defined in Regulation Z § 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in § 1026.2(a)(12), is extended by a creditor, as defined in § 1026.2(a)(17), or is extended to a consumer, as defined in § 1026.2(a)(11). The term ''open-end credit transaction'' is undefined in section 1071. The Bureau's proposal would have specified different rules for collecting and reporting certain data points based on whether the application is for a closed-end credit transaction or an open-end credit transaction.

The Bureau sought comment on its proposed approach to this definition. The Bureau received no comments and is finalizing § 1002.102(n) as proposed. The Bureau believes this definition is reasonable because it aligns with the definition of ''open-end credit transaction'' in Regulation Z § 1026.2(a)(20), and that such alignment will minimize confusion and facilitate compliance.

102(o) Principal Owner

Proposed Rule

ECOA section 704B(e) requires financial institutions to compile and maintain the ethnicity, race, and sex of an applicant's principal owners. However, section 1071 does not expressly define who is a principal owner of a business. Proposed § 1002.102(o) would have defined principal owner in a manner that is, in part, consistent with the beneficial ownership requirements in FinCEN's customer due diligence rule.[328] Specifically, a natural person would be a principal owner if the natural person directly owns 25 percent or more of the equity interests of the business. Further, as noted in proposed comment 102(o)–1, a natural person would need to directly own an equity share of 25 percent or more in the business in order to be a principal owner. The Bureau also

[325] The Bureau notes that while the aggregate ethnicity and race categories are the same among final § 1002.107(a)(19), existing § 1002.13(a)(1)(i), and appendix B to Regulation C, the disaggregated race subcategories that an applicant may use to respond to a financial institution's inquiry as to its principal owners' race under final § 1002.107(a)(19) differ (*i.e.,* due to the addition of disaggregated Black or African American race subcategories) from the disaggregated race subcategories in existing § 1002.13(a)(1)(i), and appendix B to Regulation C. See the section-by-section analysis of § 1002.107(a)(19).

[326] For example, OMB uses these same categories for the classification of Federal data on race and ethnicity. *See* Off. of Mgmt. & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity,* 62 FR 58785 (Oct. 30, 1996).

[327] *See, e.g.,* 80 FR 36356 (June 24, 2015) (NCUA interpretive ruling and policy statement implementing an identical FIRREA definition of minority using this same modern technology).

[328] *See* 31 CFR 1010.230 (describing the beneficial ownership requirements for legal entity customers). As noted above, FinCEN recently issued a final rule to implement requirements regarding reporting of beneficial ownership information pursuant to the Corporate Transparency Act. *See* 87 FR 59498 (Sept. 30, 2022). That final rule does not amend the current customer due diligence rule (although FinCEN has indicated that it will be revised at a later point). *See* 87 FR 59498, 59507. Notably, however, FinCEN's final rule did not change the 25 percent threshold for determining ownership. *See id.* at 59594.

proposed that entities not be considered principal owners and indirect ownership by individuals likewise not be considered when determining if someone is a principal owner for purposes of collecting and reporting principal owners' ethnicity, race, and sex or the number of principal owners. Thus, when determining who is a principal owner, ownership would not be traced through multiple corporate structures to determine if a natural person owns 25 percent or more of the applicant's equity interests. Additionally, because only a natural person would be a principal owner for purposes of the rule, entities such as trusts, partnerships, limited liability companies, and corporations, would not be principal owners.

Proposed comment 102(o)–2 would have clarified that a financial institution would provide an applicant with the definition of principal owner when asking the applicant to provide the number of its principal owners pursuant to proposed § 1002.107(a)(20) and the ethnicity, race, and sex of its principal owners pursuant to proposed § 1002.107(a)(19). Proposed comment 102(o)–2 would have also explained that if a financial institution meets in person with a natural person about a covered application, the financial institution may be required to determine if the natural person with whom it meets is a principal owner in order to collect and report the principal owner's ethnicity and race based on visual observation and/or surname. Additionally, proposed comment 102(o)–2 would have noted that if an applicant does not provide the number of its principal owners in response to the financial institution's request pursuant to proposed § 1002.107(a)(21), the financial institution may need to determine the number of the applicant's principal owners and report that information based on other documents or information.

The Bureau explained that aligning the proposed definition of principal owner with the 25 percent ownership definition in the customer due diligence rule would likely be familiar to most financial institutions and applicants. The customer due diligence rule is broadly in use and banks, credit unions, and certain other financial institutions must comply with that rule. Further, the Bureau believed that applicants, as a general matter, would be more likely to be familiar with customer due diligence requirements than SBA or CDFI Fund requirements because they have to complete customer due diligence forms before opening an initial account (*i.e.,* loan or deposit account) at a bank or at certain other institutions. However, unlike the customer due diligence rule, due to potential complications with collecting ethnicity, race, and sex information for principal owners, the Bureau proposed that individuals that only indirectly own 25 percent or more of an applicant's equity interests, as well as entities and trusts, would not be considered principal owners for purposes of the rule. The Bureau sought comment on its proposed definition, including its proposal to not include individuals that only indirectly own 25 percent or more of an applicant's equity interests as principal owners.

Comments Received

The Bureau received comments on this aspect of the proposal from a number of banks, trade associations, community groups, and a business advocacy group. Some of the industry commenters and a community group supported the Bureau's proposed definition for principal owner. A group of trade associations agreed with the Bureau's proposal to align, in part, the definition with the customer due diligence rule, stating that financial institutions are already familiar with ownership concepts through that rule. Trade association commenters also supported the Bureau's proposal not to include entities and indirect ownership by natural persons, with one stating that the concepts of ownership by entities and indirect ownership would add unnecessary complexity to the Bureau's final rule and another noting that its members found them difficult concepts to explain and determine. The community group supporting the Bureau's proposed definition for principal owner stated that the proposed definition made intuitive sense, as 25 percent is a significant amount of ownership.

Several other industry commenters did not support the Bureau's proposed definition. Specifically, these commenters requested that the Bureau look to and align with all the concepts of the customer due diligence rule. The commenters stated that because financial institutions and customers are familiar with the customer due diligence rule and financial institutions already identify principal owners thereunder, consistency between the two regulatory regimes would reduce complexity and facilitate compliance. A business advocacy group stated that aligning the rules completely would allow financial institutions to leverage existing processes and training and focus on customer needs rather than regulatory interpretation. Another commenter argued that a new definition for principal owner under the rule would add unnecessary complexity to the loan origination process. A lender specifically suggested that financial institutions be required to identify and verify the identity of each individual who owns 25 percent or more of the entity, and one individual who controls the entity, as is required under the customer due diligence rule. Another commenter similarly argued for replicating this requirement for the rule, arguing that financial institutions would not find it challenging to trace indirect ownership because they already do so under the customer due diligence rule, that the approach would be familiar to small business applicants structured as legal entities, and that small businesses that are not legal entities (*e.g.,* sole proprietorships) likely would not have complicated equity structures.

Two industry commenters that supported aligning principal owner definition in the Bureau's rule more closely with the customer due diligence rule than proposed by the Bureau also expressed concern that differences in the definition between the regulatory regimes would lead to customer confusion. One of these commenters argued that confusion would likely result for applicants who will be asked to provide information about principal owners under both rules at the same point of the origination process. The other asserted that confusion as a result of different definitions would increase the possibility that customers would refuse to provide information.

A bank commented that the Bureau's proposal did not provide enough guidance or procedures for how financial institutions should handle reporting for small business applicants whose principal owner(s) are a separate corporate entity or trust.

Another bank stated that financial institutions should not be required to determine the ownership of small businesses, which it said the proposed rule would require.

A trade association, which requested an exclusion for applications from trusts from coverage under the final rule, raised a question about who should be considered a principal owner of a trust for data collection purposes, such as whether they should be the settlors, beneficiaries, trustees, or some combination thereof.

Final Rule

For the reasons set forth herein, the Bureau is finalizing its definition of principal owner in § 1002.102(o) and associated commentary with certain adjustments. The Bureau believes it is appropriate to align, in part, its

definition of principal owner with the 25 percent ownership concept in FinCEN's customer due diligence rule given financial institutions' and applicants' likely familiarity with that rule's requirements.[329] The Bureau does not believe, however, that its definition must completely match the ownership and control requirements in the customer due diligence rule as urged by some commenters. While differences between similar concepts in different regulatory regimes may lead to some initial confusion, particularly as financial institutions (as well as small business applicants) already familiar with the customer due diligence rule implement this final rule's requirements, the Bureau believes that adding the concepts of indirect ownership by natural persons, as well as ownership by entities or trusts, to the definition of principal owner would add unnecessary complexity to this final rule.

Generally, FinCEN's customer due diligence rule defines a beneficial owner as not just any individual who directly owns 25 percent or more of a legal entity, but also includes individuals who indirectly have that amount of ownership in the entity, such as through multiple corporate structures.[330] If a trust directly or indirectly owns 25 percent or more of the entity, the trustee is considered to be a beneficial owner.[331] In addition to ownership, the customer due diligence rule also looks to control. A beneficial owner also includes the single individual with significant responsibility to control, manage, or direct the entity.[332]

The Bureau does not believe that it would be appropriate for the rule's definition of principal owner to incorporate indirect ownership and control, as suggested by some commenters. This final rule requires covered financial institutions to collect and report the ethnicity, race, and sex of small business applicants' principal owners and includes the definition of principal owner at § 1002.102(o) for the purpose of facilitating financial institutions' and applicants' ability to provide such information. The Bureau believes that a simpler definition for principal owner that aligns with the customer due diligence rule's general 25 percent or more ownership concept, but which only applies to individuals (not entities or trusts) with direct ownership, will encourage applicants to provide their principal owners' ethnicity, race, and sex and facilitate more accurate reporting. With the simpler definition for principal owner, applicants do not need to first make potentially difficult determinations about which individuals indirectly own or control the small business before providing such individuals' ethnicity, race, and sex information.

The Bureau does not believe differences between the customer due diligence beneficial owner definition and the principal owner definition in this rule will lead applicants to refuse to provide their principal owners' ethnicity, race, and/or sex information, as suggested by one commenter. In contrast, the Bureau believes that its principal owner definition is less complicated and easier to understand and is more likely to facilitate applicants' willingness to provide their principal owners' information.

With respect to a commenter's assertion that the NPRM did not provide enough guidance or procedures for how financial institutions should handle reporting for small business applicants whose principal owner(s) are a separate corporate entity or trust, under the final rule (as generally in the proposal), only individuals are considered principal owners. Thus, entities, such as trusts, partnerships, limited liability companies, and corporations, are not principal owners. Final comment 107(a)(19)–10 clarifies that if an applicant has fewer than four principal owners (*e.g.,* because only one individual owns 25 percent or more of the equity interests of the small business), the financial institution reports ethnicity, race, and sex information for the number of principal owners that the applicant has identified and reports that the ethnicity, race, and sex fields for additional principal owners are ''not applicable.'' (In the NPRM, this clarification generally appeared in proposed appendix G, instruction 25.)

Relatedly, as discussed in the section-by-section analysis of § 1002.106(a), a trust may also be a small business applicant (as opposed to a trust that is an owner of small business applicant) under the final rule. In this case, as was noted by a trade association commenter, it is unclear who should be considered a principal owner for the purpose of principal owners' ethnicity, race, and sex information. The Bureau has added new comment 102(o)–2 clarifying that if a trust is an applicant for a covered credit transaction, a trustee is considered an owner of the trust, to align with commentary accompanying the definitions for LGBTQI+-owned business, minority-owned business, and women-owned business.

As to a commenter's concern that the rule would require financial institutions to determine the ownership of a business, it is unclear as to the specific aspect of the Bureau's proposal to which the commenter was referring. Under the Bureau's proposal (as in the final rule), a financial institution would collect and report the following information related to the ownership of an applicant: the applicant's status as a minority-owned and/or women-owned small business (as well as LGBTQI+-owned business status), the number of principal owners, and the ethnicity, race, and sex of those principal owners. A financial institution can rely (and, in fact, for the protected demographic information, must rely) upon an applicant's self-reported information. This aspect of those data points has been substantially finalized as proposed. Final comment 107(a)(18)–9, regarding the collection and reporting of women-owned, minority-owned, and LGBTQI+-owned business status information clarifies that a financial institution must only report an applicant's responses, even if it verifies or otherwise obtains such information. Final comment 107(a)(20)–2, regarding the collection and reporting of the number of an applicant's principal owners, also provides that a financial institution may rely upon an applicant's statements or information to report such information. It further provides that the financial institution is not required to verify the number of an applicant's principal owners, but if it does so, then it must report the verified information. Thus, a financial institution is not required to make its own determinations about the ownership of a business under the final rule.[333]

In light of the foregoing, the text of final § 1002.102(o) and final comment 102(o)–1 generally remain unchanged from the proposal, though upon further consideration the Bureau has changed the reference to ''natural person'' in the

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[329] 86 FR 56356, 56395 (Oct. 8, 2021).

[330] 31 CFR 1010.230(d)(1). *See also* Fin. Crimes Enf't Network, U.S. Dep't of Treas., *FinCEN Guidance FIN–2018–G001: Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions* 3 (Apr. 3, 2018), *https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.* Certain legal entities are exempted from the rule. 31 CFR 1010.230(e)(2).

[331] 31 CFR 1010.230(d)(3).

[332] 31 CFR 1010.230(d)(2).

[333] The Bureau notes, however, that as part of its proposal requiring financial institutions to collect principal owners' ethnicity and race via visual observation or surname in certain circumstances, a financial institution would have needed to determine if a representative of the applicant with whom it was meeting in person was a principal owner. As discussed in the section-by-section analysis of § 1002.107(a)(19) below, the Bureau is not finalizing this requirement. Thus, to the extent the comment was referring to this aspect of the proposal, the commenter's concern has been rendered moot.

proposed definition and related comment to ''individual'' in the final rule. In user testing conducted on versions of the Bureau's proposed sample data collection form at appendix E, users expressed confusion about the term ''natural person.'' [334] The Bureau does not believe that there is a meaningful difference between the terms ''individual'' and ''natural person'' and as a result has decided to use the term ''individual'' in the definition for comprehensibility.

The Bureau is finalizing proposed comment 102(o)–2, renumbered as final comment 102(o)–3, to explain the purpose of the definition of principal owner; the Bureau has revised this comment to reflect other changes in the rule.

102(p) Small Business

Final § 1002.102(p) refers to § 1002.106(b) for a definition of the term ''small business.'' See the section-by-section analysis of § 1002.106(b) for a detailed discussion of that definition.

102(q) Small Business Lending Application Register

Proposed § 1002.102(q) would have defined the term ''small business lending application register'' or ''register'' as the data reported, or required to be reported, annually pursuant to proposed § 1002.109. This definition referred only to the data that is reported, or required to be reported, annually; it did not refer to the data required to be collected and maintained (prior to reporting).[335] The Bureau sought comment on its proposed definition of ''small business lending application register'' or ''register'' in proposed § 1002.102(q). The Bureau received no comments on this definition, and therefore is finalizing § 1002.102(q) as proposed.

102(r) State

Proposed § 1002.102(r) would have referred to existing § 1002.2(aa) for a definition of the term ''State.'' Existing § 1002.2(aa) defines the term as any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States. The Bureau requested comment on its proposed approach to this definition, but did not receive any feedback. The Bureau is finalizing § 1002.102(r) as proposed. The Bureau believes that, being consistent with existing Regulation B, this definition will be familiar to financial institutions.

102(s) Women-Owned Business

Proposed Rule

ECOA section 704B(b)(1) requires financial institutions to inquire whether applicants for credit are women-owned businesses. For purposes of the financial institution's inquiry under 704B(b), 704B(h)(6) defines a business as a women-owned business if (A) more than 50 percent of the ownership or control is held by one or more women, and (B) more than 50 percent of the net profit or loss accrues to one or more women. Section 1071 does not expressly define the related terms of ''ownership'' or ''control,'' nor does it describe what it means for net profits or losses to accrue to an individual.

Proposed § 1002.102(s) would have defined a women-owned business as a business for which more than 50 percent of its ownership or control is held by one or more women, and more than 50 percent of its net profits or losses accrue to one or more women. Proposed comment 102(s)–1 would have explained that a business must satisfy both prongs of the definition to be a women-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more women, and (B) more than 50 percent of the net profits or losses accrue to one or more women.

Proposed comment 102(s)–2 would have clarified that the definition of women-owned business is used only when an applicant determines if it is a women-owned business for purposes of proposed § 1002.107(a)(19). A financial institution would have provided the definition of women-owned business when asking the applicant to provide women-owned business status pursuant to proposed § 1002.107(a)(19), but a financial institution would not have been permitted or required to make its own determination regarding whether an applicant is a women-owned business for this purpose.

Proposed comment 102(s)–3 would have further noted that a financial institution would be permitted to assist an applicant when determining whether it is a women-owned business but would not be required to do so, and could provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in proposed comments 102(s)–4 through –6. Additionally, for purposes of reporting an applicant's women-owned business status, a financial institution would rely on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

The Bureau proposed to clarify ''ownership'' and ''control'' using concepts from FinCEN's customer due diligence rule. Proposed comment 102(s)–4 would have clarified that a natural person owns a business if that natural person directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Proposed comment 102(s)–4 would have also provided examples of ownership and clarified that, where applicable, ownership would need to be traced or followed through corporate or other indirect ownership structures for purposes of proposed §§ 1002.102(s) and 1002.107(a)(19). Proposed comment 102(s)–5 would have clarified that a natural person controls a business if that natural person has significant responsibility to manage or direct the business and would provide examples of natural persons who control a business. Proposed comment 102(s)–6 would have clarified that a business's net profits and losses accrue to a natural person if that natural person receives the net profits, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

The Bureau sought comment on the proposed definition of women-owned business and possible alternatives that may clarify the term in order to help ensure that small business applicants can determine whether they are women-owned businesses for purposes of data collection pursuant to section 1071.

Comments Received

The Bureau received comments regarding the definition of a women-owned business from a number of banks, trade associations, and community groups.

One community group requested that the Bureau add an ''I don't know'' response to the list of possible responses, as there may be applicants who cannot make a legal conclusion as to whether the small business is women-owned.

Regarding the proposed requirement that to be considered a women-owned business, one or more women must hold ''more than 50 percent'' of the ownership or control, the Bureau received several comments from community groups and a CDFI lender

[334] CFPB, *User testing for sample data collection form for the small business lending final rule* at app. B, at 12, 15 (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/*.

[335] In contrast, the term ''Loan/Application Register'' in Regulation C § 1003.2(k) refers to both the record of information required to be collected pursuant to § 1003.4 as well as the record submitted annually or quarterly, as applicable, pursuant to § 1003.5(a).

supporting this requirement. A trade association stated that the Bureau should revise the requirement to state that one or more women must hold ''50 percent or more'' of the ownership or control because the statutory definition may result in underreporting for equal partnerships with mixed gender partners.

Regarding the proposed requirement that to be considered a women-owned business, more than 50 percent of the net profit or loss must accrue to one or more women, one community group stated that the statutory definition is appropriate to prevent illusory ''ownership'' by one or more women. Another commenter supported the definition.

Some commenters stated that the Bureau should not include the statutory definition requirement that more than 50 percent of the net profit or loss must accrue to one or more women. A number of commenters stated that the initial prong of the definition requiring more than 50 percent of ownership or control by a woman is sufficient for determining ownership and would reduce complexity for borrowers. A CDFI lender stated that defining ownership on a profit and loss calculation may not fully serve the objectives of the statute, and asked the Bureau to consider the CDFI Fund definition of women-owned business.[336] Several industry commenters asserted that the net profits or losses prong complicates the definition, can result in inaccurate data collection (for example, in spousal relationships where each partner equally owns and controls a small business), implicates the limited understanding of many small business owners regarding the meaning of net profits and losses as well as the sensitive nature of these issues, and that many small business owners will not understand the definition as provided and will, as a result, decline to answer the question.

A bank asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections. Specifically, the commenter gave an example of an applicant that provides demographic information for one application, and then chooses not to provide information for a subsequent application, and asking which collection should be reported.[337] A trade association stated that it is possible in certain States for a third party non-owner to act as trustee of a trust, and that the Bureau should change a comment example to clarify whether it is the Bureau's intent to presume that the trustee of a trust is the owner. Another bank also asserted that requiring banks to collect such information is costly to banks, customers, and communities. A group of trade associations asserted that the commentary should be revised to explicitly state that a financial institution must provide an applicant with the applicable definition.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.102(s) with one addition and one minor adjustment for clarity, along with several non-substantive technical revisions to update citations to other provisions.

Final § 1002.102(s) defines a women-owned business as a business for which more than 50 percent of its ownership or control is held by one or more women, and more than 50 percent of its net profits or losses accrue to one or more women. Final comment 102(s)–1 explains that a business must satisfy both prongs of the definition to be a women-owned business and includes an additional sentence to clarify that a business that is controlled by a woman or by women satisfies this prong of the definition even if none of the individuals with ownership in the business are women.

Final comment 102(s)–2 clarifies that the definition of women-owned business is used only when an applicant determines if it is a women-owned business for purposes of final § 1002.107(a)(18), and is finalized as proposed with the exception of one small adjustment for clarity.

Final comment 102(s)–3 is finalized as proposed and notes that a financial institution is permitted to assist an applicant when determining whether it is a women-owned business but is not required to do so, may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in final comments 102(s)–4 through –6, and that, for purposes of reporting an applicant's women-owned business status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

Final comment 102(s)–4 is finalized with an updated cross-reference and minor edits for consistency and clarity. It provides examples of ownership and clarifies that, where applicable, ownership needs to be traced or followed through corporate or other indirect ownership structures. With regard to a commenter's assertion that, in certain states, a trustee could act as a third party non-owner trustee of a trust, the Bureau believes that in such circumstances, the trustee would be considered an owner for purposes of this definition. Final comment 102(s)–4 also clarifies (as it did in the Bureau's proposal) that a trustee is considered the owner of a trust.

Final comment 102(s)–5 clarifies that an individual controls a business if that individual has significant responsibility to manage or direct the business, while final comment 102(s)–6 clarifies that a business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes. Both comments are finalized with minor edits for consistency and clarity.

The Bureau does not believe that it would be appropriate to deviate from the statutory definition of women-owned business, as suggested by some commenters, and notes that the Bureau's authority to deviate from the statutory language is limited. The Bureau also believes that many small business applicants already respond to questions about who owns and who controls a business entity when completing customer due diligence forms or otherwise responding to questions related to that rule and thus will be familiar with the concepts therein. Although the customer due diligence rule does not address the second prong of the definition regarding accrual of net profits or losses, final comment 102(s)–6 provides a comprehensive explanation of this prong of the definition.

With regard to comments urging the Bureau to remove the prong requiring that more than 50 percent of its net profits or losses accrue to one or more women in order to be considered a women-owned business, the Bureau finds that this prong is necessary to prevent illusory ''ownership'' claims by ''straw'' owners.

Finally, in accordance with ECOA section 704B(g)(3), the Bureau may

[336] The community group cited to the September 2021 CDFI Transactional Level Report Data Point Guidance, which provides guidance on providing transactional level report data. Under ''Women Owned or Controlled,'' the guidance states to ''[r]eport whether the investee/borrower is more than 50% owned or controlled by one or more women. If the business is a for-profit entity, report whether more than 50% of the owners are women. If the business is a nonprofit entity, report whether more than 50% of its Board of Directors are women.'' CDFI Fund, *CDFI Transactional Level Report Data Point Guidance,* at 33 (Sept. 2021), *https://www.cdfifund.gov/sites/cdfi/files/2021-08/CDFITLRGuidance_Final_Sept2021.pdf.*

[337] See the section-by-section analysis of § 1002.107(d) for a discussion on the use of previously collected data.

release material, as part of its regulatory implementation strategy, to assist both financial institutions in complying with the requirements of § 1002.102(s) and small businesses in understanding this definition.

Proposed Definition of Dwelling

Proposed § 1002.102(j) would have referred to Regulation C § 1003.2(f) for a definition of the term ''dwelling.'' That provision defines dwelling to mean a residential structure, whether or not attached to real property. The term includes but is not limited to a detached home, an individual condominium or cooperative unit, a manufactured home or other factory-built home, or a multifamily residential structure or community. Proposed comment 102(j)–1 would have provided that Bureau interpretations that appear in supplement I to part 1003 containing official commentary in connection with § 1003.2(f) are generally applicable to the definition of a dwelling in proposed § 1002.102(j). Proposed comment 102(j)–2 would have clarified that the definition of dwelling under existing § 1002.14(b)(2) applies to relevant provisions under existing Regulation B, and proposed § 1002.102(j) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing § 1002.14(b)(2). The Bureau did not receive any comments on this aspect of the proposal.

The Bureau is not finalizing its proposed definition of ''dwelling.'' The need for the Bureau to adopt its own definition of ''dwelling'' in this rulemaking is obviated by the Bureau's decision in this final rule to not require reporting of transactions that would constitute ''covered loans'' under Regulation C. That decision is discussed in detail in the section-by-section analysis of § 1002.104 below. The Bureau understands that there may be limited instances where a dwelling is used as collateral for a covered credit transaction that does not fall under the definition of a Regulation C covered loan because it does not involve the purchase, improvement, or refinance of a dwelling—for example, where a small business seeks to use their primary dwelling as collateral to obtain working capital such as inventory. In this example, the transaction would only be reported under the final rule, not under Regulation C, with a credit purpose of working capital (includes inventory or floor planning) per final comment 107(a)(6)–1. Taking into account these limited circumstances, the Bureau believes that adopting the Regulation C definition of dwelling is no longer necessary to minimize the compliance risks that would have arisen from having to report a transaction under both Regulation C and this final rule.

Section 1002.103 Covered Applications

ECOA section 704B(b) requires that financial institutions collect, maintain, and report to the Bureau certain information regarding ''any application to a financial institution for credit.'' For covered financial institutions, the definition of ''application'' will trigger data collection and reporting obligations with respect to covered credit transactions. However, section 1071 does not expressly define ''application.''

The Bureau is finalizing § 1002.103 and associated commentary with minor revisions for clarity and consistency, to define what is, and is not, a covered application for purposes of subpart B pursuant to its authority in ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. Final § 1002.103(a) provides a general definition of the term ''covered application,'' followed by a list of the circumstances that are not covered applications in final § 1002.103(b). For the reasons discussed below, the Bureau believes that its determinations as to what does and does not constitute a covered application for purposes of this rulemaking constitute reasonable interpretations of an ''application'' as used in section 1071.

103(a) Covered Application

Proposed Rule

The Bureau proposed to define a covered application in § 1002.103(a) as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. As noted above, the term ''application'' is undefined in section 1071. The Bureau believed its proposed definition of the term was reasonable, particularly as it would align with the similar definition of ''application'' in existing § 1002.2(f). The Bureau also proposed commentary to accompany this definition.

In considering the proposed definition of a ''covered application,'' the Bureau believed that incomplete and withdrawn applications—which would have generally been captured under proposed § 1002.103(a)—would be essential to the purposes of section 1071 as a tool to identify potential discrimination and to better understand the credit market. The definition of ''covered application'' in proposed § 1002.103(a), which was similar to the definition of ''application'' in existing § 1002.2(f), would have also been familiar to creditors and would have provided flexibility to accommodate different application processes.

The Bureau recognized that the proposed definition of ''covered application'' in § 1002.103(a), while flexible, would have meant that data collection and reporting may be triggered at different times for different financial institutions and different types of covered credit transactions. While the proposed definition of ''covered application'' would not have provided a bright-line rule, the Bureau believed the proposed definition would have been familiar to financial institutions and would have provided consistency with similar definitions found in existing Regulation B and Regulation C.

As discussed in the NPRM, the Bureau also considered proposing several other options for defining a ''covered application.'' First, the Bureau considered triggering collection and reporting based on a ''completed application,'' which is defined in existing § 1002.2(f) as an application in which the creditor has received ''all the information that the creditor regularly obtains and considers'' in evaluating similar products. As noted in the NPRM, the Bureau did not propose to use the definition of ''completed application'' in existing § 1002.2(f) for its definition of covered application in subpart B, as doing so would have excluded incomplete applications and many withdrawn applications that may reflect demand for credit or potential discrimination during the application process. The Bureau also considered proposing to define ''covered application'' as a set of specific data points that, if collected, would trigger a duty to collect and report small business lending data. As noted in the NPRM, the Bureau did not propose this approach for several reasons, including that it would have introduced a new regulatory definition of ''application,'' would have led to operational changes and complexities for financial institutions, and could have led to increased evasion.

Proposed comments 103(a)–1 through –3 would have provided additional guidance on identifying what is a ''covered application.'' Proposed comments 103(a)–4 through –6 would have addressed how a financial institution reports multiple covered credit transaction requests at one time or a request for a credit transaction that results in the origination of multiple

covered credit transactions. Proposed comment 103(a)–7 would have addressed how a financial institution would report applications where there is a change in whether the applicant is requesting a covered credit transaction.

The Bureau sought comment on its proposed definition of a covered application in § 1002.103(a) and associated commentary. The Bureau also sought comment on the advantages and disadvantages of collecting data on incomplete or withdrawn applications, as well as how collection would or would not further the purposes of section 1071. In addition, the Bureau sought comment on reporting of multiple lines of credit on a single credit account, including how financial institutions internally consider multiple lines of a credit on a single account and the Bureau's approach in proposed comment 103(a)–6.

Comments Received

The Bureau received comments on its proposed approach to defining a covered application from a wide range of lenders, trade associations, community groups, and a business advocacy group. The overwhelming majority of commenters to address the issue, including most industry commenters and some community groups, generally supported the Bureau's proposal to define a ''covered application'' largely consistent with the existing Regulation B definition. Several of these commenters stated that lenders are familiar with the existing Regulation B definition and so implementing it within this rule would minimize the need for additional training or new procedures. Commenters also stated that the proposed definition is a flexible one that can accommodate the variety of small business lenders, products, and processes that exist in the marketplace, and thus avoids a one-size-fits-all approach that would be unworkable in small business lending. Several lenders and trade associations urged the Bureau to finalize proposed comment 103(a)–1, which would have provided that a financial institution has latitude to establish its own application process or procedures, including designating the type and amount of information it will require from applicants. Some of these commenters also stated that the proposed comment is consistent with longstanding interpretation of existing Regulation B and that the flexibility is critical given the unique nature of commercial credit applications. A community bank stated that defining an application based on a set of specific data points would be inappropriate for commercial lending, which is less standardized than consumer mortgage lending. The bank further noted that defining an application based on a standardized set of data points would be unnecessary so long as each data point has a ''not applicable'' or ''not received'' choice for incomplete applications, which the commenter emphasized would be important to capture.

Some community groups and community-oriented lenders expressed support for the Bureau's proposed definition because it would capture applicants that do not make it to a completed application, and therefore potentially help identify barriers to credit early in the application process. These commenters argued that the proposed definition would further the purposes of section 1071, including by identifying potential bias, discouragement, or other discrimination. Similarly, some community-oriented lenders stated that the proposed definition would strike the right balance of triggering data collection and reporting requirements only after there is an actual request for credit, but still early enough in the process to capture most incomplete, withdrawn, and denied applications.

One community group expressed concern about the lack of standardization under the proposed definition, but ultimately concluded that the proposed definition makes sense and any concerns could be allayed through monitoring. The commenter expressed understanding for the desire to follow current lender procedures for defining an application based on existing Regulation B, though noted that how a lender defines an application should have enough standardization to generate consistent data and be early enough in the process to capture incomplete and withdrawn applications, which are necessary to identify discouragement. The commenter also expressed support for the idea that peer comparisons may be a reasonable way to check a financial institution's method of defining an application; for example, by analyzing whether a financial institution has abnormally high rates of approval or low rates of incomplete applications.

A number of industry commenters, including community banks, credit unions, and trade associations, described the small business application process as informal and consultive. These commenters explained that the application process often does not involve a written application or a ''formal'' application, can be months-long, and often involves extensive back-and-forth communications between the lender and the small business, including in-person meetings, phone calls, texts, and emails. One commenter noted that many loans are funded without any ''application,'' but rather based on the business's existing relationship with the institution and financial information on file. Some commenters described how the application process can start informally from a conversation, a general inquiry, or as an offshoot to deposit activity. Commenters explained that a business will bring in financial statements, tax returns, business plans, and other documents, which will be reviewed by the financial institution in order to analyze and generate the most appropriate package to fit the credit needs of the business. Several banks stated that business customers will often ''shop around'' with multiple financial institutions to get the best terms. Several commenters stated that small business lending often involves a lot of ''hand holding'' and lender involvement to reach a point where a formal application or a particular product and terms can be considered. Industry commenters also stated that commercial business customers are unique and each requires an individualized approach based on the characteristics of the business and the products of interest. Several commenters also noted that the small business lending process differs from mortgage lending, which is highly regimented and uniform.

A number of community banks and other industry commenters expressed concern that the Bureau's rule implementing section 1071 would standardize and formalize the small business application process (which, they asserted, would be to its detriment); they predicted that business customers would be unhappy with the more rigid lending structure, and may avoid seeking credit altogether. These commenters expressed concern that small business lending would become impersonal and ''form centric,'' and that it would change the fundamental relationship between lender and borrower, including the personalized attention and advice currently provided by lenders. Many of these commenters stated the view that the rule's data collection and reporting requirements would cause them to lose flexibility and adopt ''check-the-box'' criteria that is at odds with how community banks conduct business. Several commenters were concerned that at the start of an inquiry, a lender would need to implement a written application or other formalized method to collect the required data and that by doing so, conversations will turn into implied commitments. Commenters also stated

the belief that lenders would implement a more rigid application process in order to avoid triggering data collection and reporting requirements under the Bureau's rule. Several other commenters argued that data collection and reporting obligations would require lenders to rebuild their loan application process and incur additional training and other costs, would reduce the availability of credit, and would give large banks an unfair advantage because such entities will have an easier time implementing the requirements of the Bureau's rule for online applications.

Most of these commenters' concerns were directed at small business lending data collection and reporting generally, and not specifically at the proposed definition of a covered application. However, a few commenters urged the Bureau to finalize a more concrete definition of covered application due to the concern that a subjective definition would be difficult for financial institutions' employees to implement. One commenter was also concerned about how its practices would be reviewed by the subjective judgment of examiners. Another commenter cautioned against reporting of oral applications, noting that it could lead to inaccurate data if an answer is misheard or mistyped.

Some industry commenters, including trade associations for community banks, credit unions, and online lenders, requested the Bureau define a covered application consistent with existing Regulation B's ''completed application'' definition in existing § 1002.2(f), which would require reporting only when the lender has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (*i.e.,* enough information to make a credit decision). These commenters argued that triggering data collection and reporting off an ''oral or written request'' would be unrealistic, unworkable, and too open-ended. One commenter stated that a mere request is not something a lender can act or report on because there is insufficient information at that point to make the required reporting. Another commenter said that lenders need clear guidance on what events trigger data collection and the completed application definition would provide the most uniformity across products and financial institutions. Another commenter stated that using the completed application definition would avoid collecting data on incomplete applications, which often come from ''unengaged'' applicants. This commenter also noted that collecting 1071 data could lead to applicant confusion as to why personal information is being collected, which could lead to more incomplete applications. The commenter further argued that completed applications are the most essential data to capture in small business lending, that there is no indication Congress intended section 1071 to mirror HMDA or existing Regulation B, and that discouragement can be investigated using other 1071 data and existing examination authorities. Similarly, two industry commenters opposed requiring reporting on incomplete or withdrawn applications, arguing that reporting such transactions would not serve the purposes of section 1071, would create additional operational and regulatory burden, and that the focus of the Bureau's rule should be on declined and originated applications. Another urged the Bureau to avoid triggering collection based on when a credit check is pulled, noting that financial institutions may often conduct a soft pull credit check outside the application process.

In contrast, some community group commenters argued that the proposed definition of covered application would be too narrow, and requested that a covered application include all communications where a business inquires about credit and seeks a credit decision. In support, the commenters pointed to research identifying discrimination in the pre-application stage. As noted above, other community group commenters supported the Bureau's proposed definition of a covered application, stressing the need to capture applications that do not make it to a completed application.

The Bureau received several comments on certain aspects of its proposed commentary to § 1002.103(a). A community bank and a community group supported proposed comment 103(a)–4, which would have provided that if an applicant makes a request for two or more covered credit transactions at one time, the financial institution reports each request for a covered credit transaction as a separate covered application. The bank stated that while the proposed approach would result in more work for the financial institution, it would lead to more accurate reporting (since each request would generate different reported data) and the approach would be similar to how data are reported under Regulation C. The community group commenter stated that it would be a reasonable approach and would accurately reflect the varied credit needs of applicants. A group of community group commenters supported the Bureau's proposed approach to require reporting of separate applications where an applicant seeks two or more products at one time, but requested that where the applicant only seeks one product, but is not sure about the type of product, it should only be reported as a single covered application. These commenters also noted a concern that the language in proposed comment 107(a)(5)–2 requiring lenders to maintain reasonable procedures designed to collect data, including regarding the credit product requested, would require the lender to identify each product that would be acceptable to the applicant, and if multiple, report them as separate covered applications.

In response to the Bureau's request for comments as to how a financial institution should report applications where there is a change in whether the request for credit involves a covered credit transaction, which was addressed in proposed comment 103(a)–7, the Bureau received feedback from trade associations and a business advocacy group. These commenters opposed reporting on a transaction in which the product ultimately pursued is not a covered credit transaction. They argued that financial institutions should not be required to report on non-covered credit transactions, collecting partial data on a product that is not a covered transaction would affect data quality and be of low value, and doing so would not advance the purposes of section 1071. Two of the commenters sought clarification or a safe harbor providing that if a financial institution collects data on an application that the financial institution anticipates will be covered by the Bureau's rule implementing section 1071 at the time of collection, but ultimately is not covered, the initial collection does not violate existing Regulation B. Otherwise, the Bureau did not receive any additional comments directly discussing proposed comment 103(a)–7 and limited reporting of non-covered credit products, despite seeking comment on the advantages and disadvantages of requiring full or limited reporting where an applicant initially seeks a product that is a covered credit transaction, but ultimately is offered and accepts a product that is not reportable.

Although the Bureau did not seek comment on the issue, a couple commenters asked how to report on an application made jointly by multiple business co-applicants. An agricultural lender requested that, if an application is submitted by more than one business, the financial institution be permitted to treat all co-applicants as one applicant when determining whether a borrower is a ''small business.'' The commenter

also asked the Bureau to clarify how to identify whether the application is from a minority-owned or women-owned business where one, but not all, co-applicants are minority- and women-owned businesses. Another commenter requested that the Bureau clarify that loans jointly made to multiple businesses, where one or more of the co-applicants may qualify as a small business under the rule, but are not the primary business seeking the funding, are not subject to data collection and reporting requirements.

Several commenters asked the Bureau to clarify certain scenarios related to a covered application, including clarifying that certain scenarios are not covered applications. Several industry commenters were concerned that language in the NPRM's preamble—noting that ECOA section 704B(b)(1) provides that an ''application'' triggering data collection and reporting obligations occurs without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means—may be interpreted to *require* a financial institution to accept an application through all of these channels. One commenter asked for clarification whether a covered application includes an incomplete application where the information provided is insufficient to render a credit decision by the lender. A trade association representing online lenders asked the Bureau to expressly exclude from the definition of a covered application the circumstance where a business populates certain information on a web page, but does not follow through with submitting the form to the financial institution. The commenter argued that it would be very burdensome for the financial institution to capture such circumstances as reportable transactions and that attempting to do so would result in misleading, erroneous, and unhelpful data. A couple commenters requested certain additional exclusions from the definition of covered application, including for HMDA reporters, co-branded and private label credit cards, and purchased loans.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.103(a) as proposed to define a ''covered application'' as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. As described above, the overwhelming majority of commenters, including industry and community group commenters, supported this definition. As noted by some commenters, the definition will be familiar to creditors, provides flexibility to accommodate different application procedures and lending models (including written and oral applications), and will capture incomplete and withdrawn applications, which are essential data for identifying potential barriers to credit, including potential discrimination. Final § 1002.103(a) will also align with the similar definition of ''application'' in existing § 1002.2(f), which is reasonable given the term ''application'' is otherwise undefined in ECOA and section 1071. Finally, the Bureau believes this approach strikes an appropriate balance by triggering data collection and reporting requirements only after there is a request for credit (using procedures defined by the financial institution), but still early enough in the process to capture most incomplete, withdrawn, and denied applications, which are essential data to the purposes of section 1071.

A number of industry commenters, particularly smaller institutions that engage in relationship lending, described the application process as informal, high-touch, and involving extensive back-and-forth. The Bureau believes the final definition of covered application can work well within the heterogeneous and sometimes iterative context of small business lending. Indeed, final § 1002.103(a) defines covered application in a manner that provides financial institutions flexibility to define an application based on its own unique business model. Thus, while a financial institution must have some type of trigger or tipping point within its process when an applicant has made a request for credit in accordance with its procedures, therefore triggering a ''covered application,'' financial institutions have leeway on how precisely to define that tipping point, provided it occurs in the early stages of the process before a financial institution has begun meaningfully evaluating or underwriting the request.[338] Moreover, as noted above, creditors complying with existing Regulation B should be familiar with this definition, and have already incorporated it in some manner into their processes.[339] In response to industry commenters' concern that data collection and reporting under this final rule will standardize and formalize small business lending, the Bureau notes that most of this feedback was not directed at the proposed definition of a ''covered application,'' but rather at the overall data collection and reporting regime. Indeed, some of the commenters raising these concerns also expressly supported the proposed definition of a covered application. Moreover, in response to commenters' general concerns that data collection and reporting under this rule will standardize and formalize small business lending, the Bureau does not believe that collection of certain data points will necessitate that lenders to fundamentally alter how they conduct business. Moreover, section 1071 is a congressional mandate; the Bureau has sought to implement it in a manner that furthers the purposes of the statute while reducing unnecessary burden.

[338] The Bureau recognizes that the flexibility provided in final § 1002.103(a), which defines a covered application, may result in data collection and reporting obligations being triggered at different times for different financial institutions and different types of covered credit transactions. For example, for a financial institution that defines an application under its procedures as the submission of a standard form either online or in-person, a ''covered application'' will be triggered when an applicant submits the form. In contrast, another financial institution may not use a standard form and instead define an application as a request for credit only when the applicant authorizes the creditor to pull a credit check on the business and principal owners to allow the creditor to determine whether the business, in particular, qualifies for a particular product. In that circumstance, a ''covered application'' will not be triggered until that process was satisfied. Using the same example, if the financial institution orally collects certain information from a prospective applicant (such as gross annual revenue and business location) and discusses with the prospective applicant potential credit product options offered by the financial institution, no ''covered application'' will be triggered until the prospective applicant indicates that it wants to proceed to apply for credit and authorizes the financial institution to pull a credit check. Similarly, if a prospective applicant merely expresses interest in knowing the types of products that the creditor offers—not yet focusing on any particular type of covered credit transaction and not yet interested in submitting a ''covered application''—the interaction also will not be reportable under this example.

[339] The Bureau believes that business creditors should be familiar with operationalizing this definition based on their experience providing adverse action notices under existing Regulation B, which can be triggered in relation to an incomplete application. *See* § 1002.9(a)(1) and (c) (requiring notice within 30 days after taking adverse action on an incomplete application or 30 days after receiving an incomplete application). The Bureau believes that financial institutions may also be familiar with Regulation C's definition of ''application,'' which generally aligns with existing § 1002.2(f)'s definition of the term. *See* § 1003.2(b) (generally defining an ''application'' as ''an oral or written request for a covered loan that is made in accordance with procedures used by a financial institution for the type of credit requested''); *see also* Regulation C comment 2(b)–1 (noting that Bureau interpretations that appear in the official commentary to Regulation B are generally applicable to the definition of application under Regulation C).

Several commenters had specific suggestions or concerns regarding the definition of a covered application. Regarding several commenters' concern that the definition is too subjective, the Bureau notes that a bright-line definition would likely impose a more rigid process on financial institutions that would be difficult to implement given the heterogenous nature of small business lending. Moreover, as noted above, the definition used in final § 1002.103(a) should be familiar to financial institutions and will provide consistency with existing Regulation B and Regulation C. The Bureau is also not adopting existing Regulation B's definition of a ''completed application,'' as urged by some commenters. Although the Bureau agrees that a ''completed application'' definition would provide greater uniformity, the definition would exclude incomplete applications and most withdrawn applications. The Bureau believes including such applications is essential to the purposes of section 1071, as it may reflect demand for credit and potential discrimination early in the application process. As to the commenters who took issue with the proposed covered application definition precisely because it includes incomplete and withdrawn applications, the Bureau believes collecting data on such applications is likewise essential for the purposes of section 1071 and may reveal important trends or information on why small businesses initially seek credit, but ultimately do not complete the application process.

On the other hand, the Bureau does not believe it would be appropriate to expand the definition of ''covered application'' to include all communications where a business inquires about credit and seeks a decision. Although discrimination may occur in the pre-application phase, the Bureau believes that it could be very difficult as an operational matter for financial institutions to collect 1071 data whenever a business expresses any interest in credit, no matter how preliminary or informal the request, and that could require reporting of transactions with missing, unavailable, or erroneous data. As discussed below in the section-by-section analysis of § 1002.103(b), the Bureau is excluding inquiries and prequalification requests from the definition of a covered application; many of the reasons for those exclusions are relevant here as well and thus the Bureau is not broadening the general definition of a covered application. In response to a commenter's concern about reporting of oral applications, the Bureau notes that it is the responsibility of the financial institution to ensure that it accurately collects and reports required data pursuant to final § 1002.107, no matter the method of application. Commenter requests for certain additional exclusions from the definition of covered application, including for HMDA reporters, co-branded and private label credit cards, and purchased loans, are addressed in more detail in the section-by-section analysis of § 1002.104 below.

Several commenters asked the Bureau to clarify certain scenarios related to a covered application. First, in response to several industry commenters' concerns that the language in the NPRM's preamble discussing ECOA section 704B(b)(1) could be interpreted to *require* a financial institution to accept an application through all of these channels, the Bureau notes that this was not the intent and that it does not interpret ECOA section 704B(b)(1) in that manner. Rather, the Bureau interprets the statutory language to mean that data collection and reporting requirements apply regardless of a financial institution's method of accepting applications. Thus, whatever the means used by a financial institution to accept applications (*e.g.,* in person, by telephone, by electronic transmission, etc.), once a covered application is triggered, the financial institution has a duty to collect and report on the application.

Next, a commenter asked whether a covered application includes an incomplete application where the information provided is insufficient to render a credit decision by the lender. Assuming the business has requested a covered credit transaction in accordance with procedures used by a financial institution for the type of credit requested, the financial institution would be required to collect and report data, even if there is insufficient information to render a credit decision.[340] Indeed, as noted above, the Bureau believes capturing incomplete or withdrawn applications is essential to the purposes of section 1071.

In response to a trade association's request to expressly exclude from the definition of a covered application the circumstance where a business populates certain information on a web page, but does not follow through with submitting the form to the financial institution, the Bureau notes that reporting of such circumstances depends on the procedures used by a financial institution for the type of credit requested. For example, if a financial institution's procedures require an applicant to submit a paper or digital form to the financial institution in order to be considered for the credit product requested, then there is no covered application that is reportable until the business submits the form to the financial institution. If, on the other hand, the financial institution regularly begins evaluating information about the applicant even if the form is not ''officially'' submitted to the financial institution, then there is likely a reportable covered application, even if the applicant has not ''submitted'' the form. In other words, if a financial institution offering online applications does not track or begin to evaluate applications until the business presses a ''submit'' button, the financial institution would not be required to begin tracking partial information inputted online for purposes of this final rule.

One commenter was concerned that the proposed definition lacked standardization, and emphasized the need for monitoring to ensure that financial institutions define an application under their own procedures in a manner that generates consistent data and is early enough in the process to capture incomplete and withdrawn applications. The Bureau agrees that review of data, including peer analysis, is important and may indicate whether a financial institution collects data in a manner that appropriately captures incomplete and withdrawn applications. For example, instances of unusually high approval rates or unusually low rates of incomplete and withdrawn applications can preliminarily indicate financial institutions that may be seeking to define an ''application'' in its written

[340] Generally, a ''covered application'' may align with the information necessary to make a credit decision or it may be possible to have a ''covered application'' before having information necessary to make a credit decision—it depends on each financial institution's own procedures. For example, suppose a financial institution defines an application under its procedures as the point when an applicant, or someone on the applicant's behalf, requests credit by filling out certain key pieces of information on an application form. If nothing else is required to qualify for credit and the financial institution's process is to immediately transmit the application to underwriting for a decision once the form is submitted, under the proposed definition of ''covered application,'' data collection and reporting obligations would likely be triggered at the same time there is sufficient information to make a credit decision. On the other hand, if the financial institution requires additional verification of information and the institution commonly makes follow-up requests after the applicant has requested credit and before submitting the loan file to underwriting, the financial institution would likely have a ''covered application'' before it has sufficient information to make a credit decision.

policies as occurring later in the process than actually occurs in practice; if a financial institution has a very high approval rate because all ''applications'' have been vetted earlier in the process, the financial institution's stated definition of an application likely does not reflect its actual practices. Similarly, where a financial institution has very few incomplete or withdrawn applications this may—depending on the financial institution's product offering and business model—be a sign that the financial institution is collecting data or defining an application as occurring after an applicant has requested credit. While a financial institution has flexibility to identify its own procedures for what constitutes a request for credit, thereby triggering data collection and reporting obligations under this final rule, the Bureau anticipates that in most cases a covered application will typically occur before the financial institution underwrites or evaluates the request for credit.

The Bureau is finalizing comment 103(a)–1 with minor revisions for clarity. Final comment 103(a)–1 underscores that a financial institution has latitude to establish its own application procedure and to decide the type and amount of information it will require from applicants. The Bureau removed the word ''process'' (from the phrase ''process and procedures'') in proposed comment 103(a)–1 to align with the term ''procedures'' in final § 1002.103(a) and in final comment 103(a)–2; the rewording is not intended to indicate a substantive change. The Bureau is also finalizing as proposed comments 103(a)–2 and –3. Final comment 103(a)–2 explains that the term ''procedures'' refers to the actual practices followed by a financial institution as well as its stated application procedures, and provides an example. Final comment 103(a)–3 provides that the commentary accompanying existing §§ 1002.2(f) and 1002.9 is generally applicable to the definition of ''covered application,'' except as provided otherwise in final § 1002.103(b).

In response to certain commenter questions about the scope of a covered application, the Bureau is adding new comment 103(a)–4 to clarify that the term covered application does not include solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution because in these situations, the business has not made a request for credit, and provides illustrative examples. New comment 103(a)–4, including a summary of comments received relating to the change, is discussed in the section-by-section analysis of § 1002.103(b).

The Bureau is finalizing comment 103(a)–5 (proposed as comment 103(a)–4) to provide that if an applicant makes a request for two or more covered credit transactions at one time, the financial institution reports each request as a separate covered application. The Bureau believes this approach furthers the purposes of section 1071 by better capturing demand for credit, including demand for different covered credit transactions at the same time. The Bureau also believes this method of reporting will lead to higher data accuracy, as argued by one commenter, due to the simplicity of the approach. Finally, the Bureau believes that concerns about duplicative information requests will be mitigated by permitting financial institutions to reuse certain previously collected data, as set forth in final § 1002.107(d). In response to a commenter request, the Bureau is revising final comment 103(a)–5 to clarify that if an applicant is only requesting a single covered credit transaction, but has not decided on which particular product, the financial institution reports the request as a single covered application. This clarification resolves a commenter's concern that a financial institution will need to report multiple covered applications if more than one credit product is acceptable to the applicant. Final comment 103(a)–5 also provides illustrative examples.

The Bureau is finalizing comments 103(a)–6 and –7 (proposed as comments 103(a)–5 and –6) with minor adjustments for clarity and consistency. Final comment 103(a)–6 addresses the circumstance where an initial request for a single covered credit transaction would result in the origination of multiple covered credit transactions. Similarly, final comment 103(a)–7 addresses requests for multiple lines of credit at one time, providing that such requests are reported based on the procedures used by the financial institution for the type of credit account.

The Bureau is adopting new comment 103(a)–8 to address reporting of duplicate covered applications. Under new comment 103(a)–8, a financial institution may treat two or more duplicate covered applications as a single covered application for purposes of subpart B, so long as for purposes of determining whether to extend credit, the financial institution would also treat one or more of the applications as a duplicate under its procedures. The Bureau is adding this comment to respond to commenters' general concerns about duplicative reporting and because the Bureau does not believe reporting of true duplicates would further the purposes of section 1071. As set forth in new comment 103(a)–8, however, the provision only applies if the applications are duplicates that a financial institution would otherwise treat as such under its own procedures.

The Bureau is finalizing comment 103(a)–9 (proposed as comment 103(a)–7) with revisions for clarity. Final comment 103(a)–9 addresses how a financial institution reports applications where there is a change in whether the applicant is requesting a covered credit transaction. Final comment 103(a)–9 provides that if an applicant initially requests a product that is not a covered credit transaction, but prior to final action taken decides to seek instead a product that is a covered credit transaction, the application is a covered application and must be reported pursuant to final § 1002.109. However, if an applicant initially requests a product that is a covered credit transaction, but prior to final action taken decides instead to seek a product that is not a covered credit transaction, the application is not a covered application and thus is not reported. The Bureau agrees with commenters' concerns that requiring reporting on applications where the applicant ultimately does not seek a covered credit transaction could lead to data quality issues, for example, if only partial data are captured. Although the Bureau sought comment on whether to require full or limited reporting in order to address concerns about potential steering in these cases, the Bureau did not receive any specific comments advocating for either full or limited reporting. In response to commenter requests for clarification that a financial institution does not violate existing Regulation B if it collects otherwise prohibited information on a transaction that ultimately is not a covered application, the Bureau has revised final § 1002.112(c)(4) to provide a safe harbor for incorrect determination of a covered credit transaction if, at the time of collection, the financial institution had a reasonable basis for believing that the application was a covered application. The Bureau has also revised final comment 103(a)–9 to clarify that once a financial institution determines there is a covered application, it shall endeavor to compile, maintain, and report the data required under § 1002.107(a) in a manner that is reasonable under the circumstances. Final comment 103(a)–9 also discusses reporting if a financial institution makes a counteroffer for a product that is not a covered credit

transaction. Finally, the Bureau revised the language ''during the application process'' to ''prior to final action taken'' in final comment 103(a)–9 to provide greater clarity on the applicable timeframe.

The Bureau is adding new comment 103(a)–10 to address reporting in situations where a covered financial institution receives a covered application from multiple businesses that are not affiliates, as defined in final § 1002.102(a). The Bureau is adding this commentary in response to commenters' questions about how to report certain data if there is more than one co-applicant. Final comment 103(a)–10 provides that if a covered financial institution receives a covered application from multiple businesses who are not affiliates, as defined by final § 1002.102(a), it shall compile, maintain, and report data pursuant to final §§ 1002.107 through 1002.109 for only a single applicant that is a small business, as defined in final § 1002.106(b). A covered financial institution shall establish consistent procedures for designating a single small business for purposes of collecting and reporting data under subpart B in situations where there is more than one small business co-applicant, such as reporting on the first small business listed on an application form.

The Bureau considered requiring reporting data of all co-applicant small businesses, but doing so could potentially add significant complexity and may result in data quality issues. For example, reporting co-applicants as separate applications would likely result in duplicative reporting or special rules to address how to modify the reported data to avoid duplication. Similarly, requiring additional fields to accommodate reporting of all co-applicants' information would result in a significant expansion of the total data fields reported, adding considerable complexity and potentially leading to data quality issues. Given that only two commenters raised the issue of co-applicants, the Bureau believes that financial institutions likely do not frequently encounter applications involving more than one small business applicant.

On the other hand, the Bureau is not requiring reporting of a small business co-applicant only if it is the primary business seeking funding, as suggested by one commenter. The Bureau believes it may not always be clear who is the ''primary'' applicant if there are multiple co-applicants; such a rule could be used to evade reporting altogether in these situations. The Bureau therefore believes that it is reasonable to require data collection and reporting for a single small business if there are multiple co-applicants. Final comment 103(a)–10 provides several illustrative examples. In addition, new § 1002.5(a)(4)(x) permits a creditor to collect certain demographic information concerning a co-applicant without violating existing Regulation B. See also the section-by-section analysis of § 1002.106(b) for a discussion of calculating gross annual revenue for purposes of determining small business status under final § 1002.106(b) if there are multiple co-applicants.

Lastly, the Bureau is adding new comment 103(a)–11 to clarify that refinances and requests for additional credit amounts on an existing account are covered applications, as further discussed in the section-by-section analysis of § 1002.103(b).

103(b) Circumstances That Are Not Covered Applications

Proposed Rule

Proposed § 1002.103(b) would have identified certain circumstances that are not covered applications—even if they may otherwise be considered an application under existing § 1002.2(f). Specifically, the Bureau proposed that a covered application would not include (1) reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests. Solicitations and firm offers of credit would also not have been ''covered applications'' under the proposed definition. Proposed comments 103(b)–1 through –5 would have provided additional guidance and examples of circumstances that do and do not trigger data collection and reporting for covered applications.

The Bureau sought comment on proposed § 1002.103(b) and associated commentary concerning circumstances that would not be a covered application. Solicitations for comment on specific issues are noted throughout the discussion below.

Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. The Bureau proposed to exclude from the definition of a ''covered application'' requests by borrowers to modify the terms or duration of an existing extension of credit, other than requests for additional credit amounts. The Bureau believed that requests to modify the terms or duration of an existing extension of credit, which occur with high frequency in the small business lending space, would have added complexity and burden for financial institutions, while potentially providing limited additional information relevant to the purposes of section 1071.

However, the Bureau proposed that reporting would have been required for requests for additional credit amounts (such as line increases or new money on existing facilities). The Bureau believed that capturing requests for additional credit amounts would further the purposes of section 1071, particularly the community development purpose, as it would have more accurately captured demand for credit.

Inquiries and prequalification requests. The Bureau proposed to exclude inquiries and prequalification requests from what constitutes a ''covered application.'' The Bureau believed that requiring data collection for all inquiries and prequalification requests could create operational challenges and pose data accuracy issues, including raising the risk of missing, unavailable, erroneous, or duplicative data.

The Bureau also considered whether to only require reporting of inquiries and prequalification requests in situations that would otherwise be treated as an ''application'' under existing Regulation B—*i.e.,* when the financial institution evaluates information about the business, decides to decline the request, and communicates this to the business. Ultimately, the logistics of reporting an inquiry or prequalification request only in these circumstances (where an inquiry or prequalification request becomes an ''application'' under existing § 1002.2(f)) could be operationally challenging for financial institutions, could lead to data distortion as only denials would be captured, and could cause unintended market effects.

On the other hand, potential discrimination may occur in these early interactions with a financial institution. In particular, the Bureau was concerned about excluding data on inquiries and prequalification requests when the financial institution evaluates information about a business and declines the request, as such data may be useful for identifying potential discouragement of or discrimination against applicants or prospective applicants.

Ultimately, however, the Bureau believed it was appropriate to interpret ''application'' as used in section 1071 to exclude inquiries and prequalification requests given the considerations identified above, including the timing and often informal nature of such

interactions, the operational challenges of implementing such a definition, and related concerns about the reliability of the data.

The Bureau sought comment on a number of issues in connection with the reporting of inquiries and prequalification requests. For example, the Bureau sought comment on whether instead to define a ''covered application,'' consistent with existing Regulation B, to include inquiries or prequalification requests where the financial institution evaluates information about the business, decides to decline the request, and communicates this to the business. Related to this alternative approach, the Bureau further sought comment on whether additional data fields would be necessary in order to distinguish prequalification requests and inquiries from other reported applications. In addition, if the Bureau were to require reporting of declined inquiries or prequalification requests, the Bureau sought comment on whether financial institutions would want the option to report all prequalification requests and inquiries, to allow for a comparison with denials.

Solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution. Proposed comment 103(b)–4 would have clarified that the term covered application does not include solicitations and firm offers of credit. The Bureau explained that like other reviews or evaluations initiated by the financial institution, these communications do not involve an *applicant* requesting credit, and so would not be ''covered applications.'' Excluding solicitations and firm offers of credit would also be consistent with the language of ECOA section 704B(b)(1), which expressly contemplates that an application could arise in response to a solicitation by a financial institution, though the text is silent on solicitations without any applicant response. Thus, consistent with the statutory language, the Bureau proposed that a solicitation or firm offer of credit could become a ''covered application'' under the proposed definition if an applicant responds to the solicitation or offer by requesting a covered credit transaction.

Comments Received

The Bureau received comments on its proposal to identify certain circumstances that are not covered applications, even if they otherwise would have been considered an application under existing § 1002.2(f), from a wide range of lenders, trade associations, community groups, and a business advocacy group.

Some commenters, including several lenders and trade associations, expressly supported all the clarifications of circumstances that are not reportable in proposed § 1002.103(b). One noted that the proposed exclusions would avoid duplicative steps and keep the data collection focused on its core purposes. Other commenters stated that the proposed exclusions were appropriate because they would not provide useful data and that the proposal would help ease financial institutions' transition to data collection. Comments on particular aspects of proposed § 1002.103(b) are discussed below.

Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. Many industry commenters supported the Bureau's proposed exclusion of reevaluations, extensions, or renewal requests on an existing business credit account. However, industry commenters largely urged the Bureau to exclude requests for additional credit amounts on existing accounts. These commenters argued that reporting line increases would add unnecessary complexity and time to an otherwise streamlined process that occurs with high frequency, in response to rapid changes to business conditions, and is typically automated, which they said further lowers any risk of discrimination. These commenters argued that data collection for line increases would hurt small businesses by introducing hurdles in transactions where time is of the essence, and might discourage businesses from seeking line increases or creditors from offering them. Commenters also noted differences in how credit line increases are underwritten compared to other business credit: the process typically does not involve an application or other documentation, may involve limited underwriting, and any analysis performed is usually focused on the business's past performance and relationship with the financial institution. In addition, commenters expressed concern that including line increases would distort the data (for example, by ''double reporting'' accounts or because of the unique nature of credit line increases) or would provide data of limited value. A couple commenters emphasized the potential compliance difficulties for financial institutions, noting that excluding line increases would be simpler and avoid the need for financial institutions to determine who initiated a line increase. A trade association raised the additional concern that reporting of credit line increases and other requests for additional credit amounts will inflate the number of originations counted for purposes of determining whether an institution is a covered financial institution. In support of excluding modifications more generally, one commenter stated that modifications are not explicitly covered by other consumer financial laws and regulations, such as HMDA, the Real Estate Settlement Procedures Act of 1974 (RESPA), and Regulation Z.

Although opposed to the reporting of line increases, several commenters urged that, to the extent such transactions are reportable, the Bureau should mitigate the burden on financial institutions by (1) exempting any existing account from data collection under the Bureau's rule; and (2) permitting lenders to rely on prior responses regardless of when provided, unless there is a reason to believe the data are inaccurate. In support of the first proposal, these commenters argued that existing accounts may need challenging technology build-outs to integrate the rule's data collection requirements and existing clients may not be used to the collection process.

Most community groups to comment on this issue generally requested that all such circumstances (reevaluations, extensions, renewals), as well as refinances, be treated as reportable applications. These commenters argued that there should be a reportable application whenever a business communicates an interest in obtaining credit and has requested lender action, or if the lender takes action on the request, such as pulling a credit report, the business's tax information, or obtaining other data that can be used for underwriting—particularly if the financial institution's actions might negatively affect the business (for example, by lowering their credit score). A few commenters specifically focused on renewals and extensions, urging the Bureau to require reporting of these transactions, and to separate such transactions in the data from new originations. These commenters argued that renewals and extensions are an important source of credit for businesses and not reporting such circumstances would create a disconnect with Community Reinvestment Act (CRA) reporting. One commenter urged the Bureau to collect verbal and written agricultural loan modification or restructuring requests made to the Farm Service Agency, arguing that such requests constitute applications under existing Regulation B, highlighting concerns about discrimination in loan

servicing and the detrimental effects on businesses when servicing applications are not granted, including default, acceleration, and foreclosures. Some commenters further argued that lender-initiated renewals should also be captured, given the detrimental effect they may have on a business that is ''denied'' credit or experiences a reduction in access to credit.

Several commenters requested clarification on aspects of the Bureau's proposed approach to reevaluation, extension, or renewal requests. A community bank was uncertain what dates to report under § 1002.107(a)(2) and (9) (application date and action taken date) for requests for additional credit on existing accounts, and was concerned that if the dates changed from the initial origination, it could be construed as a data misrepresentation. Several other commenters inquired whether a transaction is a reportable covered application if a new note is executed as part of a request to consolidate existing credit amounts under the same terms or as part of a periodic review extending the credit under the same terms. A sales-based financing company explained that its customers often request funding over time, and asserted that each new request for credit should be reportable.

Inquiries and prequalification requests. The industry commenters to weigh in on inquiries and prequalification requests, including several banks, a CDFI lender, trade associations, and a business advocacy group, overwhelmingly supported the Bureau's proposal to exclude inquiries and prequalification requests. Commenters argued that including inquiries and prequalification requests would be operationally difficult given the high volume of such requests and because the interactions typically occur before the financial institution has the infrastructure in place to track requests for credit. They also argued that including such interactions could be misleading and lead to data accuracy issues, given the informal nature of such requests and because many such inquiries are subsequently abandoned or otherwise left incomplete. A business advocacy group also noted concerns about duplicative reporting of inquiries and prequalification requests if the business ultimately submits a credit application. A group of trade associations for insurance premium finance lenders argued that including inquiries and prequalification requests would be unworkable for their lenders, who are often not aware of a prospective applicant's interest in credit until they receive an agreement from the applicable insurance agent or broker; as a result, such financial institutions would be unaware of any inquiries or prequalification requests. Another commenter argued that reporting such transactions would effectively punish borrowers for inquiring about qualification requirements, products, and rates. Finally, one commenter stated that each financial institution should be permitted to define what constitutes an application, including any exclusions. Although industry commenters were generally in favor of the exclusion, a number of industry commenters stated that the line between inquiries or prequalification requests and covered applications should be sufficiently clear to avoid uncertainty during implementation, and asked the Bureau provide examples, in commentary to the rule, to differentiate these scenarios.

Conversely, a number of commenters, including a lender and community groups, urged the Bureau to require reporting on all or some inquiries and prequalification requests. Citing a study identifying the prevalence of discrimination in the pre-application phase,[341] commenters argued that the definition of covered application must be broad enough to capture pre-application phase discrimination. Several commenters requested that all communications where a business inquires about credit and seeks a credit decision should be reportable; another commenter urged reporting whenever the financial institution pulls a credit report or takes other action to begin underwriting. Several other commenters suggested that the Bureau align with existing Regulation B's treatment of prequalifications by treating denied inquiries and prequalifications as reportable applications.[342] One community group emphasized the importance of having online applications reported, including online prequalification requests in particular. The commenter argued that the absence of such data has been detrimental in the HMDA context, it creates an imbalance between online and traditional lenders, and the burden of reporting would be low as lenders are already required to capture such transactions for purposes of providing adverse action notices.

Although the Bureau sought comment on whether, alternatively, to define a ''covered application'' consistent with Regulation C—which does not require a financial institution to report prequalification requests and does not address reporting of inquiries more generally—the Bureau did not receive any comments directly on this point. Similarly, the Bureau did not receive any comments directly responding to its request for comment on the frequency with which financial institutions accept prequalification requests and what data are collected in connection with such prequalification requests, as well as potential effects on the market if some or all prequalification requests were reportable under section 1071. In addition, the Bureau did not receive any comments in response to its request for feedback on whether assumptions[343] are used in the small business lending context and whether reporting of assumptions for small business lending would further the purposes of section 1071.

Solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution. A number of industry commenters urged the Bureau to exclude ''preapprovals,'' which the commenters described as credit offered or originated by the financial institution without an initiating application from the business (including offers for a different product or offers to extend additional credit amounts). One of the commenters was particularly concerned about lender-initiated offers based on data collected or acquired by the financial institution about the small business; for example, a financial institution that uses deposit account data to evaluate a business for credit card offers. The commenter argued that in these circumstances, the business has not been ''denied'' credit because it never applied for credit; similarly, the commenter argued, accepted offers also should not be reported because there is no initiating application from the business. The commenter further argued that reporting of originated offers initiated by the financial institution would skew the data, as it would only reflect approvals. Reporting of ''denied'' offers, argued the commenter, would be infeasible, create confusion for the customer, and likely lead lenders to discontinue extending such offers altogether. Several other industry commenters similarly urged the Bureau to exclude ''preapprovals,'' though they

[341] Nat'l Cmty. Reinvestment Coal., *Disinvestment, Discouragement and Inequity in Small Business Lending* (Sept. 2019), *https://ncrc.org/wp-content/uploads/2019/09/NCRC-Small-Business-Research-FINAL.pdf.*

[342] Existing comment 2(f)–3 provides that a creditor treats an inquiry or a prequalification request as an application if it evaluates information about the consumer, decides to decline the request, and communicates this to the consumer.

[343] Regulation C requires the reporting of assumptions for HMDA. *See* Regulation C comment 2(j)–5 (discussing when assumptions should be reported as home purchase loans).

did not explain what precisely they meant by the term. One commenter argued that while preapprovals are clearly articulated in Regulation C, ''preapprovals'' do not exist in the small business lending space.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.103(b) as proposed to identify certain circumstances that are not covered applications, even if they otherwise would have been considered an application under existing § 1002.2(f). Specifically, final § 1002.103(b) provides that a covered application does not include (1) reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests. The Bureau is finalizing comments 103(b)–1 through –4 with minor revisions for clarity and consistency, to provide additional guidance and examples of circumstances that do and do not trigger data collection and reporting under the definition of a covered application. The Bureau is finalizing comment 103(b)–5, which discusses inquiries and prequalification requests, to provide additional discussion and examples distinguishing a covered application from an inquiry or prequalification request. As discussed in the section-by-section analysis of § 1002.103(a) above, the Bureau is also adding new comment 103(a)–4 to clarify that solicitations, firm offers of credit, or other evaluations initiated by the financial institution are not a covered application; however, if the business seeks to obtain the credit offered, the business's request constitutes a covered application.

Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. Pursuant to final § 1002.103(b)(1), the Bureau is excluding reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts, from the definition of a covered application. The Bureau believes that requests to modify the terms or duration of an existing extension of credit—such as extensions on the duration of a credit line or changes to a guarantor requirement—occur with high frequency in the small business lending space. If the Bureau were to require reporting of such circumstances, the Bureau believes it would add complexity for reporting financial institutions while, as some commenters have noted, potentially providing limited additional information relevant to the purposes of section 1071. Moreover, the Bureau believes that broadly including requests to modify the terms or duration of existing extensions of credit might affect data quality absent additional flags to distinguish the transactions from new originations, as well as to identify the particular nature of the changes. The Bureau further notes that Regulation C takes a similar approach by excluding reporting of loan modifications.[344]

Although some commenters argued that such transactions should be reported because they would provide a better understanding on the availability of credit, the Bureau believes such benefits would be modest, particularly absent additional data concerning how the modified credit request differs from the original request, which would require the collection of a number of additional data points. Similarly, although one commenter urged the Bureau to collect verbal and written agricultural loan modification or restructuring requests made to the Farm Service Agency, as discussed directly above, the Bureau believes expanding data collection and reporting requirements to all modification requests (except requests for additional credit amounts) would add significant complexity for lenders, could be duplicative, and may provide limited benefits without knowing the precise terms changed in the modification request. Nor does the Bureau believe that the definition of covered application should be expanded to encompass any expression of interest from a business to obtain credit or action by the financial institution towards underwriting; as noted above in the section-by-section analysis of § 1002.103(a) above, triggering data collection and reporting obligations too early could add significant complexity and affect data quality.

The Bureau believes that requiring reporting of requests for additional credit amounts (such as line increases or new money on existing facilities) is appropriate. Capturing requests for additional credit amounts directly furthers the purposes of section 1071, particularly the business and community development purpose, as it will more accurately capture demand for credit. Although industry commenters opposed reporting on new credit amounts due to what they described as the streamlined, fast-paced nature of such reviews, the Bureau believes those factors do not outweigh the benefits of having these data collected and reported. Moreover, the Bureau does not believe that collecting data on such transactions will be so time consuming or difficult that it will dissuade small businesses from seeking the additional credit they need, particularly in light of final § 1002.107(d), which permits financial institutions to reuse applicant-provided data in certain circumstances. Collecting data on requests for additional credit amounts will assist in fair lending testing and provide additional insight into small business credit trends and availability, furthering the purposes of section 1071, even if—as some commenters suggested—line increases are often underwritten differently than new requests for credit.

Regarding commenters' concerns about duplicative reporting, the Bureau notes that pursuant to final § 1002.107(a)(7) and (8), the financial institution only reports the additional credit amount sought (and approved or originated, as applicable)—not the entire credit amount extended—therefore avoiding duplicative reporting. Moreover, the fact that a request is for a line increase will be reflected in the reporting of credit purpose pursuant to final § 1002.107(a)(6). Thus, unlike renewals or modifications more generally, which may occur for a variety of reasons, requests for additional credit amounts and the amounts requested will be clearly identifiable in the data. The Bureau also believes that commenters' concerns about the time and difficulty associated with collecting data are further mitigated by final § 1002.107(d), which permits a financial institution to reuse certain data points under certain circumstances. In response to a commenter's concern that reporting of credit line increases and other requests for additional credit amounts will inflate the number of originations counted for purposes of determining whether an institution is a covered financial institution, the Bureau notes that new comment 105(b)–4 clarifies that requests of additional credit amounts on an existing account are not counted as originations for the purpose of determining whether a financial institution is a covered financial institution pursuant to § 1002.105(b).

The Bureau is also providing specialized rules for the reporting of line increases, as suggested by several commenters. One suggested strategy—exempting accounts that are in place before this final rule goes into effect—

[344] *See* Regulation C comment 2(d)–2. Although CRA regulations currently require the reporting of renewals, the recent proposed revisions to the CRA rule would instead use 1071 data once available to satisfy small business loan and small farm loan data collection and reporting requirements. 87 FR 33884, 33997–98 (June 3, 2022).

could significantly reduce reportable transactions, potentially for years into the future.[345] Moreover, under the tiered implementation period set forth in final § 1002.114(b), the Bureau believes that financial institutions (and their customers) will have adequate time to adjust to reporting. Similarly, in response to a different commenter's question about reporting requests for additional credit amounts, the Bureau notes that if there is an application for an additional credit amount on a covered credit transaction, a financial institution must collect data pursuant to this final rule even if the existing account was opened prior to the applicable compliance date.

The Bureau is also not adopting the commenters' second suggestion—to indefinitely allow financial institutions to rely on prior applicant responses—as the commenters provide no reason why reused data are more trustworthy in the context of requests for additional credit amounts, compared to other existing customers' requests for new credit. However, pursuant to final § 1002.107(d), financial institutions may reuse most applicant-provided data, so long as there is no reason to believe the data are inaccurate, for up to 36 months. Although not specific to requests for additional credit amounts, this provision may ease some of the commenters' concerns.

In response to comments, mainly from community groups, regarding the importance of having refinance transactions reported, the Bureau is revising comment 103(b)–2 to make clear that an applicant's request to refinance, which occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower, is reportable. The Bureau agrees with commenters that refinance transactions should be covered applications; they legally constitute a new credit obligation, and so are typically included within regulatory schemes governing originations.[346] Indeed, as one commenter correctly noted, the Bureau's inclusion of refinancing categories for the credit purpose data point (in proposed comment 107(a)(6)–1) in the proposed rule shows that the Bureau intended for refinances to be reportable transactions.

Several other commenters also requested clarification on aspects of the Bureau's proposed approach to reevaluation, extension, or renewal requests. In response to a community bank's questions regarding what dates to report under § 1002.107(a)(2) and (9) (application date and action taken date) for requests for additional credit on existing accounts, the Bureau notes the dates should be based on the new request for credit. Because a request for additional credit amounts is considered a separate covered application pursuant to final § 1002.103(a), all data reported, including applicable dates, should be in reference to the new request for credit, and not the initial origination. Several other commenters inquired whether a transaction is a reportable covered application if a new note is executed as part of a request to consolidate existing credit amounts under the same terms or as part of a periodic review extending the credit under the same terms. If an existing obligation is satisfied by a new credit obligation, as determined by contract and State law, it would generally be reportable as a covered application (assuming the other conditions of a covered application are met). Although in certain circumstances this may require reporting of credit amounts previously outstanding under a different credit obligation with the same borrower and with similar or identical terms, the Bureau believes that seeking to exempt these fact-specific circumstances would add considerable complexity to the rule and could undermine data quality. The Bureau generally agrees with the assertion that each new request for credit that is separately evaluated should be reportable (excluding counteroffers, pursuant to final comment 107(a)(9)–2). If a financial institution evaluates each new request for credit, then each of those instances should be reported as separate covered applications for the amount advanced. For example, if a small business makes several requests for advances from a merchant cash advance provider, each of which is evaluated by the provider, each of those requests will typically constitute a separate covered application. In contrast, if a financial institution extends a line of credit up to a specified amount, then any request drawn against the line within that established limit is authorized and would not be a separate covered application. See also existing § 1002.2(q), which defines the term to "extend credit" or "extension of credit."

Inquiries and prequalification requests. As the Bureau explained in the NPRM, existing Regulation B recognizes that before a consumer or business requests credit in accordance with the procedures used by a creditor for the type of credit requested, a creditor may provide a prospective applicant with information about credit terms. Generally, an inquiry occurs when a prospective applicant consumer or business requests information about credit terms offered by a creditor; a prequalification request generally refers to a request by a consumer or business for a preliminary determination on whether the prospective applicant would likely qualify for credit under a creditor's standards or for what amount.[347] Under existing Regulation B comments 2(f)–3 and 9–5, an inquiry or prequalification request may become an "application" if the creditor evaluates information about the consumer or business, decides to decline the request, and communicates this to the consumer or business; otherwise, such inquiries and prequalification requests are generally not considered applications under existing Regulation B. As explained in existing comment 2(f)–3, whether the inquiry or prequalification request becomes an application depends on how the creditor responds to the consumer or business, not on what the consumer or business says or asks. Finally, Regulation C excludes all prequalification requests from HMDA reporting, even if the prequalification request constitutes an application under existing Regulation B.[348]

Pursuant to final § 1002.103(b)(2), a "covered application" does not include inquiries and prequalification requests, even in circumstances where the inquiry or prequalification request may constitute an "application" under existing § 1002.2(f). The Bureau agrees with commenters who stated that reporting inquiries or prequalification requests would be extremely operationally difficult given the volume of such requests and because such requests typically occur very early in the process, making it difficult to obtain or track applicant-provided data. There could be data quality issues given the sometimes-informal nature of such

[345] Although information on average business credit card account age is not publicly available, credit card accounts typically have no expiration date and so may remain open indefinitely. Thus, exempting such accounts could create blind spots in the data for potentially years, or even decades, into the future.

[346] *See, e.g.,* Fed. Fin. Insts. Examination Council, *A guide to CRA Data Collection and Reporting,* at 12 (2015), *https://www.ffiec.gov/cra/pdf/2015_CRA_Guide.pdf* (stating that an institution should collect information about small business and small farm loans that it refinances or renews as loan originations). Regulation C § 1003.4(a)(3) (requiring reporting of whether the covered loan is a refinance); Regulation Z § 1026.20(a) ("A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. . . .").

[347] *See* Regulation C comment 2(b)–2 (describing prequalification requests).

[348] *See id.*

requests, which could raise the risk of missing, unavailable, or erroneous data. As noted by one commenter, reporting inquiries and prequalification requests could also be duplicative if the applicant subsequently applies for credit in accordance with the procedures designated by the financial institution; the Bureau would potentially need to create a separate data field or flag to distinguish such requests. Requiring reporting of such interactions could also lead financial institutions to pull back on offering prequalification reviews or engaging with prospective applicants, which could inhibit prospective applicants from shopping around for the best terms. As discussed in the section-by-section analysis of § 1002.103(a) above, small depository institutions have expressed concern that this rule will overly formalize small business lending and inhibit relationship lending. Given these concerns, the Bureau is not expanding the definition of a covered application to include pre-application conduct, such as every time a business inquires about credit or if a financial institution pulls information about the business, as urged by some community groups.

The Bureau also is not requiring, as suggested by some commenters, reporting of inquiries and prequalification requests only in situations that would otherwise be treated as an ''application'' under existing Regulation B—*i.e.,* when the financial institution evaluates information about the business, decides to decline the request, and communicates this to the business. The logistics of reporting an inquiry or prequalification request only in these circumstances could be operationally challenging for financial institutions and could lead to data distortion in a manner inconsistent with the statutory purposes of section 1071, as only denials would be captured. In this case, a financial institution may prefer to report all inquiries and prequalification requests, which could lead to some of the challenges identified above. Moreover, a financial institution will not know ex ante whether a prequalification will result in the financial institution notifying the business it is unlikely to qualify, and so the financial institution would likely need to collect 1071 data at the beginning of the interaction regardless. Although the Bureau sought comment about its concerns related to the reporting of only denials, no commenters specifically addressed this issue.

As noted above, one commenter emphasized the importance of having online applications reported, including online prequalification requests in particular, arguing that the absence of reporting would lead to a lack of data and an imbalance among lenders. The Bureau notes, however, that the final rule does not exclude online applications (nor did the proposal). While prequalification requests are excluded for the reasons discussed above, that exclusion is not limited to a particular channel. However, to the extent an online questionnaire is truly a voluntary tool for businesses to shop around for potential terms, and not an application under the procedures established by the financial institution, the Bureau believes such inquiries should be excluded for the reasons described above.

Of course, requests for credit that meet the definition of ''covered application'' are reportable, even if the application was preceded by an inquiry or prequalification request. For example, if a business initially seeks information about potential credit offerings, the financial institution responds, and then the business submits an application for a covered credit transaction, the application is reportable. If, on the other hand, the business asks about potential credit offerings, but then chooses not to request credit, there is no covered application.

In response to commenters' request to provide further examples, in commentary to the rule, to differentiate inquiries or prequalification requests and covered applications, the Bureau has added to comment 103(b)–5 additional illustrative examples.

The Bureau has also made minor revisions to comment 103(b)–4 for clarity and consistency.

In sum, the Bureau believes it is appropriate to interpret ''application'' as used in section 1071 to exclude inquiries and prequalification requests given the considerations identified above, including the timing and often informal nature of such interactions, the operational challenges of implementing such a definition, and related concerns about the reliability of the data. However, the Bureau does share commenters' concerns about discrimination that may occur in the pre-application phase. As discussed above, the Bureau believes it is important for regulators and other enforcers to review data collected and reported pursuant to section 1071 to preliminarily identify where financial institutions might not be appropriately defining an application, and for financial institutions to self-monitor for the same. For example, as discussed above, very high approval rates or very low rates of incomplete or withdrawn applications may be a preliminary indication that the financial institution is evading its obligations, for example, by collecting 1071 data late in the application process. Similarly, such rates may also suggest that the financial institution has a regular practice of decisioning requests for credit through ''inquiries'' or ''prequalification requests''; if such reviews are regularly conducted and effectively function as a prescreening tool for the financial institution, they should be reported as a ''covered application.'' [349]

The Bureau believes it is important for regulators and other enforcers to also carefully review the data for indicia of potential illegal discouragement in the pre-application stage, and for financial institutions to self-monitor for the same. For example, analyzing the rates of applications from small businesses within majority-minority neighborhoods, as compared to a financial institution's peers, may be useful to identify potential discrimination. Finally, the Bureau notes that inquiries and prequalification requests where the institution evaluates information about the consumer or business, declines the request, and communicates it to the business or consumer, are ''applications'' under existing Regulation B, and are thus subject to its requirements regarding ''applications,'' including its adverse action notification requirements and nondiscrimination provisions. As stated in final comment 103(b)–1, in no way are the exclusions in final § 1002.103(b) intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term application in existing § 1002.2(f) as applicable to existing Regulation B.

Solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution. The Bureau is adding new comment 103(a)–4 to clarify that the term covered application does not include solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution because the business has not made a request for credit, and to provide illustrative examples. The Bureau is adding this comment in response to comments from industry urging the Bureau to exclude ''preapprovals,'' which the commenters described as credit offered by the financial institution without an initiating application from the business. The

[349] *See also* final comment 103(b)–5.

Bureau agrees with commenters who urged that solicitations, reviews, or evaluations initiated by the financial institution should not, on their own, be considered ''covered applications'' because the communications do not involve an *applicant* requesting credit. Excluding solicitations and firm offers of credit is also consistent with the language of ECOA section 704B(b)(1), which expressly contemplates that an application in response to a solicitation by a financial institution could be an application under section 1071, but the text is silent on solicitations without any applicant response.

The Bureau does not agree, however, that such offers or evaluations should not be reported even where the applicant responds to such a request and seeks the credit offered, as suggested by one commenter. Once the applicant responds affirmatively to the solicitation indicating that it wishes to proceed, there is a request for credit from the applicant; there is no requirement in the final definition of a covered application that the applicant be the initiating entity, only that the applicant make an oral or written request for a covered credit transaction in accordance with procedures used by a financial institution for the type of credit requested. Capturing such requests would also implement the language of ECOA section 704B(b)(1), which provides that data collection and reporting is required ''whether or not such application is in response to a solicitation by the financial institution.'' The commenter also argued that reporting on accepted solicitations or offers would skew the data as it would only include accepted offers. The Bureau understands that this may result in some data skew, but believes this outcome is preferrable to having no data at all on applicant requests for credit in response to a solicitation. Thus, solicitations, firm offers of credit, or other evaluations or offers initiated by the financial institution for a covered credit transaction may become a ''covered application'' if an applicant responds to the solicitation or offer by requesting the offered credit. However, if a financial institution unilaterally—with no request from the business—increases a credit line or provides some other type of credit to the business, it would not be considered a covered application because, similar to a mere solicitation, the transaction does not involve a request for credit.

Several commenters also asked the Bureau to provide that ''preapprovals'' are not covered applications. As noted above, to the extent the commenters are referring to evaluations or offers initiated by the financial institution alone, such events are not covered applications unless the applicant affirmatively responds, wishing to proceed. However, a preapproval as described in existing comment 2(f)–5.i is an example of a covered application. Under that comment, a preapproval occurs when a creditor reviews a request under a program in which the creditor, after a comprehensive analysis of an applicant's creditworthiness, issues a written commitment valid for a designated period of time to extend a loan up to a specified amount. If a creditor's program does not provide for giving written commitments, requests for preapprovals are treated as prequalification requests.

Section 1002.104 Covered Credit Transactions and Excluded Transactions

104(a) Covered Credit Transaction

ECOA section 704B(b) requires financial institutions to collect and report information regarding any application for ''credit'' made by women-owned, minority-owned, or small businesses. Although the term ''credit'' is not specifically defined in section 1071, ECOA defines ''credit'' as ''the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.'' [350] As noted above in the section-by-section analysis of § 1002.102(d), existing Regulation B further defines ''business credit'' as ''extensions of credit primarily for business or commercial (including agricultural) purposes,'' with some exclusions.[351] As discussed in detail below, the Bureau is finalizing its proposal that covered financial institutions report data for all applications for transactions that meet the definition of business credit unless otherwise excluded.

Proposed § 1002.104(a) would have defined the term ''covered credit transaction'' as an extension of business credit that is not an excluded transaction under proposed § 1002.104(b). Proposed comment 104(a)–1 would have reiterated that the term ''covered credit transaction'' includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b). The Bureau explained that such credit transactions for agricultural purposes and HMDA-reportable transactions would have fallen within the scope of the proposed rule. The Bureau noted that this was not an exhaustive list of covered credit transactions; other types of business credit would have constituted covered credit transactions unless excluded by proposed § 1002.104(b). With respect to excluded transactions, proposed § 1002.104(b) would have stated that the requirements of subpart B do not apply to trade credit, public utilities credit, securities credit, and incidental credit. Proposed commentary would have made clear that the term ''covered credit transaction'' also did not cover factoring, leases, consumer-designated credit used for business purposes, or credit secured by certain investment properties.

The Bureau received comments on transaction coverage from many lenders, trade associations, business advocacy groups, nonbank online lenders, the offices of two State attorneys general, and community groups. The Bureau received a few comments from industry expressing general support for the proposed definition of covered credit transaction. Many community groups, as well as several community-oriented lenders and a cross-sector group of lenders, community groups, and small business advocates, requested expansive and broad product coverage; some commenters argued that such coverage was needed to prevent evasion, for comprehensive data analysis, and/or to fulfill section 1071's statutory purposes. Some commenters suggested the Bureau monitor the market to ensure that new products are covered by, and reported under, the rule. A business advocacy group and a joint letter from community groups, community-oriented lenders, and business advocacy groups urged the Bureau to subject ''all forms of credit''—including merchant cash advances, factoring, and leases, in addition to term loans, credit cards, and other forms of credit—to fair lending and credit need analysis. They asserted that each of these products occupies a substantial portion of the ''credit market'' for small businesses and excluding any of them would allow potentially detrimental lending practices to proliferate.

For the reasons set forth herein, the Bureau is finalizing its definition of ''covered credit transaction'' in § 1002.104(a) as proposed. Final § 1002.104(a) defines the term ''covered credit transaction'' as an extension of business credit that is not an excluded transaction under § 1002.104(b). Final comment 104(a)–1 reiterates that the term ''covered credit transaction'' includes all business credit (including loans, lines of credit, credit cards, and

[350] 15 U.S.C. 1691a(d); *see also* § 1002.2(j).

[351] 12 CFR 1002.2(g).

merchant cash advances) unless otherwise excluded under final § 1002.104(b). Loans, lines of credit, credit cards, merchant cash advances, and credit products used for agricultural purposes fall within the scope of this final rule, which covers the majority of products that small businesses use to obtain financing.[352] As discussed in greater detail below, the Bureau believes that covering these products in this rule is important to fulfilling the purposes of section 1071. The Bureau stresses that the products discussed herein do not constitute an exhaustive list of covered credit transactions; other types of business credit not specifically described in the rule and its associated commentary nevertheless constitute covered credit transactions unless excluded by final § 1002.104(b). In line with this approach, the Bureau thus is not expressly listing other products (such as credit extensions incident to factoring arrangements discussed below) as covered credit transactions.

Final § 1002.104(b), in turn, states that the requirements of subpart B do not apply to trade credit, HMDA-reportable transactions, insurance premium financing, public utilities credit, securities credit, and incidental credit. Associated commentary makes clear that the term ''covered credit transaction'' also does not cover factoring, leases, consumer-designated credit that is used for business or agricultural purposes, or credit transaction purchases, purchases of an interest in a pool of credit transactions, and purchases of a partial interest in a credit transaction. In response to comments received, the Bureau is now excluding HMDA-reportable transactions and insurance premium financing from the scope of this final rule. As a result, the Bureau believes that proposed commentary that would have made clear that the term ''covered credit transaction'' does not cover credit secured by certain investment properties is not necessary.

The Bureau agrees that broad product coverage is important to fulfill section 1071's statutory purposes, though the Bureau is not extending coverage to all forms of small business financing as requested by some commenters. The Bureau believes the exclusions from the definition of covered credit transaction that it proposed in § 1002.104(b) are appropriate and has added two additional exclusions (HMDA-reportable transactions and insurance premium financing) in response to comments received. For the reasons set forth herein, the Bureau is finalizing § 1002.104 pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071.

Comments received on specific types of transactions that are reportable or not reportable under this rule are discussed in turn below.

Loans, Lines of Credit, and Credit Cards

Proposed Rule

Proposed § 1002.104(a) would have defined the term ''covered credit transaction'' as an extension of business credit that is not an excluded transaction under proposed § 1002.104(b). Proposed comment 104(a)–1 would have reiterated that the term ''covered credit transaction'' includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b). The Bureau did not propose definitions for loans, lines of credit, and credit cards because the Bureau believed these products are generally and adequately covered by the definition of ''credit'' in proposed § 1002.102(i), which, as noted above, references existing § 1002.2(j). The Bureau sought comment on its proposed approach to covered credit transactions and particularly on whether it should define loans, lines of credit, and credit cards, and, if so, how.

Comments Received

A few commenters expressed general support for the explicit coverage of loans, lines of credit, and credit cards. One bank commenter opined that the Bureau's rule does not need to define loans, lines of credit, and credit cards because those definitions would add unnecessary complexities. One community group expressed approval for the Bureau's proposed coverage of lines of credit, stating that such products meet important credit needs to help businesses weather fluctuations in revenues and their coverage will help inform stakeholders whether minority- and/or women-owned businesses are able to access this important credit type or whether they experience a disproportionate amount of denials.

The Bureau received mixed feedback regarding its proposed coverage of credit cards. A few community groups supported credit card coverage, with one noting that credit cards are widely used by small businesses, often with smaller principal balances and higher interest rates than term loans. This commenter stressed the importance of assessing whether Hispanic- and African American-owned businesses are more likely to rely upon credit cards than other businesses and whether the smallest businesses, and women- and minority-owned businesses, have equitable access to term loans or are served disproportionately by credit card loans or other credit products.

By contrast, a few credit union trade associations urged the Bureau to exclude credit cards from the rule to reduce burden and reporting volumes. One commenter argued that every credit union that offers even a single small business credit card product will ultimately become a covered financial institution unless the Bureau either establishes a de minimis threshold or expressly excludes small business credit cards. Another urged the Bureau to exclude credit cards from the rule on the basis that these products are already covered by the Credit Card Accountability Responsibility and Disclosure (CARD) Act and the exclusion would reduce compliance burden without weakening the quality of resulting data and would relieve lenders of the responsibility to sort out and isolate business credit card data from consumer credit card data, which are often both run by the same platform independently of other commercial lending activities.

Final Rule

For the reasons set forth herein, the Bureau is finalizing its coverage of loan, lines of credit, and credit cards as proposed. These products are commonly offered to small business applicants (making up almost 60 percent of the aggregate dollar volume of various financial products used by small businesses).[353] According to a recent Federal Reserve Banks' survey of employer firms, loans and lines of credit were the most common forms of financing sought by applicants, with credit cards in second place.[354] The Bureau believes that covering these products is important for advancing both of section 1071's statutory purposes.

The Bureau does not believe that it would be appropriate to exclude credit cards from coverage, as requested by several commenters. The Federal Reserve Banks found that almost one third of employer firm applicants sought credit cards [355] and credit card usage among minority-owned small businesses is higher than among white-

[352] *See* White Paper at 21–22.

[353] *See id.* at 21 fig. 2.

[354] 2022 Report on Employer Firms at 25, *https://www.fedsmallbusiness.org/survey/2022/report-on-employer-firms.*

[355] *Id.*

owned small businesses.[356] The Bureau believes that excluding this popular source of small business financing, particularly among the smallest businesses and start-ups, would not be consistent with section 1071's statutory purposes. The Bureau has considered the concerns regarding reporting volumes among credit unions and notes that its higher originations threshold in final § 1002.105(b) for coverage under the rule should help alleviate these concerns. The Bureau does not believe that CARD Act reporting is a sufficient substitute for data collected under section 1071 because it does not cover business-purpose credit cards and does not include protected demographic information, both of which are central to section 1071's statutory purposes.

The Bureau is finalizing § 1002.104(a) and comment 104(a)–1 as proposed. The Bureau is not adopting definitions for loans, lines of credit, and credit cards because it believes these products are generally and adequately covered by the definition of ''credit'' in § 1002.102(i).[357]

Merchant Cash Advances

Background and Proposed Rule

As discussed above, proposed § 1002.104(a) would have defined the term ''covered credit transaction'' as an extension of business credit that is not an excluded transaction under proposed § 1002.104(b), and proposed comment 104(a)–1 would have reiterated that the term ''covered credit transaction'' includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b). The Bureau sought comment on its proposed approach to covered credit transactions, and in particular, on whether it should define merchant cash advances and/or other sales-based financing transactions, and if so, how.

As the Bureau explained in the NPRM, merchant cash advances are a form of financing for small businesses that purport to be structured as a sale of potential future income. Merchant cash advances vary in form and substance, but under a typical merchant cash advance, a merchant receives a cash advance and promises to repay it plus some additional amount or multiple of the amount advanced (*e.g.,* 1.2 or 1.5, the ''payback'' or ''factor'' ''rate''). The merchant promises to repay by either pledging a percentage of its future revenue, such as its daily credit and debit card receipts (the ''holdback percentage''), or agreeing to pay a fixed daily withdrawal amount to the merchant cash advance provider until the agreed upon payment amount is satisfied. Merchant cash advance contracts often provide for repayment directly through the merchant's card processor and/or via Automated Clearing House withdrawals from the merchant's bank account.[358] Merchant cash advances constitute the primary product under an umbrella term often referred to as ''sales-based financing;'' generally, transactions wherein a financial institution extends funds to a business and repayment is based on the business's anticipated sales, revenue, or invoices.[359]

The Bureau understands that the merchant cash advance market is generally dominated by nondepository institutions not subject to Federal safety and soundness supervision or reporting requirements. The Bureau also understands that merchant cash advance providers may not be required to obtain State lending licenses. As a result, information on merchant cash advance lending volume and practices is limited. The Bureau notes, however, that a few states have enacted laws that would impose disclosure requirements upon certain commercial financing providers, including merchant cash advance providers.[360]

Although the Bureau's 2017 White Paper estimated the merchant cash advance market constituted less than 1 percent of the aggregate dollar volume of various financial products used by small businesses in the U.S. in 2014,[361] the Bureau notes that more recent evidence suggests the industry may now be much larger. For example, the 2021 Federal Reserve Banks' survey of firms with 1–499 employees (''employer firms'') found that 8 percent of such businesses applied for and regularly used merchant cash advances.[362] Moreover, on August 18, 2019, the trade website deBanked reported that according to an investment bank's projections, ''the [merchant cash advance] industry will have more than doubled its small business funding to $19.2 billion by year-end 2019, up from $8.6 billion in 2014.'' [363]

The Bureau understands that merchant cash advances are often used by merchants due to the speed and ease with which they can be obtained,[364]

[356] *See, e.g.,* Fed. Rsrv. Bank of N.Y. *et al., Latino-Owned Businesses: Shining a Light on National Trends* (Nov. 2018), *https://www.newyorkfed.org/medialibrary/media/smallbusiness/2017/Report-on-Latino-Owned-Small-Businesses.pdf* (finding that Latino business owners are more likely than non-Latino white business owners to use credit cards).

[357] As noted in the section-by-section analysis of § 1002.107(a)(5) below, the Bureau distinguishes between secured and unsecured loans and lines of credit when financial institutions report the type of credit product being applied for. The Bureau does not believe that this distinction has relevance to whether these products constitute ''credit.''

[358] This description is based on the Bureau's review of a sample of merchant cash advance contracts that the Bureau believes fairly represent typical merchant cash advance contracts in the market. The Bureau's review comports with observations made by industry and community groups regarding merchant cash advances.

[359] As stated below, the Bureau is not specifically defining sales-based financing in the rule because the Bureau believes these products are covered by the definition of ''credit'' in final § 1002.102(i). New York and California laws have recently sought to define sales-based financing. New York law, for example, defines ''sales-based financing'' as ''a transaction that is repaid by the recipient to the provider, over time, as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received by the recipient.'' N.Y. Fin. Serv. 801(j). New York's definition of sales-based financing also encompasses a true-up mechanism where the financing is repaid as a fixed payment but provides for a reconciliation process that adjusts the payment to an amount that is a percentage of sales or revenue. *Id.* California law uses a similar definition. *See* 10 Cal. Code Reg. 2057(a)(22) (defining sales-based financing as ''a commercial financing transaction that is repaid by a recipient to the financer as a percentage of sales or income, in which the payment amount increases and decreases according to the volume of sales made or income received by the recipient'' and including ''a true-up mechanism'').

[360] *See, e.g.,* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (Dec. 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B*. The California law does not go so far as to amend the California Financing Law to require factors or merchant cash advance providers to be licensed, but it does impose first-in-the-nation disclosure requirements in connection with these products similar to those imposed under TILA. The California law is implemented through regulations that took effect on December 9, 2022. *See* State of Cal. Dep't of Bus. Oversight, *PRO 01–18 Commercial Financing Disclosures SB 1235* (June 9, 2022), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf.* The New York law is also implemented through regulations, which have not been finalized yet. See N.Y. Dep't of Fin. Servs., Revised Proposed New 23 NYCRR 600 (Sept. 14, 2022), *https://www.dfs.ny.gov/system/files/documents/2022/09/rp_23nycrr600_text_20220914.pdf.*

[361] *See* White Paper at 21 fig. 2, 22 fig. 3.

[362] Fed. Rsrv. Banks, *Small Business Credit Survey—2022 Report on Employer Firms,* at 19 (Feb. 22, 2022), *https://www.fedsmallbusiness.org/survey/2022/report-on-employer-firms* (2022 Small Business Credit Survey). Starting in 2017, the Federal Reserve Banks began to gather specific data on merchant cash advances for its annual reports on small business financing for employer firms—in the 2017 report, the survey found that 7 percent of such businesses applied for and regularly used merchant cash advances. Fed. Rsrv. Banks, *Small Business Credit Survey—2017 Report on Employer Firms,* at 9 (Apr. 11, 2017), *https://www.fedsmallbusiness.org/survey/2017/report-on-employer-firms* (2017 Small Business Credit Survey).

[363] Paul Sweeney, *Gold Rush: Merchant Cash Advances Are Still Hot,* deBanked (Aug. 18, 2019), *https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/.*

[364] *See* Fed. Rsrv. Banks, *Small Business Credit Survey—2021 Report on Employer Firms,* at 26 (Feb. 3, 2021), *https://www.fedsmallbusiness.org/*

particularly for merchants unable to obtain financing from more traditional sources.[365] According to the 2021 Federal Reserve Banks' report regarding firms owned by people of color (both small employer firms and non-employer firms), Black-owned firms, Hispanic-owned firms, and Asian-owned firms were more likely to have applied for merchant cash advances (14 percent, 10 percent, and 10 percent, respectively) than white-owned firms (7 percent).[366]

The Bureau believes that the higher frequency of merchant cash advance use among minority-owned businesses coupled with reports of problematic provider practices lends credence to claims that merchant cash advances may raise fair lending concerns. The Federal Trade Commission (FTC) released a Staff Perspective in February 2020 discussing its concerns with the merchant cash advance industry [367] and noting the industry's tendency to ''cater to higher-risk businesses or owners with low credit scores—typically offering them higher-cost products.'' [368] The FTC has also filed enforcement actions against merchant cash advance providers and their principals, in one case alleging that they misrepresented the terms of merchant cash advances that they provided, and then used ''unfair collection practices, including sometimes threatening physical violence, to compel consumers to pay.'' [369] In April 2021, the FTC obtained a settlement that required a merchant cash advance provider to pay more than $9.8 million to settle charges that it took money from businesses' bank accounts without permission and deceived business owners about the amount of financing they would receive and about other features of its financing products.[370] More recently, the FTC obtained a court order that permanently bans a merchant cash advance company and its owner from the merchant cash advance industry for deceiving and threatening small businesses and their owners.[371]

Moreover, the Bureau understands that the delinquency/default rate amongst small businesses that use merchant cash advances is relatively high—6 to 20 percent according to one estimate [372] and 10 percent according to an SEC analysis of one merchant cash advance provider [373] (compared with a charge off rate between 0 to 3.59 percent on SBA loans [374] and just over 1 percent on certain commercial and industrial loans [375]). The Bureau believes this high default rate may be explained by the fact that the typical merchant cash advance holdback percentage—10 to 20 percent of gross receipts or revenues—may be onerous for already cash-strapped small businesses.[376] The Bureau also understands that it is not uncommon for small businesses that use merchant cash advances to obtain new merchant cash advances from other merchant cash advance providers (more than a quarter of such businesses, by one account); [377] they also may use one merchant cash advance to pay off another. Firms that take on added debt loads in this way (a process known as ''stacking'') ''may not fully recognize the costs involved, which could potentially jeopardize the financial health of their businesses.'' [378]

As small businesses struggled with the COVID–19 pandemic, reports of merchant cash advance providers employing aggressive collection practices continued, such as ''pursuing legal claims against owners that freeze their bank accounts and . . . pressing their family members, neighbors, insurers, distributors—even their customers.'' [379] Given the fact that 84 percent of the credit applicants surveyed by the Federal Reserve Banks were approved for a merchant cash advance [380] and the fact that it appears to have been significantly more difficult to obtain credit as a ''high credit risk'' applicant during the COVID–19 pandemic,[381] the Bureau believes that many vulnerable small businesses sought merchant cash advances to support their pandemic recovery.

Comments Received

The Bureau received comments on this aspect of the proposal from a wide range of lenders, trade associations, business advocacy groups, community groups, individuals, the offices of two State attorneys general, and others. The Bureau observes that, throughout the development of the rule to implement section 1071, merchant cash advances have been the focus of significant attention and a unique source of near-consensus among a diverse array of stakeholders—almost all of whom

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survey/2021/report-on-employer-firms (2021 Small Business Credit Survey) (reporting that 84 percent of surveyed credit applicants were approved for a merchant cash advance, as compared to a 43 percent approval rate for personal loans).

[365] *See* 2022 Small Business Credit Survey (noting that only 8 percent of ''high credit risk'' applicants obtained all the financing sought).

[366] *See* Fed. Rsrv. Banks, *Small Business Credit Survey—2021 Report on Firms Owned by People of Color,* at 30 (Apr. 15, 2021), *https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color* (Small Business Credit Survey of Firms Owned by People of Color).

[367] Fed. Trade Comm'n, *'Strictly Business' Forum, Staff Perspective,* at 6–8 (Feb. 2020), *https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf.*

[368] *See id.* at 2.

[369] Press Release, Fed. Trade Comm'n, *New York-Based Finance Companies Deceived Small Businesses, Non-Profits and Seized Their Personal and Business Assets* (June 10, 2020), *https://www.ftc.gov/news-events/press-releases/2020/06/new-york-based-finance-companies-deceived-small-businesses. See also* Press Release, Fed. Trade Comm'n, *FTC Alleges Merchant Cash Advance Provider Overcharged Small Businesses Millions* (Aug. 3, 2020), *https://www.ftc.gov/news-events/press-releases/2020/08/ftc-alleges-merchant-cash-advance-provider-overcharged-small.*

[370] Press Release, Fed. Trade Comm'n, *Cash Advance Firm to Pay $9.8M to Settle FTC Complaint It Overcharged Small Businesses* (Apr. 22, 2021), *https://www.ftc.gov/news-events/press-releases/2021/04/cash-advance-firm-pay-98m-settle-ftc-complaint-it-overcharged.*

[371] Press Release, Fed. Trade Comm'n, *FTC Action Results in Ban for Richmond Capital and Owner From Merchant Cash Advance and Debt Collection Industries and Return of More Than $2.7M to Consumers* (June 6, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-action-results-ban-richmond-capital-owner-merchant-cash-advance-debt-collection-industries.*

[372] *See* Bryant Park Capital, *Merchant Cash Advance/Small Business Financing Industry Report,* at 28 (Jan. 2016), *https://bryantparkcapital.com/wp-content/uploads/2018/06/BPC-MCA-SMB-Financing-Industry-Report.pdf.*

[373] SEC Complaint (Jan. 2020), *https://www.sec.gov/litigation/complaints/2020/comp24860.pdf.*

[374] Small Bus. Admin., *Table 9—Charge Off Rates as a Percent of Unpaid Principal Balance (UPB) Amount by Program* (Mar. 31, 2022), *https://www.sba.gov/document/report-small-business-administration-loan-program-performance.*

[375] Bd. of Governors of the Fed. Rsrv. Sys., *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks* (Aug. 22, 2022), *https://www.federalreserve.gov/releases/chargeoff/delallsa.htm.*

[376] *See* Bd. of Governors of the Fed. Rsrv. Sys., *Browsing to Borrow: ''Mom & Pop'' Small Business Perspectives on Online Lenders,* at 9 (June 2018), *https://www.federalreserve.gov/publications/files/2018-small-business-lending.pdf* (Board Small Business Perspectives) (noting that when asked ''about the toughest part of running their businesses, most participants cited the challenges of managing their cash flow''); *id.* at 5 (noting that ''[s]ome observers have argued that the owner's loss of control over cash flow puts some small businesses at risk''). The Bureau also notes that many merchant cash advance providers believe that they are not subject to State usury laws.

[377] *See* Opportunity Fund, *Unaffordable and Unsustainable: The New Business Lending,* at 3 (May 2016), *https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/13129* (stating that ''[m]ore than a quarter of the businesses in our dataset had loans outstanding with multiple alternative lenders'').

[378] Board Small Business Perspectives at 6.

[379] Gretchen Morgenson, *FTC official: Legal 'loan sharks' may be exploiting coronavirus to squeeze small businesses,* NBC News (Apr. 3 2020), *https://www.nbcnews.com/business/economy/ftc-official-legal-loan-sharks-may-be-exploiting-coronavirus-squeeze-n1173346.*

[380] *See* 2021 Small Business Credit Survey at 26.

[381] *Compare id.* at 22 (noting that only 7 percent of ''high credit risk'' applicants obtained all the financing sought), *with* Fed. Rsrv. Banks, *Small Business Credit Survey—2020 Report on Employer Firms,* at 12 (Apr. 7, 2020), *https://www.fedsmallbusiness.org/survey/2020/report-on-employer-firms* (reporting that 23 percent of ''high credit risk'' applicants obtained all the financing sought) (2020 Small Business Credit Survey).

advocated for covering merchant cash advances in the rule.[382] Comments received in response to the NPRM were no different in that, with the exception of a sole credit union trade association, the only commenters that supported the exclusion of merchant cash advances from the rule were merchant cash advance providers or trade associations representing merchant cash advance providers (the Bureau is not aware of any credit unions that offer merchant cash advances as that term is used herein). Most of these commenters argued that merchant cash advances do not meet the definition of credit under ECOA or State law and should instead be treated like traditional factoring arrangements (described in detail below), which are generally understood not to be credit. A few of these commenters also asserted that covering merchant cash advances is contrary to public policy because doing so will negatively impact access to financing and because they benefit businesses. Two commenters asserted that the Bureau failed to engage adequately in cost/benefit analysis as required by section 1022(b)(2)(a) of the Dodd-Frank Act, claiming that some smaller funders would exit the market due to increased regulatory burdens and costs. One commenter explained that because the merchant cash advance industry has never had to track the demographic status of a small business owner, implementing the Bureau's rule would require costly programming upgrades, adjustments to merchant cash advance funder systems, and additional employees to handle the reporting and auditing of these functions. This commenter also argued the rule would result in a less competitive market dominated by larger players and would put merchant cash advances at an unfair disadvantage compared to factoring.

The Bureau received many comments, primarily from community groups and community-oriented lenders, expressing broad support for covering merchant cash advances. A few of these commenters pointed to the fact that State regulators have started cracking down on the merchant cash advance industry due to its lack of transparency and potentially predatory practices. A community group and a cross-sector group of lenders, community groups, and small business advocates noted that merchant cash advances are an important and growing part of small business financing, with the community group relaying one merchant cash advance provider's announcement that the COVID–19 pandemic created new demand for its products, in part because the kinds of smaller firms that it primarily serves encountered greater-than-normal challenges to accessing capital through traditional bank financing during the pandemic. The cross-sector group and another community group stressed a need for transparency and noted that there is insufficient data on merchant cash advances. The community group acknowledged that reporting on merchant cash advances may be more complex due to their different terms but argued that these features make transparency into this lending channel critical. This commenter also opined that excluding merchant cash advances from scrutiny would encourage lenders to ''double down'' on their use rather than offer more consumer-friendly products.

Several supporters of merchant cash advance coverage, including the offices of two State attorneys general, maintained that merchant cash advances are clearly credit and they incur repayment liability. A joint letter from community and business advocacy groups explained that merchant cash advances are distinct from factoring in that a genuine factoring transaction creates a completed sale of receivables owed to the seller as a result of goods delivered or services provided by the seller to a third party. A few commenters asserted that coverage of merchant cash advances meets section 1071's statutory purposes. One online lender noted that merchant cash advances are not regulated. Many commenters expressed strong concerns about high costs and predatory practices often associated with merchant cash advances, with the majority of these commenters expressing particular concern about use of merchant cash advances among minority business owners. A CDFI lender explained that it had analyzed several merchant cash advance and balance sheet lender agreements provided by its clients and discovered that the average product carried an annual percentage rate of 94 percent, with one product reaching 358 percent. This commenter also found that, among the Hispanic borrowers in its sample, the average monthly payment was more than 400 percent of their take-home pay. An online lender characterized the lack of transparency in pricing merchant cash advances as a significant market failure that harms small business owners. A community group expressed strong concerns about the increasingly common practice of using confessions of judgments (where a borrower must agree to allow the lender to obtain a legal judgment without going to court) within merchant cash advance lending, citing an investigation that found that the number of merchant cash advance cases ending with a confession in favor of a merchant cash advance provider in New York State rose from 14 cases in 2014 to over 3,500 cases in 2018.[383] The commenter noted that the study further found that these confession of judgment cases won the merchant cash advance industry an estimated $500 million in 2017.[384]

Potential coverage of merchant cash advances under the final rule has also drawn the attention of government entities seeking to regulate the industry. For example, in response to the SBREFA Outline, the California Department of Financial Protection and Innovation submitted a comment letter stating that ''nearly all the data points would be just as easy for a merchant cash advance company to report as any other financial institution.'' In addition, FTC staff submitted a comment letter in response to the Bureau's Request for Information on the Equal Credit Opportunity Act and Regulation B [385] noting that the FTC has brought many actions protecting small businesses but that detecting illegal conduct in this space can be challenging, particularly with regard to merchant cash advances. The FTC comment letter urged the Bureau to remind small business lenders that whether a particular law applies depends on actual facts and circumstances and not solely on how one party chooses to characterize the transaction. FTC staff also recommended that the Bureau help small businesses through data collection, collecting complaints, and education.[386]

In response to the NPRM, the offices of two State attorneys general submitted a comment stating that merchant cash advance transactions fall within the definition of credit and that the

[382] For instance, of the substantive responses to the 2017 request for information, comments authored or co-authored by dozens of stakeholders (including community and business groups, industry, and trade associations) expressed explicit support for requiring the reporting of merchant cash advances (and additional letters expressed support for covering ''fintech'' or ''alternative online'' products more generally).

[383] Zachary R. Mider & Zeke Faux, *Sign Here to Lose Everything Part 1: ''I Hereby Confess Judgment''* (Nov. 20, 2018), *https://www.bloomberg.com/graphics/2018-confessions-of-judgment.*

[384] Zachary R. Mider & Zeke Faux, *Sign Here to Lose Everything Part 2: The $1.7 Million Man* (Nov. 27, 2018), *https://www.bloomberg.com/graphics/2018-confessions-of-judgment-millionaire-marshal/.*

[385] Comment No. CFPB–2020–0026–0117 (Dec. 1, 2020), *https://www.regulations.gov/comment/CFPB-2020-0026-0117.*

[386] *Id.*

inclusion of merchant cash advance transactions is crucial given the rapid expansion of the merchant cash advance market in the past decade and limited publicly available data on market size or standard industry practices. Having brought enforcement actions against multiple merchant cash advance providers, they also asserted that the unregulated nature of the merchant cash advance market makes it ripe for the type of problematic practices that they have directly observed through their investigations into the industry. They expressed strong support for the inclusion of merchant cash advance transactions within the scope of the Bureau's rule, stating their belief that the rule will promote fairness, transparency, and enhanced data collection in the area of small business financing, including the rapidly growing merchant cash advance market that is targeting small businesses.

The Bureau also received a few comments about other aspects of its proposal to cover merchant cash advances. One commenter advised against defining merchant cash advances in the rule, arguing that such a definition could be inconsistent with some State laws and thus may create additional complexity in complying with the final rule. Another commenter urged the Bureau to clarify the application of the rule to merchant cash advances, including by clearly defining merchant cash advances and explaining how the rule will apply to the particular features of merchant cash advance products. Two commenters expressed more general support for coverage of sales-based financing.

Final Rule

For the reasons set forth herein, the Bureau is finalizing its definition of ''covered credit transaction'' as proposed. Final § 1002.104(a) defines the term ''covered credit transaction'' as an extension of business credit that is not an excluded transaction under § 1002.104(b). Final comment 104(a)–1 reiterates that the term ''covered credit transaction'' includes merchant cash advances.

The Bureau believes that the statutory term ''credit'' in ECOA is intentionally broad so as to include a wide variety of products without specifically identifying any particular product by name. As noted above, ECOA defines ''credit'' to mean ''the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.'' As a result, the definition does not explicitly state that it applies to any type of credit, whether it be installment loans, credit cards, or merchant cash advances. To the extent there is any ambiguity about whether a particular product constitutes ''credit,'' Congress appears to have intended for the Bureau (or previously, the Board) to fill that gap, but neither the Bureau nor the Board have had occasion to provide further clarity with respect to coverage of sales-based financing products like merchant cash advances except to note in commentary that factoring, as ''a purchase of accounts receivable,'' [387] is not covered by ECOA or Regulation B. However, based on its review of typical merchant cash advance arrangements and its expertise with respect to the nature of credit transactions, the Bureau believes the term ''credit'' encompasses merchant cash advances and other types of sales-based financing. As a result, the Bureau believes that merchant cash advances and other sales-based financing are covered by the definition of ''credit'' in final § 1002.102(i). The Bureau does not believe it is necessary to specifically define merchant cash advances or sales-based financing because the broad definition of ''credit'' in ECOA and Regulation B—includes credit products covered by the rule unless the Bureau specifically excludes them.

Nor does the Bureau believe that merchant cash advances should be excluded from the rule as a species of factoring because merchant cash advances do not constitute factoring within the meaning of the existing commentary to Regulation B or the definition in final comment 104(b)–1. In factoring transactions, entities receiving financing sell their legal right to payment from a third party for goods supplied or services rendered, and that right exists at the time of the transaction itself; the provider of funds seeks payment directly from the third party, and the transaction between the recipient and the provider of funds is complete at the time of the sale. In other words, the recipient of the financing has no remaining payment obligation, meaning that no payment is deferred. In contrast, at the time of the advance in a merchant cash advance, the recipient of the financing has no existing rights to payment that it can transfer. The transaction thus constitutes only a promise by the recipient to transfer funds to the provider once they materialize at a later date. The Bureau believes that the ECOA definition of credit, by referring to the right to ''defer'' payments, necessarily invokes this temporal consideration.

The Bureau does not agree with arguments raised by other commenters that merchant cash advances are not ''credit'' under ECOA. Specifically, the Bureau does not agree that the purchase of the right to a specific portion of a merchant's future proceeds, up to an agreed-upon limit, constitutes a substantially contemporaneous exchange of value between a merchant cash advance provider and a merchant. The Bureau notes that a merchant's proceeds from future sales of goods and services, by definition, do not exist in the present and thus there can be no contemporaneous exchange of value, substantial or otherwise, where there is no present right to payment. The Bureau believes merchant cash advances are clearly distinguishable from back-dated checks, service contracts with staggered payment schedules, and true leases (discussed below). Merchant cash advances are typically repaid over a period of three to 12 months and the merchant has no existing rights to payment that it can transfer to the merchant cash advance provider until they materialize at a later date, usually at least a month later. The Bureau also notes that under Regulation B, a transaction is ''credit'' if there is a right to defer payment of a debt—regardless of the number of installments required for repayment or whether the transaction is subject to a finance charge.[388]

Furthermore, the Bureau interprets ECOA's definition of credit as making dispositive whether one party has granted another the right to repay at some time subsequent to the initial transaction, without consideration of factors such as the absence of recourse or analysis of who bears the risk of loss. Merchant cash advance providers grant such a right: they advance funds to small businesses and grant them the right to defer repayment by allowing them to repay over time. Additionally, as a practical matter, the Bureau understands that merchant cash advances are underwritten and function like a typical loan (*i.e.,* underwriting of the recipient of the funds; repayment that functionally comes from the recipient's own accounts rather than from a third party; repayment of the advance itself plus additional amounts akin to interest; and, at least for some subset of merchant cash advances, repayment in regular intervals over a predictable period of time).

Finally, the Bureau believes that the inclusion of merchant cash advances in the Bureau's rule is important to fulfilling both the fair lending and the

[387] Existing comment 9(a)(3)–3.

[388] Existing comment 2(j)–1.

business and community development purposes of section 1071.[389] Commenters have warned of high costs and predatory practices in this area, and the Bureau is particularly focused on their increasingly prevalent use among minority business owners.[390] The Bureau also believes that including merchant cash advances will create a more level playing field across financial institutions that provide cash flow financing to small businesses by shedding light on such credit transactions as well as create a dataset that better reflects demand for such financing by the smallest and most vulnerable businesses.

Agricultural-Purpose Credit

Background

As reported by the 2017 Census of Agriculture,[391] there are about 3.4 million farmers and ranchers (''producers'') working on 2 million farming and ranching operations (''farms'') in the United States. The U.S. Department of Agriculture (USDA) Economic Research Service found that family farms (where the majority of the business is owned by the operator and individuals related to the operator) of various types together accounted for nearly 98 percent of U.S. farms in 2020.[392] Small family farms (less than $350,000 in gross cash farm income) accounted for 90 percent of all U.S. farms and large-scale family farms ($1 million or more in gross cash farm income) make up about 3 percent of farms but 44 percent of the value of production.[393]

According to the 2020 Annual Report of the Farm Credit Administration, most agricultural lending (approximately 83 percent) is done by either commercial banks or the Farm Credit System (FCS), a network of government-sponsored enterprises regulated by the Farm Credit Administration, an independent government agency.[394] The USDA's Farm Service Agency accounts for a small share (3 percent) of agricultural credit through direct loans and guarantees of loans made by private lenders.[395]

In a July 2019 report, the U.S. Government Accountability Office (GAO) discussed its finding that information on the amount and types of agricultural credit to socially disadvantaged farmers and ranchers is limited,[396] and suggested that this rulemaking may be a way to engage in ''additional data collection and reporting for nonmortgage loans.'' [397] The GAO found that, using 2015–2017 USDA survey data, socially disadvantaged farmers and ranchers represented an estimated 17 percent of primary producers in the survey, but accounted for only an estimated 8 percent of total outstanding agricultural debt.[398] Loans to purchase agricultural real estate accounted for most of socially disadvantaged farmers and ranchers' outstanding debt (67 percent).[399] Farms with minority or women primary producers [400] are, on average, smaller and bring in less revenue than farms with a non-socially disadvantaged primary producer (*i.e.,* a white male)—while socially disadvantaged farmers and ranchers represented 30 percent of all farms, they operated 21 percent of total farmland and accounted for 13 percent of the market value of agricultural products sold in 2017.[401]

The share of minority representation in farming, particularly that of Black farmers, has declined sharply over the last 100 years.[402] (The number of female producers has increased significantly over the last 100 years but remains relatively small compared to male farm producers.[403]) Based on the disposition of numerous lawsuits alleging discrimination against minority farmers,[404] the Bureau believes that credit discrimination may play a role in this decline. The GAO cites advocacy groups for socially disadvantaged farmers and ranchers, which have said some socially disadvantaged farmers and ranchers face actual or perceived unfair treatment in lending or may be dissuaded from applying for credit because of past instances of alleged discrimination.[405] In addition, the GAO cites advocacy groups, lending industry representatives, and Federal officials in stating that socially disadvantaged farmers and ranchers are more likely to operate smaller, lower-revenue farms, have weaker credit histories, or lack clear title to their agricultural land, which can make it difficult for them to qualify for loans.[406] The Bureau understands that determining the ''creditworthiness'' of a farmer is often a judgmental process in which lending decisions are de-centralized and involve weighing many discretionary factors, and believes that there are heightened fair lending risks in agricultural lending.

Proposed Rule

In its proposal, the Bureau noted that credit used for agricultural purposes is generally covered by the broad definition of credit under ECOA and

[389] ECOA section 704B(a).

[390] *See, e.g.,* Fed. Rsrv. Bank of N.Y. *et al., Latino-Owned Businesses: Shining a Light on National Trends* (Nov. 2018) (stating ''Latino business owners are more likely than non-Latino White business owners to use credit cards, factoring, and merchant cash advances—products that require less collateral and are associated with higher average interest rates'').

[391] The Census of Agriculture is conducted by the USDA every five years and provides a detailed picture of farms and the people who operate them. *See generally* U.S. Dep't of Agric., *2017 Census of Agriculture* (Apr. 2019), *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[392] Econ. Rsch. Serv., U.S. Dep't of Agric., *Farming and Farm Income* (updated Sept. 1, 2022), *https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/.*

[393] *Id.*

[394] Farm Credit Admin., *2020 Annual Report of the Farm Credit Administration,* at 20 (2020), *https://www.fca.gov/template-fca/about/2020AnnualReport.pdf.*

[395] *Id.*

[396] *See* Gov't Accountability Off., *Agricultural Lending: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers is Limited* (2019), *https://www.gao.gov/assets/gao-19-539.pdf* (GAO Report).

[397] *Id.* at 12.

[398] *Id.* at 16. ''The primary producer is the individual on a farm who is responsible for the most decisions. Each farm has only one primary producer.'' *Id.* at 5.

[399] *Id.* at introductory highlights.

[400] ''Producers'' are individuals involved in farm decision-making. A single farm may have more than one producer.

[401] *See* GAO Report at 7.

[402] In 1910, approximately 893,370 Black farmers operated approximately 41.1 million acres of farmland, representing approximately 14 percent of farmers. U.S. Census Bureau, *1910 Census: Volume 5 (Agriculture), Statistics of Farms, Classified by Race, Nativity, and Sex of Farmers,* at 298 (1910), *https://www2.census.gov/library/publications/decennial/1920/volume-5/06229676v5ch04.pdf.* In 2017, of the country's 3.4 million total producers, only 45,508 of them (1.3 percent) are Black and they farm on only 4.1 million acres (0.5 percent of total farmland); by comparison, 95 percent of U.S. producers are white and own 94 percent of farmland. U.S. Dep't of Agric., *2017 Census of Agriculture,* at 62, 72 (Apr. 2019), *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[403] In 1910, women farmers represented approximately 4 percent of farm workers. *See* U.S. Census Bureau, *1910 Census: Volume 5 (Agriculture), Statistics of Farms, Classified by Race, Nativity, and Sex of Farmers,* at 340 (1910), *https://www2.census.gov/library/publications/decennial/1920/volume-5/06229676v5ch04.pdf.* As of 2017, women account for approximately 36 percent of farmers. *See* U.S. Dep't of Agric., *2017 Census of Agriculture,* at 62 (Apr. 2019), *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[404] *See, e.g.,* Order, *In re Black Farmers Discrimination Litig.,* No. 08–mc–0511 (D.D.C. filed Aug. 8, 2008), *https://blackfarmercase.com/Documents/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf*; *Pigford* v. *Glickman,* 206 F.3d 1212 (D.C. Cir. 2000). *See also Garcia* v. *Vilsack,* 563 F.3d 519 (D.C. Cir. 2009); *Love* v. *Connor,* 525 F. Supp. 2d 155 (D.D.C. 2007); *Keepseagle* v. *Veneman,* No. 99–CIV–03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001).

[405] GAO Report at introductory highlights. Additionally, the GAO cited these sources as noting that some socially disadvantaged farmers and ranchers may not be fully aware of credit options and lending requirements, especially if they are recent immigrants or new to agriculture. *Id.*

[406] *Id.*

agricultural businesses are included in section 1071's definition of small business. Taking into account the information above, the Bureau stated that covering agricultural credit in this rulemaking was important for advancing both of section 1071's statutory purposes and did not propose defining covered credit in a way that would exclude agricultural credit from coverage. The Bureau sought comment on the potential costs and complexities associated with covering such credit.

Comments Received

The Bureau received comments on this aspect of the proposal from many agricultural lenders, banks, trade associations, and community groups. Several community-oriented lenders and many community groups voiced support for the Bureau's proposed coverage of agricultural-purpose credit. A joint letter from community groups, community oriented lenders, and business advocacy groups asserted that covering agricultural credit will be helpful in advancing the goals of section 1071 because the vast majority of farms are small and family run, and farmers are an important part of the community development landscape, and because the litigation regarding discrimination against Black farmers shows the risk of discrimination and unequal access is significant in the agricultural context. A rural community group argued that the Bureau's legislative mandate is clear on this issue because agricultural lending falls under ECOA's definition of credit and farming operations are correctly included in the proposed rule's definition of small business. Several commenters asserted that covering agricultural credit serves section 1071's community development and fair lending statutory purposes. Another community group expressed its belief that 1071 data will allow for promotion of adaptive and sustainable agriculture among smaller farmers as opposed to relying on large agricultural businesses.

Some commenters discussed their belief that including agricultural credit within the scope of this rule was needed to address historical and/or continuing discrimination. A rural community group described the challenges relating to justifying claims in the discrimination settlements against USDA due specifically to the lack of any other form of data to quantify the results of disparities in treatment with access to loans. This commenter also relayed minority farmers' experiences of being more at risk of foreclosure due to not being told about or not being given fair access to many farm programs that benefit white farmers and due to receiving unfavorable loans originated with the specific intent of pushing these farmers into acceleration and foreclosure to remove them from their land. This commenter also detailed how the rule would illuminate a host of factors leading to disparate treatment of minority farmers, citing conflicts of interest among staff of local Farm Service Agency offices, disclosure of loan terms, imposition of collateral requirements, and changes in valuations of assets in appraisals. This commenter described discouragement of minority farmers from making loan applications or requesting loss mitigation and asserted that data collection is a proven way to document and address such discouragement. The commenter alleged that agricultural lenders, notably Farm Credit System lenders, lack the data or any system to comply with ECOA.

One community group maintained that constrained access to capital has contributed to the staggering loss of Black-owned farmland in the Deep South, while another said that the Bureau's rule will highlight the racially disparate impact of facially neutral policies that disproportionately result in adverse outcomes for Black farmers, including underwriting decisions based on the types of farm, the business structure, and land appraisals. A CDFI lender relayed examples of issues faced by Black farmers, including: (1) lack of access to fair, affordable credit as a barrier for new farmers; (2) lenders and local USDA offices that seek to frustrate Black farmers by making things more complicated and causing lengthy delays that white farmers do not encounter; (3) lack of relationships with banks resulting in their being less willing to work with the farmers and provide assistance during the loan application process; (4) agricultural loan underwriting criteria that favor beef, cattle, and grain production, which are often the enterprises of large-scale white farmers; (5) alternative financing from a private lender not being an adequate substitute for having fair access to government lending programs with 1 percent interest and 40 year terms; and (6) Black farmers often being unable to secure financing and thus being left with no choice but to sell their land to white farmers.

Several commenters stressed the need for transparency due to lack of sufficient data on agricultural lending markets. One such commenter noted that the USDA has not made its limited data—which includes only numbers of loans applied for, made, and denied, at the county level—easily available to the public. This commenter also argued that comprehensive data are particularly important to increase equity and uniformity in loan modifications and restructurings and to assist with decisions related to pandemic relief programs and the grant of specialized loan servicing. Another commenter suggested that 1071 data would help the USDA, the SBA, and other relevant government agencies better understand the needs of small agricultural businesses and noted that agricultural credit extends beyond acquisition of inventory farmland to include operational loans, agricultural machinery and building loans, and loans to develop local markets for selling agricultural products. A community group dismissed concerns that agricultural lending data would be too complex to collect and report, because it is already reported under CRA.

Some commenters suggested changes and clarifications related to applying the Bureau's rule to agricultural credit. One community group suggested the Bureau modify or clarify data collection to identify forms of disparate treatment unique in small-scale farm operations that may differ from other small businesses. This commenter also suggested that the Bureau clarify that the rule covers the Farm Service Agency, the Farm Credit System, all lenders making Farm Service Agency guaranteed loans, and the full range of other entities that provide credit to small farm businesses. A number of Farm Credit System lenders expressed support for a trade association letter that discussed how agricultural lending is fundamentally different from small commercial lending and requested a different small business definition to account for how they would be disproportionately covered by the rule. These comments are discussed in more detail in the section-by-section analysis of § 1002.106(b). One agricultural community group suggested that base acre payment transactions (transactions that take into account certain government payments, which are in turn based on a farm's historic crop yield) should be considered covered credit transactions because of concerns that base program acres may not benefit Native American farmers and because base acre payments are often used to prove or deny a farmer's request for loan origination or modification.

Some industry commenters requested an exclusion for agricultural credit from the Bureau's rule. One credit union association argued that agricultural lending should be exempted because many agricultural borrowers are serviced by small local community financial institutions, including credit

unions whose members are agriculturally based and whose members and borrowers are represented on the credit unions' board of directors. A few other commenters asserted that agricultural credit is not comparable to other types of small business lending and urged the Bureau to exempt it on those grounds; one stated that it does not make sense to compare a 200-acre farm with a gas station. A trade association pointed to different treatment under CRA and HMDA as evidence that it was unlikely that section 1071 was enacted to cover agricultural lending because their underwriting criteria are distinct and different from small business loans. A bank also suggested exempting agricultural lending, maintaining that its numbers would not be useful for fair lending purposes because unlike small business loans that are more on a one loan to one borrower or two-to-one basis, its agricultural portfolio included multiple loans to the same borrower. A few commenters argued that covering agricultural credit under the rule would have an outsized impact on farmers by increasing this cost of credit and reducing its availability. A trade association asserted that the burden of section 1071 compliance may force small lenders to reduce their lending below the exemption threshold, which in turn may limit the access to agricultural credit because large banks often do not engage in significant agricultural lending.

Final Rule

For the reasons set forth herein, the Bureau is not defining a ''covered credit transaction'' in final § 1002.104 in a way that would exclude agricultural credit from the final rule. Credit used for agricultural purposes is generally covered by the broad definition of credit under ECOA. First, ECOA's definition of ''credit'' is not limited to a particular use or purpose and Regulation B expressly covers agricultural-purpose credit. Further, ECOA does not provide an exception for agricultural credit, and it assigns enforcement authority to regulators of agricultural lending such as the Secretary of Agriculture and the Farm Credit Administration.[407] Moreover, agricultural businesses are included in section 1071's statutory definition of small business.[408] The Bureau believes that covering agricultural credit in this rulemaking is important for advancing both of section 1071's statutory purposes and is not excluding agricultural credit from the final rule. The Bureau notes that most of the comments received on this aspect of the proposal were in favor of the rule covering agricultural lending. Even the many comments that the Bureau received from Farm Credit System lenders and related associations generally focused on urging the Bureau to adopt a separate small farm definition rather than a wholesale exclusion of agricultural credit.

As noted above, the products discussed in this rule do not constitute an exhaustive list of covered credit transactions; other types of business credit not specifically described in the rule and its associated commentary nevertheless constitute covered credit transactions unless excluded by final § 1002.104(b). In line with this approach, the Bureau thus is not delineating certain products (such as base acre payment transactions) as covered credit transactions.

The Bureau does not believe it would appropriate to exclude agricultural credit from the rule, as requested by some commenters. With regard to the concern that agricultural lending should be exempted because of the impact on small local community financial institutions, such as credit unions, the Bureau notes that it is increasing its institutional coverage threshold, as discussed in the section-by-section analysis of § 1002.105 below, to limit any risk of impact on smaller financial institutions or of market disruption in the small business lending sector. By declining to draw a potentially blurry line between business-purpose credit and agricultural-purpose credit, the Bureau also believes that its finalized inclusive approach will better enable it to ensure that financial institutions that are offering business credit are complying with the final rule.

With respect to comments asserting that agricultural credit is unique and not comparable to other types of small business lending, the Bureau acknowledges that every small business industry has its own unique characteristics. In order to fulfill section 1071's business and community development purpose and to address the particularities of certain lending models, the Bureau is providing clarification regarding how reporting rules apply to certain covered credit transactions and is also not covering certain transactions. For the reasons described herein, however, the Bureau is not categorically exempting agricultural credit from the rule.

Moreover, the Bureau believes that data on agricultural credit will be useful for fair lending purposes. As discussed above, there is some evidence that minority-owned farms may obtain, or may be offered, higher interest rates and less favorable terms on agricultural credit. Data collected and reported under this final rule will allow the Bureau, other government agencies, and other data users to have insight into the existing market, observe the market for potentially troubling trends, and conduct fair lending analyses.

The Bureau has considered the comments arguing that covering agricultural credit under the rule would have an outsized impact on farmers by increasing this cost of credit and reducing its availability. The Bureau has also considered the claim that small lenders will reduce their lending below the exemption threshold, which in turn may limit the access to agricultural credit because large banks often do not engage in significant agricultural lending. The Bureau does not believe that there is a significant risk that lenders will reduce their agricultural lending as a result of this rule such that there will be a marked impact on the availability of agricultural credit. Moreover, as noted in the section-by-section analysis of § 1002.105 below, the Bureau is increasing its institutional coverage threshold for the final rule to reduce the impact on financial institutions with the lowest volume of small business lending, including agricultural lenders.

Based on its review of the GAO Report,[409] the decline of minority representation in farming over the last 100 years,[410] the disposition of numerous lawsuits alleging discrimination against minority

[407] *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a).

[408] ECOA section 704B(h)(2) (defining a small business as having the same meaning as the term ''small business concern'' in section 3 of the Small Business Act (15 U.S.C. 632)). Section 704B(h)(2) defines small business by reference to the Small Business Act definition of a small business concern, which includes independently owned and operated ''enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries.'' 15 U.S.C. 632(a)(1).

[409] *See, e.g.,* GAO Report at 16.

[410] In 1910, approximately 893,370 Black farmers operated approximately 41.1 million acres of farmland, representing approximately 14 percent of farmers. U.S. Census Bureau, *1910 Census: Volume 5 (Agriculture), Statistics of Farms, Classified by Race, Nativity, and Sex of Farmers,* at 298 (1910), *https://www2.census.gov/library/publications/decennial/1920/volume-5/06229676v5ch04.pdf.* In 2017, of the country's 3.4 million total producers, only 45,508 of them (1.3 percent) are Black and they farm on only 4.1 million acres (0.5 percent of total farmland); by comparison, 95 percent of U.S. producers are white and own 94 percent of farmland. U.S. Dep't of Agric., *2017 Census of Agriculture,* at 62, 72 (Apr. 2019), *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

farmers,[411] and comments discussing how the inclusion of agricultural credit in the rule is needed to address historical and/or continuing discrimination, the Bureau finds that covering agricultural credit is crucial to serving section 1071's purpose of facilitating enforcement of fair lending laws.

The Bureau furthers finds that covering agricultural credit is vital to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of small businesses, including small farms. The Bureau agrees with commenters that stressed the need for transparency due to lack of sufficient data on agricultural lending markets. The Bureau believes that the transparency afforded by data collected and reported under this final rule will empower rural communities to better address the challenges they face, particularly with regard to equitable credit access. Representatives of these communities appear to agree—in a recent letter addressed to the House and Senate Agriculture and Financial Services and Banking committees characterizing the proposed rule as ''pro-farmer,'' multiple community groups noted that ''[s]mall farmers have consistently demanded more transparent and fair markets, and our members know that having an accurate and up-to-date picture of agricultural lending will help farmers and consumers, not hurt them.'' [412] Relatedly, in a recent report, the Bureau found that rural communities face unique challenges in accessing and using consumer financial products and that further research is required to better understand the needs of rural households and how the Bureau can best ensure that rural residents have equitable access to financial markets.[413]

The Bureau notes that many agricultural lenders have already been collecting and reporting some form of data by HMDA, the CRA, and/or the Farm Credit Administration and so should be able to adapt to the data collection requirements mandated by Congress. Additionally, to the extent that commenters were concerned about the impact on the smallest agricultural lenders, many of those concerns are addressed by the Bureau's decision, as discussed in the section-by-section analysis of § 1002.105(b) below, to require data collection and reporting only by financial institutions that meet a 100-loan threshold. In short, as further discussed in part IX below, the Bureau does not anticipate any material adverse effect on credit access in the long or short term to rural small businesses.

104(b) Excluded Transactions

Proposed § 1002.104(b) would have provided that the requirements of subpart B do not apply to trade credit, public utilities credit, securities credit, and incidental credit. Proposed comments 104(b)–1 and –2 would have made clear that the term covered credit transaction also does not cover factoring and leases. Proposed comments 104(b)–3 and –4 would have clarified that the term covered credit transaction does not include consumer-designated credit or credit secured by certain investment properties because such transactions are not business credit. In the NPRM, the Bureau also discussed its proposed treatment of extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities and certain purchases of covered credit transactions.

The Bureau received comments on its overall approach to § 1002.104(b) from several banks, trade associations, individuals, and members of Congress. Two industry commenters supported the exclusions as proposed, with another commenter expressing support but also suggesting expansion. Two commenters suggested listing all exclusions in the regulatory text with any clarifications of those exclusions set out in the commentary. A bank trade association urged the Bureau to extend section 1071 requirements to all nontraditional lenders and nontraditional products to avoid leaving open the opportunity for the abuse or dissatisfaction of small business borrowers to go undetected or disadvantaging highly regulated institutions such as community banks. A joint letter from several members of Congress asked the Bureau reconsider its proposed exclusions on the grounds that such exclusions would lead to a gap in understanding of the small business lending marketplace and whether entities are in compliance with fair lending laws. Comments received regarding specific exclusions, including additional exclusions sought by commenters, are discussed in greater detail below.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b) to provide that the requirements of subpart B do not apply to trade credit, HMDA-reportable transactions, insurance premium financing, public utilities credit, securities credit, and incidental credit. In response to comments received, the Bureau is excluding HMDA-reportable transactions from coverage under the final rule. As a result, the Bureau believes that proposed comment 104(b)–4 that would have made clear that the term ''covered credit transaction'' does not cover credit secured by certain investment properties is not necessary. Final comments 104(b)–1 and –2 make clear that the term covered credit transaction also does not cover factoring and leases. Final comment 104(b)–3 clarifies that the term covered credit transaction does not include consumer-designated credit because such transactions are not business credit. New comment 104(b)–4 provides clarification regarding certain purchases of covered credit transactions, including pooled loans, and partial interests. All of these provisions are discussed in detail below.

The Bureau has considered comments suggesting that all exclusions be listed in the regulatory text. The Bureau appreciates the need for clarity in articulating which products must be reported under this final rule but believes that it can provide sufficient clarity through its regulatory text and commentary. The Bureau's approach differentiates between products that meet the definition of both ''credit'' and ''business credit'' under Regulation B, and between those products that the Bureau is excluding (for reasons discussed below) pursuant to its exception authority under ECOA section 704B(g)(2). Products excepted under section 704B(g)(2) are enumerated in the regulatory text. Such specific exclusion is not necessary for products the Bureau considers not to be ''business credit'' in the first place; however, the Bureau believes that identifying and describing some such products in the commentary—which it has done—will provide clarity and facilitate compliance.

[411] *See, e.g.,* Order, *In re Black Farmers Discrimination Litig.,* No. 08–mc–0511 (D.D.C. filed Aug. 8, 2008), *https://blackfarmercase.com/Documents/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf*; *Pigford* v. *Glickman,* 206 F.3d 1212 (D.C. Cir. 2000). *See also Garcia* v. *Vilsack,* 563 F.3d 519 (D.C. Cir. 2009); *Love* v. *Connor,* 525 F. Supp. 2d 155 (D.D.C. 2007); *Keepseagle* v. *Veneman,* No. 99–CIV–03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001).

[412] HEAL (Health, Environment, Agriculture, Labor) Food All., Rural Coal., Nat'l Young Farmers Coal., Ctr. for Responsible Lending *et al., RE: Support for Proposed Section 1071 rule and Opposition to H.R.7768—Farm Credit Administration Independent Authority Act* (R. Davis) (Sept. 14, 2022), *https://www.ushcc.com/advocacy-letters.html.*

[413] CFPB, *Data Spotlight: Challenges in Rural Banking Access* (Apr. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_data-spotlight_challenges-in-rural-banking_2022-04.pdf.*

104(b)(1) Trade Credit

Background

Under existing Regulation B, trade credit refers to a ''financing arrangement that involves a buyer and a seller—such as a supplier who finances the sale of equipment, supplies, or inventory; it does not apply to an extension of credit by a bank or other financial institution for the financing of such items.'' [414] Thus, trade credit typically involves a transaction in which a seller allows a business to purchase its own goods or services without requiring immediate payment in full, and the seller is not otherwise involved in financial services and does not otherwise provide credit that could be used for purposes other than the purchase of its own goods or services.[415] Businesses offering trade credit generally do so as a means to facilitate the sale of their own goods and not as a stand-alone financing product or a more general credit product offered alongside the sale of their own goods or services.

Although ECOA and Regulation B generally may apply to trade credit, most of the specific notification requirements of existing Regulation B do not apply to trade credit transactions.[416] The Bureau's White Paper estimated that trade credit represents approximately 21 percent of the aggregate dollar volume of various financial products used by small businesses.[417] The Bureau understands that there are tens of thousands of merchants and wholesalers that extend credit to small businesses solely in connection with the sale of their goods and services.

Proposed Rule

The Bureau proposed to not cover trade credit in the section 1071 final rule. Proposed § 1002.104(b)(1) would have defined trade credit as a financing arrangement wherein a business acquires goods or services from another business without making immediate payment to the business providing the goods or services. Proposed comment 104(b)(1)–1 would have provided that an example of trade credit is one that involves a supplier that finances the sale of equipment, supplies, or inventory. Proposed comment 104(b)(1)–1 would have provided that an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit. Proposed comment 104(b)(1)–2 would have clarified that the definition of trade credit under existing comment 9(a)(3)–2 applies to relevant provisions under existing Regulation B, and that proposed § 1002.104(b)(1) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing comment 9(a)(3)–2. The Bureau sought comment on its proposal to exclude trade credit from the rule and on its proposed definition of trade credit.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of commenters, including banks, trade associations, and a business advocacy group. Several industry commenters expressed general support for the proposal to exclude trade credit. However, some of these commenters advocated expanding the exclusion. For instance, one commenter suggested that all asset-based financing should be excluded as trade credit, arguing that if the rule should not apply to sellers to facilitate their sales of goods, the rule also should not apply to their ''behind the scenes'' non-recourse factors and asset-based lenders who facilitate those sales. Two commenters urged broadening the proposed exclusion to include captive finance companies when they are financing equipment manufactured by their parent companies because these companies exist solely to facilitate the acquisition of the original equipment manufacturers' products. A few comments more broadly asked that the Bureau not limit the exclusion to ''in-house'' trade credit, suggesting that trade credit offered by financial institutions allows more suppliers to offer trade credit programs, and as a result provides more opportunities for credit access to small businesses. These commenters additionally argued that such expansion is needed to prevent uneven regulatory treatment, to promote competition in the market for trade credit, to avoid pushing more business transactions into a less regulated environment, and to obtain more fulsome data collection and reporting on trade credit. A trade association asked the Bureau to clarify that the trade credit exclusion encompasses auctions where a buyer may pay for acquired property at a later date.

A few other industry commenters urged the Bureau to cover trade credit in the final rule. Two of these commenters argued that providers of trade credit, especially in the agricultural sector, are competitors to traditional lenders, and should be covered. One commenter asked the Bureau to provide several specific transaction examples so that covered financial institutions can readily identify those transactions that they must report on, and those that are exempted. Another commenter asked the Bureau to clarify whether floor plan financing, which generally allows merchants to stock inventory available for sale without advance payment to the manufacturer or distributor, would fall within the proposed trade credit exclusion. This commenter noted that floor plan finance companies support merchants by allowing them to maintain some level of inventory with frequent adjustments to the financing and payment terms, and they may be affiliated with the manufacturer or distributor.

Several commenters urged the Bureau to expand its trade credit exclusion to private label or cobranded credit. These commenters primarily argued that such transactions need to be quickly completed, often at a point-of-sale, and that asking for protected demographic information and other required data may reduce the supply and demand for such credit. A few commenters suggested that if the Bureau were to include private label and co-branded transactions in the final rule, it should only require the collection and reporting of such transactions over $50,000 to mitigate the impact of their inclusion.

Final Rule

For the reasons set forth herein, the Bureau is finalizing largely as proposed its exclusion for trade credit in this final rule. Final § 1002.104(b)(1) defines trade credit as a financing arrangement wherein a business acquires goods or services from another business without making immediate payment in full to the business providing the goods or services. The Bureau has added the words ''in full'' to the proposed definition to account for the fact that trade credit may include an immediate partial payment or down payment to the businesses providing the goods or services. Final comment 104(b)(1)–1 provides that an example of trade credit is one that involves a supplier that finances the sale of equipment, supplies, or inventory. Final comment 104(b)(1)–1 provides that an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit, and it also provides that credit extended by a business providing goods or services to another business is not trade credit for the purposes of subpart B where the supplying business intends

[414] Comment 9(a)(3)–2.

[415] *See* comment 9(a)(3)–2.

[416] *See* § 1002.9(a)(3)(ii).

[417] White Paper at 21 fig. 2.

to sell or transfer its rights as a creditor to a third party, such as a financial institution. Final comment 104(b)(1)–2 clarifies that the definition of trade credit under existing comment 9(a)(3)–2 applies to relevant provisions under existing Regulation B, and that § 1002.104(b)(1) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing comment 9(a)(3)–2.

The Bureau is adopting a definition of ''covered credit transaction'' that excludes trade credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under ECOA 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. While trade credit constitutes ''credit'' within the meaning of § 1002.102(i) and may constitute ''business credit'' within the meaning of § 1002.102(d), depending on its purpose, and therefore generally covered by ECOA, the Bureau believes that trade credit is different from products like loans, lines of credit, credit cards, and merchant cash advances and that there are several reasons to exclude it from coverage. The Bureau does not believe it would be appropriate to include trade credit in the scope of this final rule, despite some commenters' assertions that providers of trade credit in the agricultural sector would have a competitive advantage over other lenders.

Trade credit is not a general-use business lending product—that is, trade creditors generally extend credit as a means to facilitate the sale of their own goods or services, rather than offering credit as a stand-alone financial product or as more general credit product offered alongside the sale of their own goods or services. The Bureau believes that while trade creditors might meet the definition of a financial institution under § 1002.105(a), they are not primarily financial services providers, nor do they have the infrastructure needed to manage compliance with regulatory requirements associated with making extensions of credit. The Bureau understands that trade credit can be offered by entities that are themselves very small businesses; these entities, in particular, may incur large costs relative to their size to collect and report small business lending data in an accurate and consistent manner.[418] Taken together, requiring trade credit to be reported under subpart B could lead to significant data quality issues. The Bureau also wants to avoid the risk that the fixed costs of coming into compliance with the rule could lead these businesses to limit offering trade credit to their small business customers, which may run contrary to the business and community development purpose of section 1071. These concerns are distinct from coverage generally under ECOA and Regulation B, which as noted above may still apply to trade credit.

The Bureau does not believe that the trade credit exclusion should be expanded to include all asset-based financing, captive finance companies, or trade credit offered by financial institutions that are not suppliers of goods or services, as requested by some commenters. The Bureau believes that, unlike trade creditors themselves, such providers offer stand-alone credit products in the same way as other financial institutions and are not retailers or merchants with limited regulatory compliance experience. As such, the Bureau does not have the same concerns about data quality or reduced small business lending by affiliates and facilitators that it does about trade creditors themselves. Thus, the Bureau is finalizing its definition of trade credit in § 1002.104(b)(1) to focus on the business providing the goods or services being financed. The trade credit exclusion does not extend to affiliates and facilitators of trade creditors that provide financing, even if only for the trade creditor's products and not for competing or unrelated products. Thus, provided that they otherwise meet the definition of a covered financial institution in § 1002.105(b), such affiliates and facilitators must collect and report data under the rule.

The Bureau also is not making further revisions to the regulatory text or commentary. With respect to the suggestion that the Bureau clarify that the trade credit exclusion encompasses auctions, the Bureau notes that because auction houses generally do not supply equipment, supplies, or inventory but rather facilitate sales for others, they do not offer trade credit under final § 1002.104(b)(1). However, other exclusions, such as the exclusion for incidental credit discussed below, may apply to such transactions. The Bureau is not adding further transaction examples, as only one comment requesting such additions and it otherwise appears that commenters understood that the proposed exclusion was intended to narrowly cover credit directly extended by the supplier of goods and services. Regarding floor plan financing, the Bureau notes that under final § 1002.104(b)(1), the trade credit exclusion applies where the manufacturer or distributor is financing its own inventory, but not where a financial institution is providing the financing and receiving payment.

The Bureau is also not expanding the trade credit exclusion to cover private label or cobranded credit transactions, which are credit transactions (typically, credit cards, but also revolving lines of credit and installment loans) that are originated at or facilitated by financial institutions through retailers either in-store or through a website. Moreover, as explained in the section-by-section analysis of § 1002.107(a)(5), the Bureau believes it is important to capture these products as a separate credit type. As that section explains, a private-label credit card account is a credit card account that can only be used to acquire goods or services provided by one business (for example, a specific merchant, retailer, independent dealer, or manufacturer) or a small group of related businesses. A co-branded or other card that can also be used for purchases at unrelated businesses is not a private-label credit card.

The Bureau believes that covering private label or cobranded credit transactions supports section 1071's statutory purposes. For instance, the Bureau believes that having robust data on this important source of financing will help to better understand small business needs. In researching the consumer credit card market, for example, the Bureau learned that while private label card account holding has declined relative to general purpose cards,[419] late fees comprised the

[418] *See* Leora Klapper *et al., Trade Credit Contracts,* 25 Review of Fin. Studies 838–67 (2012), *https://academic.oup.com/rfs/article/25/3/838/1616515*, and Justin Murfin & Ken Njoroge, *The Implicit Costs of Trade Credit Borrowing by Large Firms,* 28 Review of Fin. Studies 112–45 (2015), *https://academic.oup.com/rfs/article/28/1/112/1681329*.

[419] The Bureau estimates that around 90 million consumers hold at least one general purpose and at least one private label card. Some 79 million hold only general-purpose cards. Just under 9 million hold only private label cards. General purpose cards remain prevalent, while private label cardholding has become relatively less common. By year-end 2020, there were 485 million open general purpose card accounts and 214 million open private label accounts. General purpose cardholding is just as common today as it was prior to the Great Recession, though that share is down from 63 percent on the eve of the pandemic. In contrast, 36

Continued

overwhelming majority—91 percent—of all consumer fees and 25 percent of total interest and fees for private label cards (compared to 45 percent and 7 percent, respectively, for general purpose credit cards).[420] Additionally, since private label and cobranded credit accounts are typically offered and serviced by financial institutions, with applications typically submitted directly to the financial institution via a website, the Bureau does not have the same concerns related to data quality or regulatory compliance as it does with trade credit offered by a supplier of goods and services who is not in the business of providing financial services. The Bureau also is not placing a $50,000 minimum threshold on such transactions, as suggested by a few commenters, because doing so would exclude significant portions of small business lending. The Bureau does not believe that such an approach would further the purposes of section 1071.

104(b)(2) HMDA-Reportable Transactions

Proposed Rule

The potential for overlap exists between section 1071 and HMDA because HMDA reporting requirements apply to mortgages regardless of whether they are consumer-purpose or business-purpose, so long as they are secured by residential real property. Section 1071 applies to all small business credit, regardless of what the credit is to be used for. For example, a mortgage intended to finance the purchase of an investment property would be covered by HMDA, assuming relevant institutional thresholds and other coverage criteria were otherwise met. If the mortgage applicant is a natural person, their ethnicity, race, and sex would be captured and reported under HMDA. However, if the mortgage applicant were a non-natural person (*e.g.,* a limited liability company or a corporation), then the lender would not collect demographic data under HMDA. That is, the lender would still need to report the application under HMDA, but they would report ethnicity, race, and sex as ''not applicable.'' But under the Bureau's proposed rule, the lender would have captured the applicant's principal owners' ethnicity, race, and sex.

In its NPRM, the Bureau stated that by proposing to adopt Regulation C's definition of dwelling and its commentary regarding investment properties, the Bureau sought to ensure consistency and minimize compliance burdens for financial institutions that must also report credit transactions covered by HMDA (that is, HMDA-reportable transactions). Using the 2019 HMDA data, the Bureau had found that close to 2,000 lenders and around 530,000 applications indicated a ''business or commercial purpose'' and around 500,000 applications were used for an ''investment'' (as defined by the occupancy code) purpose. Of those applications, around 50,000 were for 5+ unit properties. The overall number of applications the Bureau expected to be reported annually under the proposed rule would have been around 26 million. Thus, the Bureau had anticipated a relatively small but not insignificant overlap regarding real estate investment loans between HMDA and section 1071.

Also in its proposal, the Bureau stated that it had considered excluding all transactions that were also reportable under HMDA but believed such an exclusion would have added complexity to data analysis. The Bureau understood that requiring lenders to find and delete from databases that supply their small business lending data submission only those transactions that also appear in HMDA may require a separate scrub of the data and create additional compliance burden, as well as compliance risk, if HMDA-reportable transactions are not deleted from a small business lending data submission. For example, if a small business wants to purchase a 5+ dwelling unit property (that is, HMDA reportable), the financial institution would have to make sure it is not collecting protected demographic information on principal owners, even though that information must be collected for every other type of loan that same business might apply for. The Bureau also believed that it may not be possible to identify loans in the HMDA data that, but for this exclusion, would be reported under the Bureau's rule implementing section 1071 because the financial institution would need to know which HMDA applications are for small businesses versus large businesses. Moreover, excluding HMDA-reportable applications could mean that a financial institution that is below the HMDA reporting threshold would not report these loans at all.

Further, in addition to not being able to distinguish which applications are from small and not large businesses, the Bureau noted in its proposal its concerns that excluding all transactions that were also reportable under HMDA may be at odds with the statutory purposes of section 1071. The Bureau explained that the following proposed data points would not be collected for applications only reported under HMDA: (1) the principal owner's ethnicity, race, and sex where the applicant is an entity not an individual; (2) minority-owned and women-owned business status; (3) gross annual revenue; and (4) other data points such as pricing, NAICS code, and number of workers.

For applications that, under the proposal, would have been reported under both HMDA and section 1071 (generally, business credit secured by dwellings, with the exception of credit secured by 1–4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy), the Bureau sought comment on whether it should require such applications to be flagged as such when reported under subpart B. The Bureau noted its belief that for data integrity and analysis purposes, it may be helpful to know if a loan is in both datasets and a dual reporting flag may help ensure any data analysis is not double-counting certain applications.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of commenters, including lenders, trade associations, community groups, and a business advocacy group. Only one commenter, a community group, expressly supported dual reporting. The Bureau received a general suggestion to connect a loan to a HMDA record and then capture, under HMDA, demographic data on corporate entities, and expand its coverage to include more lenders, such as government entities and CDFIs. Two commenters suggested the Bureau provide a section 1071/HMDA sample form to aid dual reporting compliance. Some industry commenters generally stressed the need for consistency among reporting regimes and asked the Bureau to reconcile any differences.

Numerous comments, echoing those made by a trade association, urged the CFPB to avoid duplicative and inconsistent reporting of HMDA and CRA data in order to reduce compliance burden and the potential for inaccurate data reporting. An agricultural lender suggested the Bureau might be able to obtain 1071 data using the existing

percent of adults held at least one private label card in 2020, compared to 52 percent in 2005. Consumers in all credit score tiers have seen declines in private label card account holding. Most general purpose and private label cards are held by consumers with superprime scores. CFPB, *The Consumer Credit Card Market,* at 25–26 (Sept. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.*

[420] *See* CFPB, *Credit card late fees,* at 13 (Mar. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.*

definitions and collection process currently in place for covered institutions under HMDA. A few credit union trade associations maintained that reporting of HMDA-reportable transactions should be voluntary. A bank recommended the Bureau remove and avoid data collection requirements that are duplicative and/or inconsistent, providing the example of misaligned action taken categories or alternatively, eliminate all business-purpose loans from the HMDA reporting requirement. A credit union argued that the benefit of dual reporting does not justify the increased burdens.

A few industry commenters stated that if dual reporting is required under the final rule, a dual reporting flag would be useful. Another commenter opposed adoption of a dual reporting flag, arguing that flagging entries will be a manual process that will increase the time it takes to file both reports and increase the possibility of making an error.

Almost all the comments on this aspect of the proposal argued against the proposal to report HMDA-reportable transactions under this rule. Some opponents to dual reporting urged the Bureau to exclude all HMDA-reportable transactions from this rule, while others recommended excluding transactions covered by this rule (such as business purpose loans) from Regulation C. A few other commenters did not express a preference and asked that the Bureau exempt HMDA-reportable applications from section 1071 reporting, or vice versa. Many commenters asserted burden and stated that reported data would be duplicative and/or inconsistent. Several commenters pointed to differences in census tract reporting requirements as a source of potential confusion and data errors. And as discussed in the section-by-section analysis of § 1002.107(a)(19), another urged the Bureau to consider difficulties caused by the differences in collection and reporting of the ethnicity, race, and sex fields and the variations in data specifications for such information.

One bank commenter suggested that avoiding dual reporting may also avoid materially misrepresenting a lender's total loan application activity. A few industry commenters argued that reporting under HMDA alone meets 1071 purposes, with two of these commenters pointing to the Bureau's website, which states that HMDA ''data help show whether lenders are serving the housing needs of their communities; they give public officials information that helps them make decisions and policies; and they shed light on lending patterns that could be discriminatory.'' [421] Two commenters that argued against dual reporting explained that mortgage lending is fundamentally different from small business lending. Responding to concerns about data gaps, two other commenters suggested that if the Bureau tailored the exception to applications that are reported under HMDA, not applications that could be reported under HMDA, institutions not subject to the HMDA reporting regime would still have to report HMDA-eligible applications under section 1071 because they would not actually report such applications under HMDA. A bank recommended separating HMDA and section 1071 reporting such that only after a transaction was assessed for HMDA-reportability would a financial institution determine whether the transaction needed to be reported under section 1071.

Final Rule

For the reasons set forth herein, the Bureau is adding new § 1002.104(b)(2) to exclude a covered loan as defined by Regulation C, 12 CFR 1003.2(e), pursuant to its authority under ECOA section 704B(g)(2) to adopt exceptions to any requirement of section 1071, as the Bureau deems necessary or appropriate to carry out section 1071's purposes. Under this approach, for all applications with potential HMDA and section 1071 overlap, the Bureau would not require reporting under section 1071 (transactions would only be reportable under HMDA, and the recordkeeping and demographic data collection obligations of HMDA will apply). In 2021, there were 61,789 ''business or commercial purpose'' applications (excluding purchased loans), reported under HMDA with the ''investment'' occupancy code, for 5+ unit properties. Of those, 54,436 were from ''non-natural person'' applicants so demographic data under HMDA was not collected (thus, such data would have been requested for only for 7,353 of the 61,789 applications in 2021). The Bureau recognizes that there would continue to be no demographic data information collected and reported for the ~55,000 HMDA applications with non-natural person owners. The Bureau is finalizing this exclusion of HMDA-reportable transactions in order to alleviate concerns from a broad range of industry commenters about the difficulties associated with dual reporting, particularly in light of potential inconsistences related to demographic data collection and recordkeeping. In addition, this approach resembles the effort by the CRA agencies to eliminate dual reporting under section 1071 and the eventual CRA rule.

While the Bureau agrees that dual reporting of such transactions could be useful, the Bureau is mindful of commenters' concerns regarding burden and that reported data would be somewhat duplicative and/or potentially inconsistent for data points such as census tract, and principal owners' ethnicity, race, and sex. The Bureau believes that excluding all HMDA-reportable transactions would further the purposes of section 1071 because such an exclusion would limit this potential inconsistency that could result in poor data quality. Further, the Bureau is excluding all HMDA-reportable transactions from this final rule because excluding section 1071 transactions from Regulation C of HMDA would require a separate rulemaking and would disrupt ongoing and planning HMDA data collection efforts that have been in place for years.

The Bureau also agrees that reporting under HMDA alone would meet section 1071's purposes. Regulation C, which implements HMDA, provides that its public loan data can be used: (i) to help determine whether financial institutions are serving the housing needs of their communities; (ii) to assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and (iii) to assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.[422] These purposes are entirely consistent with section 1071's purposes to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[423] As the Bureau has previously stated, it believes that ''HMDA's scope is broad enough to cover all dwelling-secured commercial-purpose transactions and that collecting information about all such transactions would serve HMDA's purposes.'' [424] The Bureau has also noted that collecting data about dwelling-secured commercial-purpose transactions serves HMDA's purposes by showing not only the availability and condition of multifamily housing units, but also the full extent of leverage on single-family homes, particularly in communities that

[421] CFPB, *Mortgage Data (HMDA), About HMDA, https://www.consumerfinance.gov/data-research/hmda/* (last visited Mar. 20, 2023).

[422] Regulation C § 1003.1(b)(1).

[423] ECOA section 704(a).

[424] 80 FR 66127, 66171 (Oct. 28, 2015).

may rely heavily on dwelling-secured loans to finance small-business expenditures.[425]

The Bureau recognizes its finalized approach will result in some data gaps. Most notably, some section 1071 information will not be collected for applications reported under HMDA, including the principal owner's ethnicity, race, and sex where the applicant is not an individual but an entity (*i.e.,* not a natural person); minority-owned, women-owned, and LGBTQI+-owned business statuses; gross annual revenue; pricing; NAICS code; and number of workers. Moreover, at this time, the Bureau is not tailoring its exception to applications that are actually reported under HMDA, as opposed to those that could be reported under HMDA. New § 1002.104(b)(2) excludes all transactions meeting the definition of a Regulation C ''covered loan,'' which means that institutions not subject to the HMDA reporting regime (because, for example, of institutional coverage thresholds) do not have to report HMDA-eligible applications under section 1071 even though they would not actually report such applications under HMDA. Additionally, the Bureau does not believe it would be feasible to connect, as suggested, an application reported under this final rule to a HMDA record and then capture, under HMDA, demographic data on corporate entities, and expand its coverage to include more lenders, such as government entities and CDFIs.

After considering the comments, the Bureau has concluded that trying to close all potential data gaps would defeat the purpose of trying to reduce complexity and alleviate concerns from commenters about having to implement and maintain two separate reporting systems. Given the fact that the Bureau expects around 25 million applications to be reported annually under the final rule, it believes that its exclusion of HMDA-reportable transactions will result in a relatively small loss of data and that these data might have been inconsistent with other 1071 data in ways that could impede analysis, frustrating the purposes of section 1071. The Bureau also notes that even in its proposal, and as discussed below, it did not seek to requiring reporting of all HMDA-reportable transactions under section 1071—only those ''business or commercial purpose'' applications (excluding purchased loans), reported under HMDA with the ''investment'' occupancy code, for 5+ unit properties would have also been reported under 1071. As a result, the Bureau notes that for 7,353 of the 61,789 such applications in 2021, there would continue to be no demographic data information collected and reported for only ~55,000 HMDA applications with non-natural person owners. The Bureau believes that this is an acceptable number given how small it is compared to the total number of reported transactions and given the strong concerns expressed about the difficulties with compliant dual reporting that could result in poor data quality and thereby undermine the section 1071 statutory purposes. As for the number of ''covered loan'' applications that are ultimately not reported under HMDA, the Bureau believes that these applications can be excluded for the same reasons explained below in the section-by-section analysis of § 1002.105(b); financial institutions with the lowest volume of small business lending might limit small business lending activity because of the fixed costs of coming into compliance with the reporting requirements, creating risk of market disruption which would run contrary to the business and community development purpose of section 1071. Additionally, as the Bureau explained in HMDA, the Bureau ''sought to exclude financial institutions whose data are of limited value in the HMDA dataset, thus ensuring that the institutional coverage criteria do not impair HMDA's ability to achieve its purposes, while also minimizing the burden for financial institutions.''[426] The Bureau similarly believes that these data would have limited value in the 1071 dataset—the Bureau will be able to fulfill section 1071's purposes without it, while reducing burden and complexity for financial institutions that are not HMDA reporters.

Finally, the Bureau notes that section 1071 will capture business credit transactions that are secured by real estate but are not presently captured under HMDA. For example, section 1071 will capture transactions secured by non-dwellings as well as business loans secured by an applicant's primary residence or residential investment property as collateral for inventory financing or working capital (such loans would not be captured under HMDA because they do not involve a home purchase, home improvement, or refinancing). The small business lending rule will also capture transactions that are secured by dwellings located on real property used primarily for agricultural purposes.

[425] *Id.*

[426] *Id.* at 66278.

Credit Secured by Certain Investment Properties

Based on feedback received during the SBREFA process as well as its general knowledge regarding both consumer and commercial real estate lending, the Bureau understands that many financial institutions use their consumer mortgage lending channels to process credit applications secured by 1–4 individual dwelling units and used for investment purposes, while applications for credit secured by 5+ unit multifamily properties or rental portfolio loans secured by more than four 1–4 unit residential properties are generally processed through commercial mortgage lending channels. The Bureau also understands that loans made through consumer mortgage lending channels are often made pursuant to the guidelines of Fannie Mae, Freddie Mac, the Federal Housing Administration, and the Department of Veterans Affairs, and are likely already reported under HMDA.

In line with the SBREFA Panel's recommendation, the Bureau proposed that the rule not cover credit secured by certain investment properties, because such credit may not always be primarily for business or commercial purposes. Specifically, proposed comment 104(b)–4 would have explained that a covered credit transaction does not include an extension of credit that is secured by 1–4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy. The Bureau did not propose to exclude credit secured by owner-occupied dwellings; for example, those secured by a dwelling occupied by a business's sole proprietor/principal owner. The Bureau proposed to exclude real estate investment loans only in certain limited circumstances (such as when credit is secured by non-owner occupied 1–4 dwelling units and not 5+ dwelling units). The Bureau proposed to define ''dwelling'' to have the same meaning as Regulation C § 1003.2(f). Similarly, proposed comment 104(b)–4, which would address what does and does not constitute an investment property, was modeled on Regulation C's comment 4(a)(6)–4.

In its proposal, the Bureau noted its belief that its exclusion of credit secured by certain investment properties will better capture lending to true small businesses (as opposed to consumers seeking to diversify their investments) and will also better align with financial institution lending practices. The Bureau stated that it understands that it may not always be easy for financial institutions to distinguish between

business-purpose real estate investment loans and consumer-purpose real estate investment loans; however, covering all such loans would likely include some percentage of consumer-purpose loans, which could be contrary to section 1071's business and community development purpose.

The Bureau sought comment on its proposed approach for credit secured by certain investment properties, including whether it is appropriate to consider credit not to be business credit when it is secured by 1–4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy; and, if not, whether a different number of dwelling units in the property securing the credit would be an appropriate way to make a distinction between business and consumer-purpose credit. The Bureau also sought comment on whether to permit financial institutions to voluntarily report real estate investment loan transactions that are secured by non-owner occupied 1–4 dwelling units.

The Bureau received comments on this aspect of the proposal from lenders, trade associations, and a community group. Several commenters supported the exclusion of credit secured by certain investment properties. A community group stated that the exclusion was appropriate because the purpose of such credit is investment and not operating a business of renting out units.

A few comments urged expansion of the proposed exclusion to other real estate secured lending. A joint letter from several trade associations representing the commercial real estate industry advocated for expanding the proposed exclusion to impose a clear boundary between small business lending and all investment property lending to ensure that the information gathered under section 1071 reflects true small business lending. In line with this suggestion, this commenter also recommended rule text revisions. Another trade association suggested expanding the exclusion to all non-owner occupied commercial and multifamily real estate lending, arguing that the credit is underwritten on the cash flow of the property and the value of the property itself, rather than the operating revenue of a business, like other investment properties. Another commenter suggested the Bureau specifically exempt commercial real estate loans secured by non-owner-occupied investment real estate to borrowing entities with NAICS codes 5311XX, the industry code for lessors of real estate.

Some comments reflected requests for clarifications and confusion regarding the proposal. A bank suggested removing occupancy status from covered credit transaction considerations because occupancy does not fairly or materially delineate small business lending from consumer lending and creates complexity in how financial institutions would need to design processes, systems, and training. Community groups suggested the Bureau require financial institutions to ask whether the credit will be used primarily for business purposes, such as to secure rental income. A bank suggested the Bureau focus on borrower type (natural person versus entity) instead of property type. A trade association urged the Bureau to remove the proposed exclusion for credit secured by certain investment properties and replace it with an exclusion of all credit subject to Regulation Z. Another bank commenter sought clarification of the proposed exclusion, noting situations where a borrower or a related party occupies a dwelling unit but still considers it to be an investment property and not a business. A trade association asked the Bureau how to determine owner occupancy for non-dwelling real estate, such as where a business owns an office building with multiple rental office spaces, and rents out all of these spaces except for one space occupied by the business itself. One bank appeared to believe that credit secured by 1–4 dwelling unit investment properties would be reportable for both HMDA and section 1071 with varying reporting requirements.

For the reasons stated herein and in the section above regarding HMDA-reportable transactions, the Bureau is adding new § 1002.104(b)(2) to exclude a covered loan as defined by Regulation C, 12 CFR 1003.2(e). This new exclusion renders moot the Bureau's consideration of proposed comment 104(b)–4 by encompassing virtually all credit that is secured by 1–4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy. The Bureau's decision also renders moot comments regarding requests for clarifications and confusion regarding the proposal.

A ''covered loan'' as defined by Regulation C, 12 CFR 1003.2(e), means a closed-end mortgage loan or an open-end line of credit that is not an excluded transaction under § 1003.3(c). A transaction is not a ''covered loan'' if it is excluded by purpose. For example, Regulation C excludes agricultural-purpose transactions and transactions that are secured by a dwelling, as defined by § 1003.2(f), that is located on real property that is used primarily for agricultural purposes.[427] The regulation also excludes transactions otherwise made primarily for a business or commercial purpose [428] unless the transaction is also: a home improvement loan; [429] a home purchase loan; [430] or a refinancing (including cash-out refinancing).[431] Transactions are only covered under HMDA as covered loans if they are secured by a lien on dwelling. In addition to principal residences, a dwelling includes, but is not limited to, manufactured homes, multifamily apartment buildings, and properties for long-term housing and related services (such as assisted living for senior citizens or supportive housing for people with disabilities). Thus, a transaction may need to be reported under section 1071 if it is secured by a lien on a non-dwelling; for example, a recreational vehicle, houseboat, a hotel, dormitory, or properties for long-term housing and medical care if the primary use is not residential. For a full list of exclusions, please refer to Regulation C, section 1003.3. The Bureau notes that even if a transaction is excluded under Regulation C, that does not mean it is necessarily reportable under section 1071. For example, even though a transaction is a not a HMDA ''covered loan'' if it is a purchase of a partial interest in an otherwise covered loan, and thus not excluded by new § 1002.104(b)(2), it is also not reportable under this rule because, as explained below in the section regarding certain purchases of covered transactions, only the definition of ''covered application'' will trigger data collection and reporting obligations with respect to covered credit transactions and such purchases do not involve an application for credit.

While the Bureau anticipates that adoption of new § 1002.104(b)(2) results in the exclusion of most dwelling-secured lending, this Bureau is not expanding this exclusion to all investment (non-owner occupied) property lending, as recommended by a few commenters. Where a small business seeks credit to invest in commercial (non-dwelling) real estate, it is likely to apply to a financial institution's commercial lending division and there are unlikely to be any difficulties in determining that the transaction is a business-purpose real estate investment (and not a consumer-purpose real estate investment). It is

[427] 12 CFR 1003.3(c)(9).

[428] 12 CFR 1003.3(c)(10).

[429] 12 CFR 1003.2(i).

[430] 12 CFR 1003.2(j).

[431] 12 CFR 1003.2(p).

important for this rule to capture lending to true small businesses (as opposed to consumers seeking to diversify their investments) to meet section 1071's business and community development purpose. Moreover, because such lending is not covered by HMDA, the potential for poor data quality arising from inconsistent dual reporting does not occur in this situation. In other words, excluding such transactions from coverage would not advance section 1071's statutory purposes in the same way as does excluding HMDA-reportable transactions. Rather, covering these transactions will allow data users for the first time to better understand the rationale behind credit decisions, help identify potential fair lending concerns, and provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps for commercial real estate lending and cash flow financing. In addition, robust data on such credit transactions across applicants, financial institutions, products, and communities could help target limited resources and assistance to applicants and communities, thus furthering section 1071's business and community development purpose. With respect to fair lending compliance, such data would help data users analyze potential discriminatory disparities.

104(b)(3) Insurance Premium Financing

To better manage cash flow and help pay for costly property and casualty insurance premiums, many businesses enter into insurance premium financing arrangements. Under a typical arrangement, an insurance premium financing company provides funds to pay for premiums that are remitted directly to the business's insurance provider, either directly or through an insurance agent or broker. The business then repays the premium amount advanced, plus some additional amount in the form of interest or a service charge, which is sometimes capped by State law.[432] If the business fails to repay the loan or otherwise defaults in its obligation, or if the insurance contract is cancelled, the insurance premium financing company is empowered under the financing agreement to demand the unearned premiums directly from the insurer. The Bureau understands that insurance premium financing companies have little to no contact with the businesses seeking credit and insurance premium financing arrangements are typically underwritten based on the terms of the insurance policy, the financial strength of the insurer that issued the policy and holds the unearned premium, and the uncollateralized exposure of the financing company, if any.

Unlike with other forms of credit, borrowers in insurance premium financing transactions are not free to use advanced amounts for general purchases because those amounts are intended solely to cover the cost of property and casualty insurance premiums and the funds are often remitted directly to the business's insurer. Moreover, because insurance premium financing companies are contractually empowered in the event of default to cancel the insured's insurance coverage and obtain a refund of unearned premiums to repay the amount advanced, these transactions are not typically underwritten based on the insured's ability to repay but on the value of the unearned premium collateral and the financial strength of the insurance carrier holding that collateral. The Bureau also understands that, in some cases, certain contractual terms, including maximum interest rates, are regulated by State law.[433]

In the NPRM, the Bureau stated its belief that an organization offering insurance premium financing, where the organization provides short-term loans to businesses to pay for property and casualty insurance, would have been included within the definition of a financial institution in proposed § 1002.105(a), even though this specific business model was not described in proposed comment 105(a)–1. The Bureau did not specifically discuss insurance premium financing in its section-by-section analysis of proposed § 1002.104, noting that the Bureau was proposing to require that covered financial institutions report data for all applications for transactions that meet the definition of business credit unless otherwise excluded.

A group of insurance premium financing trade associations urged the Bureau to exclude insurance premium financing from the rule. This comment did not dispute that such financing is credit but argued that it should not be covered because it is unlike any other form of small business credit—insurance premium finance lenders do not interact with or exchange information with the applicant, credit terms (including interest rate and fees) are preestablished and do not vary, and some State insurance codes provide requirements regarding interest rates, fees, disclosures, and other aspects of a premium finance transaction. This commenter also maintained that insurance premium financing presents minimal fair lending risk, most of the data proposed to be required is not currently collected and would not be useful for comparisons, and financing companies would incur significant costs to comply, potentially limiting access to this credit. The commenter noted that FinCEN exempted insurance premium financing companies from its final rule imposing customer due diligence (beneficial ownership) obligations under the Bank Secrecy Act. This trade association stated that, if the Bureau does not exclude insurance premium financing companies, the Bureau should clarify how the rule will apply to avoid curtailment of credit and conflict with State insurance laws, particularly those that prohibit, or at a minimum discourage, insurance agents and brokers from collecting applicant-provided demographic data from insureds.

The Bureau also received a letter from several members of Congress citing potential conflicts between proposed section 1071 requirements and State regulatory frameworks that they believed would improperly impair or interfere with State insurance law. They requested the Bureau reconsider subjecting these products to the final rule because they believed that doing so would not advance the policy underpinning section 1071 and would further negatively impact small businesses and their ability to purchase adequate insurance coverage.

For the reasons set forth herein, the Bureau is excluding insurance premium financing transactions from the final rule. New § 1002.104(b)(3) defines insurance premium financing as a financing arrangement wherein a business agrees to pay to a financial institution, in installments, the principal amount advanced by the financial institution to an insurer or insurance producer in payment of premium on the business's insurance contract or contracts, plus charges, and as security for repayment, the business assigns to the financial institution certain rights, obligations, and/or considerations (such as the unearned premiums, accrued dividends, or loss payments) in its insurance contract or contracts. New § 1002.104(b)(3) adds that this exclusion does not include the financing of insurance policy premiums obtained in connection with the financing of goods and services.

[432] *See, e.g.,* Fla. Stat. Ann. section 627.840(3)(b); 215 Ill. Comp. Stat. Ann. 5/513a10(c).

[433] *See, e.g.,* Fla. Stat. Ann. section 627.840 (providing, in part, that a premium finance company shall not impose a service charge of more than $12 per $100 per year); 215 Ill. Comp. Stat. Ann. 5/513a10 (stating that the maximum service charge is $10 per $100 per year).

The Bureau is adopting a definition of ''covered credit transaction'' that excludes insurance premium financing pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. While insurance premium financing constitutes ''credit'' within the meaning of § 1002.102(i) and may constitute ''business credit'' within the meaning of § 1002.102(d) (depending on its purpose), the Bureau believes that it is categorically different from products like loans, lines of credit, credit cards, and merchant cash advances and that there are several reasons to believe that excluding it from coverage advances section 1071's statutory purposes. Insurance premium financing is not a general-use lending product, but instead, like trade credit, exists only to facilitate the sale of a specific nonfinancial product or service. Providers of insurance premium financing are not primarily financial services providers, nor do they currently manage compliance with regulatory requirements associated with making extensions of credit. Taken together, requiring insurance premium financing to be reported under subpart B may lead to significant data quality issues. In addition, the fixed costs of coming into compliance with this final rule could lead insurance premium financing companies to limit offering this credit to their small business customers, potentially undermining the business and community development purpose of section 1071.

The Bureau believes the new exclusion in final § 1002.104(b)(3) will carve out narrow financing arrangements where the amount financed is reasonably related to and intended to directly pay the cost of a business's insurance policy premiums. New § 1002.104(b)(3) also limits the exclusion to situations where the business assigns the financial institution certain rights, obligations, and/or considerations (such as the unearned premiums) in its insurance policy because the Bureau understands that such security interests ensure that the underwriting focus is on the insurer, and not the small business applicant. New § 1002.104(b)(3) clarifies that the exclusion does not include the financing of insurance contract premiums purchased in connection with the financing of goods and services.

The Bureau notes that final § 1002.104(b)(3) does not cover situations where the insurance provider itself provides a business the right to defer payment of an insurance premium or fee owed by the business beyond the monthly period in which the premium or fee is due. However, such arrangements may be covered by the trade credit exclusion in final § 1002.104(b)(1).

Factoring

Background

In traditional factoring arrangements, a business in need of financing sells all or a portion of its accounts receivable (existing but unpaid invoices) to another business, known as a ''factor.'' The factor then receives payments on the accounts receivable from the business's debtors or customers directly, and not from the business that had entered into the factoring transaction. If the business has sold only a portion of its invoices, then once the account debtors pay their invoices to the factor, the factor remits the remainder of the balance to the business after deducting a fee (specifically, a discount applied to the sold accounts receivable usually stated on a percentage basis).

The Bureau understands that the factoring market is generally dominated by nondepository institutions not subject to Federal safety and soundness supervision or reporting requirements. The Bureau also understands that generally, factors may not be required to obtain State lending licenses. As a result, information on factoring volume and practices is limited. The Bureau notes, however, that the California and New York disclosure laws mentioned above cover factoring.[434]

The Bureau's 2017 White Paper estimated the factoring market as constituting around 8 percent of the number of accounts used by small businesses in the U.S. in 2014.[435] Based on more recent evidence, the Bureau believes the industry has not significantly grown. For example, the 2017 and 2020 Federal Reserve Banks' surveys of firms with 1–499 employees (''employer firms'') found that 4 percent of such businesses applied for and regularly used factoring.[436] In the 2020 Small Business Credit Survey of Employer Firms, this figure dropped to 3 percent of employer firms[437] and in the 2021 survey, this figure went back up to 4 percent.[438]

An existing comment in Regulation B (comment 9(a)(3)–3) provides that ''[f]actoring refers to a purchase of accounts receivable, and thus is not subject to [ECOA or Regulation B].'' Existing Regulation B does not offer a definition for ''accounts receivable.'' However, if there is a ''credit extension incident to the factoring arrangement,'' Regulation B's notification rules[439] apply, as do other relevant sections of ECOA and Regulation B.[440] The Bureau understands that the Board's treatment of credit extensions incident to factoring arrangements—as a type of credit but one entitled to exemptions from certain requirements—was motivated by its reading of congressional intent related to the Women's Business Ownership Act of 1988,[441] which amended ECOA to extend notification and record retention requirements to business credit. In its proposed rule on this issue, the Board explained that it was treating credit extensions incident to factoring arrangements differently from other forms of business credit based on ''evidence of congressional intent that the amendments should not apply to . . . certain types of business credit (such as applications for trade credit and credit incident to factoring arrangements).''[442]

Proposed Rule

In the NPRM, the Bureau proposed to not cover factoring. Modeled on the definitions set forth in the New York and California commercial financing

[434] *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B*.

[435] White Paper at 21 fig. 2, 22 fig. 3.

[436] 2020 Small Business Credit Survey; 2017 Small Business Credit Survey.

[437] *See* 2021 Small Business Credit Survey at 24.

[438] *See* 2022 Small Business Credit Survey at 25.

[439] *See* existing § 1002.9(a)(3)(ii) (requiring a creditor to notify an applicant, within a reasonable time (as opposed to within 30 days for credit sought by consumers and businesses with gross revenues of $1 million or less in preceding fiscal year), orally or in writing, of the action taken).

[440] Comment 9(a)(3)–3.

[441] Public Law 100–533, 102 Stat. 2689 (1988).

[442] 54 FR 29734, 29736 (July 14, 1989); *see also* 134 Cong. Rec. H9282–89 (daily ed. Oct. 3, 1988) (explaining that the committee recognizes that some forms of commercial loan transactions and extensions of credit may ''require specialized rules,'' and that, for example, the committee believes that loans and credit extensions incidental to trade credit, factoring arrangements, and sophisticated asset-based loans should continue to be exempted from the record retention and automatic notification requirements).

disclosure laws,[443] proposed comment 104(b)–1 would have provided that factoring is an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment has not yet been made. Proposed comment 104(b)–1 would have also clarified that an extension of business credit incident to a factoring arrangement is a covered credit transaction and that a financial institution shall report such a transaction as an ''Other sales-based financing transaction'' under proposed § 1002.107(a)(5).

The Bureau sought comment on its proposed approach to factoring. The Bureau also sought comment on how the subset of purported factoring arrangements that may in fact be credit (*i.e.,* those that are revolving in nature or that cover anticipated receivables) should be reported under the rule. Specifically, the Bureau sought comment on whether such arrangements should be reported as credit extensions incident to factoring (and thus reported as ''other sales-based financing'') or as merchant cash advances.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of commenters, including lenders, trade associations, and community groups. One commenter urged the Bureau to include the distinctions between merchant cash advances and factoring that were discussed in its NPRM preamble in the final rule's text or commentary to avoid future confusion over what products are ultimately covered by the final rule. This commenter also asked the Bureau to address the role of recourse and underwriting in its analysis of whether a particular financing transaction qualifies as credit. Another commenter encouraged the Bureau to consider differences between various factoring product structures and offered some explanations on how the term and costs of factoring arrangements could be reported. A community group asked the Bureau to explicitly include credit extensions incident to factoring arrangements in the list of covered transactions in the final rule, along with loans, lines of credit, credit cards, and merchant cash advances.

A wide range of commenters, including many community groups, community-oriented lenders, several members of Congress, individuals, and a nonbank online lender, urged the Bureau to cover factoring in the final rule. One community group suggested the Bureau use its discretionary authority to define credit broadly, regardless of comment 9(a)(3)–3 in Regulation B or other ECOA provisions, to avoid a conflict with congressional intent of shedding light on the distribution of financing to minority-owned, women-owned, and small businesses. Several commenters shared concerns about insufficient data on factoring and stressed the need for more transparency and for having a complete picture of the small business financing market. A few commenters argued that factoring constitutes a large part of the small business financing landscape and that section 1071's purposes would not be fulfilled without covering this product. Several commenters pointed to the fact that factoring arrangements are often used by minority-owned small businesses as evidence that they should be covered by the rule, with a few commenters specifically raising fair lending concerns related to factoring.

A few commenters questioned factoring's exclusion as non-credit, with the cross-sector group arguing that its inclusion would not create compliance concerns for other provisions of Regulation B because section 1071 is not broadly applicable to the entirety of Regulation B. That commenter also argued that a factoring arrangement is ''credit'' whenever its recipient is held liable for deferred payments conditional on the third party's ability to repay. This commenter noted that while recourse agreements (cited by the commenter as constituting 88 percent of the industry) enable the factor to pursue payment from the recipient if the third party fails to repay, non-recourse agreements also enable factors to seek payments from recipients under a variety of circumstances. Another community group argued a factoring arrangement is credit when a small business receives an amount less than the amount due from its client because the small business recipient in that case is effectively paying interest and/or fees. A joint letter from community groups suggested the Bureau make clear that factoring is excluded only where there is a bona fide sale of an accrued right to payment without creating any obligations—contingent or otherwise—on the seller.

Two commenters pointed to the fact that New York and California both include factoring in their respective commercial financing disclosure laws as a reason why it should be covered by the rule. Some commenters expressed strong concerns that the exclusion of factoring would open a door to potential evasion by merchant cash advance providers and other actors. Many commenters urged the Bureau to include factoring within its rule implementing section 1071 in order to monitor these arrangements and prevent abuses.

Two commenters, both providers of factoring, suggested the Bureau clarify that non-recourse factoring is covered by the trade credit exclusion. These commenters noted that non-recourse factors would be subject to the rule as proposed because it would have provided that the extension of business credit by a financial institution (such as a factor) other than a supplier for the financing of the sale of inventory is not ''trade credit.'' These commenters argued that compliance would be burdensome and disruptive to their operations, with one commenter stressing how important non-recourse factoring is in facilitating the sale of product by sellers to buyers.

Final Rule

For the reasons set forth herein, the Bureau is finalizing comment 104(b)–1 largely as proposed and is not covering factoring under the rule. The Bureau believes that, as discussed with respect to merchant cash advances above, a factoring agreement, as described in comment 104(b)–1, is not credit under ECOA because the provider of the funds does not grant the recipient the right to defer payment. Instead, the provider of funds seeks payment directly from a third party on a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment in full has not yet been made. The Bureau also believes that treating factoring as credit under the rule could create inconsistencies and compliance concerns related to existing Regulation B, which currently states that factoring (as a purchase of accounts receivable) is not subject to ECOA.

The Bureau is finalizing a detailed description of what constitutes factoring in comment 104(b)–1 because the existing Regulation B commentary regarding factoring may not provide sufficient clarity for purposes of collecting and reporting data under section 1071 as it does not define ''accounts receivable.'' This finalized description, modeled on the definitions set forth in the New York and California commercial financing disclosure

[443] *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B*.

laws,[444] provides that factoring is an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment in full has not yet been made. The Bureau has added the words ''in full'' to the proposed description to account for the fact that factoring may include an immediate partial payment or down payment to the businesses supplying the goods or services. Comment 104(b)–1 states that it is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing comment 9(a)(3)–3.

Based on the Bureau's work to date, comments received, and conversations with industry stakeholders, the Bureau understands that purported factoring arrangements may take various forms, including longer-term or revolving transactions that appear to have credit or credit-like features, and the Bureau believes that a subset of such arrangements may constitute credit incident to the factoring arrangement. Comment 104(b)–1 thus clarifies that an extension of business credit incident to a factoring arrangement is a covered credit transaction and that a financial institution shall report such a transaction as an ''Other sales-based financing transaction'' under § 1002.107(a)(5). By contrast, arrangements that do not involve goods or services that have already been supplied or rendered are not ''factoring'' under the Bureau's description. The Bureau makes clear in comment 104(b)–1 that, despite the fact that some providers may label such arrangements as factoring, the name used by the financial institution for a product is not determinative of whether or not it is a ''covered credit transaction,'' and such arrangements are not factoring as described in the final rule and are covered.

The Bureau does not believe it would be appropriate to codify distinctions between merchant cash advances and factoring in the final rule's text or commentary, as suggested by a commenter. The Bureau believes that factoring involves the sale of existing and alienable assets, while merchant cash advances involve a promise of future payments derived from anticipated receivables. Accordingly, providers of merchant cash advances—but not factoring that involves the sale of existing and alienable assets—grant the right to incur debt and defer its payment at a later date within the meaning of ''credit'' under § 1002.102(i).

For that reason, to the extent that a purported factoring arrangement involves multiple revolving transactions such that the transaction between the recipient and the provider of funds is not complete at the time of the sale, that transaction constitutes credit, and the Bureau would expect such a transaction to be reported as an ''Other sales-based financing transaction'' because it constitutes an extension of business credit that may or may not be incident to a factoring arrangement (depending on whether the first transaction involved the sale of existing and alienable assets). In terms of how to report the term and costs of extensions of credit incident to factoring arrangements, the Bureau notes that final § 1002.107(a)(12)(v) would require financial institutions to report, for a merchant cash advance or other sales-based financing transactions, the difference between the amount advanced and the amount to be repaid and that final § 1002.107(a)(5)(iii) requires reporting of estimated loan term for merchant cash advances and other sales-based financing in certain circumstances.

As noted above, the products discussed in this preamble do not constitute an exhaustive list of covered credit transactions; other types of business credit not specifically described nevertheless constitute covered credit transactions unless excluded by final § 1002.104(b). In line with this approach, the Bureau is not expressly delineating additional products (such as credit extensions incident to factoring arrangements) as covered credit transactions in the final rule's regulatory text or commentary. Nor is it reopening existing Regulation B at this time in order to interpret ''credit'' to include factoring. The Bureau acknowledges that factoring constitutes a large part of the small business financing landscape, particularly among minority-owned small businesses, and that it would be helpful to have more transparency into these arrangements. However, making such a change as part of this final rule could creating inconsistences and compliance challenges with respect to existing Regulation B provisions.

The Bureau also does not believe that the question of whether a factoring arrangement is credit should be determined based on whether the small business recipient is effectively paying finance charges. For the reasons discussed in the section-by-section analysis of § 1002.102(i), the Bureau is finalizing a definition of ''credit'' that largely follows the definition of credit in ECOA[445] and existing § 1002.2(j); meaning the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. This longstanding definition does not turn on ''the number of installments required for repayment, or whether the transaction is subject to a finance charge,''[446] nor on how underwriting is conducted. Rather, in order for factoring to be credit under ECOA, a factor must grant the right to defer payment of debt or to incur debts and defer its payment.

The Bureau also does not believe it would be appropriate, at this time, to distinguish between recourse and non-recourse factoring that involves the business-to-business sale of existing and alienable assets. The Bureau is aware that a significant proportion of the factoring market, as it is currently understood, may consist of recourse factoring, in which factors may pursue repayment from the recipient of funds if the third party fails to pay, and that even non-recourse agreements may enable factors to seek repayment from recipients under some circumstances, such as fraud. As a result, the Bureau understands that in much of what market participants understand to be ''factoring'' within the meaning of existing Regulation B, the transaction between the recipient and the provider of funds is not conclusively complete at the time of the sale. The Bureau agrees with commenters that these transactions are, at minimum, akin to credit. Nevertheless, the Bureau believes that requiring reporting for these transactions at this time would have the effect of upending market participants' settled expectations that ''factoring'' is not credit within the meaning of existing Regulation B. Therefore, data collection and reporting pursuant to subpart B is not required for an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment has not yet been made, regardless of whether the

[444] *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235;* N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B.*

[445] *See* 15 U.S.C. 1691a. Existing Regulation B uses the term ''applicant'' instead of ''debtor.''

[446] Existing comment 2(j)–1.

agreement includes recourse or other nonpayment contingency provisions.

The Bureau appreciates the fact that New York and California both include factoring in their respective commercial financing disclosure laws and has in fact drawn from the States' helpful regulatory language for its own section 1071 commentary. However, coverage of factoring by these or other States [447] in their commercial financing disclosure regimes does not affect what constitutes ''credit'' under ECOA. The Bureau understands concerns that exclusion of factoring may open a door to potential evasion by merchant cash advance providers and other actors. However, the Bureau does not agree that it must include factoring in this final rule in order to monitor these arrangements and prevent abuses.

In the course of considering financial institutions' compliance with the rule, the Bureau intends to closely scrutinize secured finance transactions to ensure that companies are appropriately categorizing and reporting products as required by section 1071. The Bureau also intends to obtain more information about the use of recourse and other nonpayment provisions in the factoring market, including types of these provisions and the frequency with which factors invoke them. If it proves necessary to modify existing Regulation B or subpart B, the Bureau is prepared to exercise all of its available authorities, including its authority under section 703 of ECOA to make adjustments that are necessary to prevent circumvention or evasion.

With respect to comments asking the Bureau to clarify that non-recourse factoring is covered by the trade credit exclusion, the Bureau notes that while non-recourse factors may not be subject to the trade credit exclusion because they are not typically a supplier that finances the sale of equipment, supplies, or inventory, they are likely providing ''factoring'' as described in final comment 104(b)–1. For the reasons discussed in the section-by-section analysis of § 1002.104(b)(1), the Bureau is not expanding its exclusion of trade credit to include third-party financing companies.

Leases

Background

A leasing transaction generally refers to an agreement in which a lessor transfers the right of possession and use of a good or asset to a lessee in return for consideration.[448] Under a ''true'' or ''operating'' lease, a lessee (the user) makes regular payments to a lessor (the owner) in exchange for the right to use an asset (such as equipment, buildings, motor vehicles, etc.).

Leases are not expressly addressed in ECOA or Regulation B. Until the issuance of the NPRM, the Bureau had never opined on whether ECOA and Regulation B apply to leases, and the Board made only one statement about the applicability of ECOA and Regulation B to leases, in the preamble to a final rule under ECOA. In that 1985 statement, the Board responded to the Ninth Circuit's opinion in *Brothers* v. *First Leasing,*[449] which concluded that consumer leasing falls under ECOA.[450] The Board stated that it believes that ''Congress did not intend the ECOA, which on its face applies only to credit transactions, to cover lease transactions unless the transaction results in a 'credit sale' as defined in the Truth in Lending Act and Regulation Z.'' [451] The Board then noted that it will continue to monitor leasing transactions and take further action as appropriate.[452] The Bureau is unaware of any such further actions taken by the Board.

The Bureau understands that many financial institutions (such as equipment finance companies) offer both loans and leases to their small business customers and some financial institutions comply with Regulation B for their leases as well as their loans as a matter of course. Lessor stakeholders have told Bureau staff that from their perspective, as well as that of their customers, loans and leases are indistinguishable. The Bureau understands that this is particularly true of ''financial'' or ''capital'' leases, as defined under article 2A of the Uniform Commercial Code (UCC),[453] which closely resemble (and according to some stakeholders, in some cases are indistinguishable from) term loans. The Bureau understands that financial leases are treated like assets on buyers' balance sheets, whereas operating leases are treated as expenses that remain off the balance sheet. The Bureau understands that the ownership characteristics of a financial lease also resemble those of a loan—the financial lease term is the substantial economic life of the asset (as evidenced by a low dollar purchase option at the end of the lease term and/or lack of residual financial obligations at the end of the lease term) and the lessee claims both interest and depreciation on their taxes. The Bureau understands that for some financial institutions, reporting loans but not leases may require added cost and effort to separate them in databases. The Bureau also understands that because depository institutions currently report both loan and lease activity to other regulators in their Call Reports, they may prefer to maintain a consistent approach for section 1071.

Proposed Rule

In the NPRM, the Bureau proposed to not cover leases. Drawing from the UCC definition of ''lease,'' [454] which was incorporated into the New York and California commercial financing disclosure laws,[455] proposed comment 104(b)–2 would have provided that the term covered credit transaction does not cover leases, and that a lease, for purposes of proposed subpart B, is a transfer from one business to another of the right to possession and use of goods for a term, and for primarily business or commercial (including agricultural) purposes, in return for consideration. It would have further stated that a lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. The Bureau sought comment on whether there are types of leases, or leases with certain characteristics, that should be excluded from proposed comment 104(b)–2 and thus treated as reportable under section 1071. Based on the practical difficulty cited by some stakeholders of distinguishing leases from loans, the Bureau also sought comment on whether financial institutions should be permitted to voluntarily report lease transactions.

[447] Other States, including Virginia and Utah, have passed similar commercial financing disclosure laws. *See, e.g.,* Virginia H. 1027 (enacted Apr. 11, 2022), *https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0516*; Utah S.B. 183 (enacted Mar. 24, 2022), *https://le.utah.gov/~2022/bills/static/SB0183.html*.

[448] *See* UCC 2A–103(1)(j) (defining a ''lease'').

[449] 724 F.2d 789 (9th Cir. 1984).

[450] 50 FR 48018, 48020 (Nov. 20, 1985).

[451] *Id.*

[452] *Id.* Since then, courts have gone both ways on the issue. *Compare Ferguson* v. *Park City Mobile Homes,* No. 89–CIV–1909, 1989 WL 111916, at *5 (N.D. Ill. Sept. 18, 1989) (consumer leases are ''credit'' under ECOA), *with Laramore* v. *Ritchie Realty Mgmt. Co.,* 397 F.3d 544, 547 (7th Cir. 2005) (consumer leases are not ''credit'' under ECOA).

[453] The Bureau notes that the UCC separately defines a ''consumer lease.'' *See* UCC 2A–103(1)(e). The Bureau's analysis regarding leases does not apply to leases primarily for a personal, family, or household purpose.

[454] UCC 2A–103(1)(j) ('' 'Lease' means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.'').

[455] *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B*.

Comments Received

The Bureau received comments on this aspect of the proposal from several community groups and community oriented lenders, trade associations, an online lender, and several members of Congress. Many of these comments argued that leases should be covered under the Bureau's rule. A few commenters suggested that leases were much like loans and other credit, with one commenter asserting that where a small business may retain leased equipment, that is akin to lending in which debt is incurred, payment is deferred and payments are made over a significant time period for a substantial asset, that is, the equipment. This commenter noted that the Bureau could apply its proposed loan threshold to leases. A cross-sector group of lenders, community groups, and small business advocates maintained that any data collection on the leasing market would be valuable, even if limited to credit sale leases or ''$1 leases'' (where the lessee makes payments on the leased item and at the end of the lease term, purchases the item for $1), which the commenter viewed as a form of credit sale lease.

A few commenters urged the Bureau to cover this large and growing share of the small business financing market in order to avoid data gaps. Two commenters expressed fair lending and predatory practice concerns regarding leasing—one commenter pointed to a lawsuit filed by the California State Attorney General against two lease financing companies operating in 15 states that allegedly forced 193 Black churches to make lease payments on falsely advertised and faulty computer kiosks.[456] Another commenter noted that leases are often used by minority-owned businesses, in some cases more often than white-owned businesses. This commenter also noted that New York and California both include leasing in their respective commercial financing disclosure laws and that at the Federal level, bicameral commercial financing disclosure legislation has been introduced to cover leasing. Two commenters argued that not covering leases in the final rule would open the door to potential evasion, allowing merchant cash advance providers and other financing companies to structure transactions as leases instead of loans.

Several trade associations, including ones representing equipment and vehicle lease and finance companies, expressed support for the Bureau's proposed approach to not cover leases. One commenter commended the Bureau for recognizing that leases are not treated as credit in the U.S. regulatory structure and for proposing use of the widely accepted UCC definition of a lease. Another commenter observed that the Bureau's proposed definition of ''lease'' would not cover instances where a lessee purchased or eventually owned the product being leased. This commenter advised against covering leases in the rule, arguing that doing so would result in incorrect reporting when applicants' employees submit lease applications but do not know the full scope of their employer's ownership makeup or financial holdings; it would also increase compliance costs, making short-term leases and rentals significantly more expensive.

Final Rule

For the reasons set forth herein, the Bureau is finalizing comment 104(b)–2 largely as proposed and is not covering leases under the final rule. Drawing from the UCC definition of ''lease,''[457] which was incorporated into the New York and California commercial financing disclosure laws,[458] comment 104(b)–2 provides that the term covered credit transaction does not cover leases, and that a lease, for purposes of subpart B, is a transfer from one business to another of the right to possession and use of goods for a term, and for primarily business or commercial (including agricultural) purposes, in return for consideration. It further states that a lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. In addition, comment 104(b)–2 clarifies that the name used by the financial institution for a product is not determinative of whether or not it is a ''covered credit transaction.''

The Bureau considered several other approaches to covering leasing, including referring to Regulation Z's definition of ''credit sale.'' Under that definition, a ''credit sale'' is ''a sale in which the seller is a creditor,'' and it includes a lease—unless the consumer may terminate it at any time without penalty—where the consumer ''[a]grees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved'' and ''[w]ill become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.''[459] The Bureau understands that financial institutions focused on offering leases and loans for business purposes are generally not familiar with the Regulation Z definition of ''credit sale,'' given that Regulation Z applies only to consumer credit.[460] The Bureau thus believes that referring to the Regulation Z definition of ''credit sale'' could create confusion and would not align with current industry practices. The Bureau understands that such financial institutions offering leases primarily for business or commercial (including agricultural) purposes are more accustomed to applying the UCC definitions of ''lease''[461] and ''finance lease,''[462] and/or the generally accepted accounting principles (GAAP) rules issued by the Financial Accounting Standards Board governing ''operating,'' ''capital,'' and ''finance'' leases.[463] The Bureau believes that drawing from the UCC definition of lease will lead to more consistency with financial institutions' current practices. Nearly all U.S. jurisdictions have adopted Article 2A of the UCC,[464] and the Bureau

[456] *See* Complaint, *California* v. *Television Broadcasting Online, Ltd.,* 2011 WL 849066 (Cal. Super. Feb. 2011), *https://oag.ca.gov/system/files/attachments/press_releases/n2042_complaint.pdf.*

[457] UCC 2A–103(1)(j) (''`Lease' means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.'').

[458] *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B.*

[459] 12 CFR 1026.2(a)(16).

[460] *See* Regulation Z §§ 1026.2(a)(12) (defining ''consumer credit'' as ''credit offered or extended to a consumer primarily for personal, family, or household purposes'') and 1026.3(a)(1) (excluding extensions of credit ''primarily for a business, commercial or agricultural purpose'').

[461] UCC 2A–103(1)(j).

[462] UCC 2A–103(1)(g).

[463] *See* Fin. Acct. Standards Bd., *Accounting Standards Update: Leases (Topic 842),* No. 2016–02 (Feb. 2016), *https://www.fasb.org/Page/ShowPdf?path=ASU+2016-02_Section+A.pdf&title=Update+2016-02%E2%80%94Leases+%28Topic+842%29+Section+A%E2%80%94Leases%3A+Amendments+to+the+FASB+Accounting+Standards+Codification%C2%AE&accepted Disclaimer=true&Submit=.*

[464] *See* Ala. Code 7–2A–101 *et seq.;* Alaska Stat. 45.12.101 *et seq.;* Ariz. Rev. Stat. 47–2A101 *et seq.;* Ark. Code Ann. 4–2A–101 *et seq.;* Cal. Com. Code 10101 *et seq.;* Choctaw Tribal Code 26–2A–101 *et seq.;* Colo. Rev. Stat. 4–2.5–101 *et seq.;* Conn. Gen. Stat. 42a–2A–101 *et seq.;* D.C. Code 28:2A–101 *et seq.;* Del. Code Ann. tit. 6, 2A–101 *et seq.;* Fla. Stat. 680.1011 *et seq.;* Ga. Code Ann. 11–2A–101 *et seq.;* Haw. Rev. Stat. 490:2A–101 *et seq.;* Idaho Code 28–12–101 *et seq.;* 810 Ill. Comp. Stat. 5/2A–101 *et seq.;* Ind. Code 26–1–2.1–101 *et seq.;* Iowa Code 554.13101 *et seq.;* Kan. Stat. Ann. 84–2a–101 *et seq.;* Ky. Rev. Stat. Ann. 355.2A–101 *et seq.;* Mass. Gen. Laws ch. 106, 2A–101 *et seq.;* Md. Code Ann., Com. Law 2A–101 *et seq.;* Me. Stat. tit. 11, 2–1101 *et seq.;* Mich. Comp. Laws 440.2801 *et seq.;* Minn. Stat. 336.2A–101 *et seq.;* Miss. Code Ann. 75–2A–101 *et seq.;* Mo. Rev. Stat. 400.2A–101 *et seq.;* Mont. Code Ann. 30–2A–101 *et seq.;* N.C. Gen. Stat. 25–2A–101 *et seq.;* N.D. Cent. Code 41–02.1–01 *et seq.;*

Continued

understands that virtually every form of lease used by major leasing companies provides that it is governed by the laws of one of the jurisdictions that has adopted Article 2A.

Based on its review of business-purpose leases and its expertise with respect to the meaning of ''credit,'' the Bureau believes that the term ''credit'' does not encompass such business leases. In the business-purpose context, the Bureau understands that in a true lease, the lessor retains title and will receive the property back after the conclusion of the lease term, without any expectation by either party that, for example, ownership of the property will be transferred or that payments made pursuant to the lease agreement constitute anything other than payments in exchange for the temporary use of the property. As a result, the Bureau does not believe that in the business-purpose context a true lease transaction involves the right to incur debt and defer its payment, defer payment of a debt, or defer payment for goods or services.

The Bureau is aware that there are other types of leases with characteristics that bear some resemblance to forms of credit like credit sales, such as a contemplated transfer of ownership at the end of the lease term. The Bureau does not parse whether different types of leases might constitute ''credit'' but notes that final comment 104(b)–2's definition of lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. For further clarification, the Bureau notes that UCC section 1–203 provides helpful guidance on how to distinguish a lease from a security interest. For example, UCC section 1–203 provides, in part, that a lease transaction creates a security interest if the lessee's payment obligation continues for the term of the lease and is not subject to termination by the lessee and the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.[465] The UCC additionally provides that additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised.[466] The UCC appropriately notes that whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.[467] The Bureau believes that drawing from an established definition of ''lease'' that small business lenders already use will minimize compliance risks and will offer sufficient consistency and clarity regarding interpretation of final comment 104(b)–2.

The Bureau is not covering leases under this final rule, as requested by some commenters. The Bureau agrees that some business leases are structured like loans and other credit but notes that a commenter's example of a small business being able to retain leased equipment is an example of the creation of a security interest, not a lease under final comment 104(b)–2. Similarly, so-called ''$1 leases'' create security interests because the lessee has an option to become the owner of the goods for nominal additional consideration. As noted by one commenter, final comment 104(b)–2's definition of lease does not include a transaction resulting in the retention or creation of a security interest.

The Bureau understands that bicameral commercial financing disclosure legislation was introduced in the last Congress to cover some leasing and other commercial finance products under the Federal Truth in Lending Act and that New York and California both include leases in their respective commercial financing disclosure laws. (The Bureau has in fact drawn from the states' helpful regulatory language for its own section 1071 commentary.) However, the Bureau does not believe that the coverage of leases in these particular legislative efforts has any bearing on what constitutes ''credit'' under ECOA. The Bureau appreciates commenters' concerns that not covering leases could open a door to potential evasion and lead to data gaps or fair lending problems. The Bureau believes that it can observe the small business financing market for such abuses and prevent them without including all leases in the rule. For example, in considering financial institutions' compliance with the rule, the Bureau intends to closely scrutinize transactions to ensure that companies are appropriately categorizing and reporting products as required by section 1071.

Consumer-Designated Credit

The Bureau understands that some small business owners may use consumer-designated credit in order to finance their small businesses—such as taking out a home equity line of credit or charging business expenses on their personal credit cards.

The proposed rule would not have covered products designated by the creditor as consumer-purpose products (consumer-designated credit). Proposed comment 104(b)–3 would have made clear that the term covered credit transaction does not include consumer-designated credit used for business purposes, because such transactions are not business credit. Proposed comment 104(b)–3 would have provided that a transaction qualifies as consumer-designated credit if the financial institution offers or extends the credit primarily for personal, family, or household purposes. The Bureau sought comment on this proposed interpretation, including how the Bureau has defined the scope of consumer-designated credit. The Bureau also sought comment on whether it should permit financial institutions to voluntarily report consumer-designated credit when they have reason to believe the credit might be used for business purposes.

The Bureau received comments on this aspect of the proposal from a range of banks, credit unions, trade associations, and community groups. One trade association generally agreed with the Bureau's approach to consumer-designated credit but asked the Bureau to clarify whether retail installment sales contracts are covered by the exclusion of consumer-designated credit. This commenter also asked the Bureau to confirm that, in determining whether credit is excluded as consumer-designated credit, existing comment 2(g)–1 interpreting the definition of ''business credit'' applies, which provides that ''[a] creditor may rely on an applicant's statement of the purpose for the credit requested.''

Some industry commenters supported the Bureau's proposed exclusion of consumer-designated credit. One of these commenters argued that the inclusion of consumer-designated credit within the rule would dramatically expand the size of the data collected beyond the purpose of section 1071, circumventing the congressional intent and increasing the rule's impact on the availability of credit for all consumers—

N.H. Rev. Stat. Ann. 382–A:2A–101 *et seq.;* N.J. Stat. Ann. 12A:2A–101 *et seq.;* N.M. Stat. Ann. 55–2A–101 *et seq.;* N.Y. UCC Law 2–A–101 *et seq.;* Neb. Rev. Stat. UCC 2A–101 *et seq.;* Nev. Rev. Stat. 104A.2101 *et seq.;* Ohio Rev. Code Ann. 1310.01 *et seq.;* Okla. Stat. tit. 12A, 2A–101 *et seq.;* Or. Rev. Stat. 72A.1010 *et seq.;* Pa. Cons. Stat. 2A101 *et seq.;* R.I. Gen. Laws 6A–2.1–101 *et seq.;* S.C. Code Ann. 36–2A–101 *et seq.;* S.D. Codified Laws 57A–2A–101 *et seq.;* Tenn. Code Ann. 47–2A–101 *et seq.;* Tex. Bus. & Com. Code Ann. 2A.101 *et seq.;* Utah Code Ann. 70A–2a–101 *et seq.;* V.I. Code Ann. tit. 11A, 2A–101 *et seq.;* Va. Code Ann. 8.2A–101 *et seq.;* Vt. Stat. Ann. tit. 9A, 2A–101 *et seq.;* W. Va. Code 46–2A–101 *et seq.;* Wash. Rev. Code 62A.2A–101 *et seq.;* Wisc. Stat. 411.101 *et seq.;* Wyo. Stat. Ann. 34.1–2.A–101 *et seq.*

[465] UCC 1–203(b).

[466] UCC 1–203(d).

[467] UCC 1–203(a).

not just business borrowers. Another commenter asked the Bureau to clarify that it will not challenge the designation of a transaction as consumer-designated credit, expressing concerns because financial institutions have no reliable method for validating a latent business purpose in an application for a consumer-designated credit transaction. Two banks recommended against requiring financial institutions to second guess consumers' intentions regarding use of funds by requiring them to report on loans suspected to be used for business purposes.

Several commenters urged the Bureau to cover consumer credit that will be used for business purposes. One community group suggested collecting 1071 data where personal credit card applicants responded that 50 percent or more of the loan would be used for small business purposes, asserting that this threshold would sufficiently weed out applications that would result in nominal amounts of funding for small business purposes but would still capture ones that are potentially important for meeting the community development purpose of section 1071. Two commenters expressed concerns that not covering consumer-designated credit would result in a push toward unregulated products, with one commenter asserting that a portion of the fintech sector is engaging in unscrupulous targeting of vulnerable customers (including racial and ethnic minorities). Two community groups asked the Bureau to reconsider its proposal, emphasizing how important consumer-designated credit is as a source of financing for small businesses, particularly for women-owned and minority-owned small businesses, sole proprietorships, and new businesses. Another community group recommended that the Bureau additionally include personal credit card loans that finance business expenses, asserting that these cards are a vital source of credit for very small and start-up businesses, as well as businesses owned by women and people of color.

A number of banks suggested the Bureau exclude all credit subject to Regulation Z. Some suggested that such an exemption would provide clarity to the definition of ''covered credit transaction'' and would ease compliance burden when identifying covered applications, implementing data collection, and ensuring data integrity in a manner that meets the statutory purpose. One trade association added that financial institutions are already familiar with determining loan purpose under the Regulation Z definition in their everyday lending activities and that this approach would alleviate confusion with the proposed exclusion for credit secured by certain investment properties.

For the reasons set forth herein, the Bureau is finalizing comment 104(b)–3 almost entirely as proposed and is not covering consumer-designated credit under the final rule. Comment 104(b)–3 makes clear that the term covered credit transaction does not include consumer-designated credit used for business or agricultural purposes, because such transactions are not business credit. The Bureau is adding the reference to agricultural purposes for clarity. Comment 104(b)–3 provides that a transaction qualifies as consumer-designated credit if the financial institution offers or extends the credit primarily for personal, family, or household purposes. For example, an open-end credit account used for both personal and business purposes is not business credit for the purpose of subpart B unless the financial institution designated or intended for the primary purpose of the account to be business-related.

The Bureau believes it is appropriate to interpret section 1071 as not applying to this type of credit. Most notably, ECOA section 704B(b) directs financial institutions to collect data in the case of an application ''*for credit* for women-owned, minority-owned, or small *business*'' (emphasis added). The statute thus applies only to applications for credit for a business; at the time of an application for consumer-designated credit, however, the application is not for a business. Several policy reasons also support this approach. First, financial institutions may not be able to consistently identify when consumer-designated credit is being used for business or agricultural purposes. Inconsistent reporting across financial institutions could lead to data quality concerns. Credit sought by consumers for both personal and business purposes could be particularly difficult to separate into reportable and non-reportable portions. The Bureau believes that excluding consumer-designated credit will simplify compliance by obviating the need for financial institutions to identify and distinguish business uses of consumer-purpose credit products. Second, not including consumer-designated credit that is used for business or agricultural purposes within the scope of this rulemaking makes it clear that the applications reported will all be seeking credit to use for business/agricultural purposes, which supports section 1071's directive to collect and report data in the case of an application for credit for a *business.* Third, not covering consumer-designated credit that is used for business or agricultural purposes provides certainty to financial institutions that offer only consumer-designated credit that they are not subject to this final rule's data collection and reporting requirements.

With respect to the request to clarify whether retail installment sales contracts are covered by the exclusion of consumer-designated credit, the Bureau notes that this exclusion applies equally to all credit products. In other words, a retail installment sales contract qualifies as consumer-designated credit if the financial institution offers or extends it primarily for personal, family, or household purposes. The Bureau confirms, as requested, that because the Bureau is finalizing § 1002.102(d) to define business credit as having the same meaning as in existing § 1002.2(g), existing comment 2(g)–1 also applies to subpart B. Thus, in determining whether credit is excluded as consumer-designated credit, a financial institution ''may rely on an applicant's statement of the purpose for the credit requested.'' [468]

The Bureau agrees with commenter concerns that the inclusion of consumer-designated credit within the rule would dramatically expand the size of the data collected beyond the purpose of section 1071, circumventing congressional intent and potentially increasing the rule's impact on the availability of credit for all consumers—not just small business borrowers. The Bureau also confirms that financial institutions may rely on an applicant's statement of purpose for the credit requested and need not report consumer-purpose loans suspected to be used for business purposes, recognizing that alternative approaches would likely result in inconsistent results across lenders as they tried to discern latent business purposes in an application for a consumer-designated credit transaction.

With respect to the suggestion that the Bureau require financial institutions to inquire on an application whether 50 percent or more of the borrowed funds would be used for small business purposes and require collection of 1071 data in those instances, the Bureau believes that this approach would raise many of the policy concerns discussed above. The Bureau appreciates the concerns about potential fair lending violations and evasion raised by commenters relating to consumer-designated credit. The Bureau believes that its finalized bright-line approach

[468] Existing comment 2(g)–1.

will better enable it to ensure that financial institutions that are offering business credit are complying with the final rule.

The Bureau is not excluding to exclude all credit subject to Regulation Z from this rule's definition of ''business credit,'' as suggested by some commenters. The final rule does not cover consumer-designated credit, which includes Regulation Z credit as well as other consumer-designated credit that is not encompassed by Regulation Z. The Bureau notes that some of Regulation Z's provisions apply to business purpose credit cards[469] and that Regulation Z does not cover consumer credit over certain applicable threshold amounts.[470]

Certain Purchases of Covered Credit Transactions, Including Pooled Loans and Partial Interests Proposed Rule

As discussed in the section-by-section analysis of § 1002.103 above, ECOA section 704B(b) requires that financial institutions collect, maintain, and report to the Bureau certain information regarding ''any application to a financial institution for credit.'' For covered financial institutions, the definition of ''application'' triggers data collection and reporting obligations with respect to covered credit transactions. In the NPRM, the Bureau noted that under proposed subpart B, purchasing a loan, purchasing an interest in a pool of loans, or purchasing a partial interest in a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data. Rather, a reporting obligation arises on the basis of receiving a covered application for credit. (See the section-by-section analysis of § 1002.109(a)(3) for additional information.) The Bureau also noted the corollary point that selling an originated covered credit transaction would not, in itself, obviate an existing obligation of a covered financial institution to report small business lending data for that application, pursuant to proposed comment 107(a)–1.i.

In addition, the Bureau believed that requiring covered financial institutions to collect and maintain data related to the purchase of an interest in a pool of covered credit transactions would do little to further the purposes of section 1071. The Bureau generally believed that a pooled loan purchase would arise after credit decisions on the relevant loans had already been made (*e.g.,* after the loans were originated) and therefore the Bureau believed that the purchaser of an interest in a pool of loans would understand that there would be no section 1071 obligation. Information about the loans in this pool would already be captured, as the application for each originated loan in the pool would already be reported (assuming it was originated by a covered financial institution and otherwise satisfies the requirements of subpart B). For clarity, however, the Bureau stated in the NPRM preamble that no reporting obligations arise from purchasing an interest in a pool of covered credit transactions, including credit-backed securities or real estate investment conduits. The Bureau believed that this clarification, similar to Regulation C comment 3(c)(4)–1, would assist covered financial institutions in understanding the scope of their obligations.

Moreover, the Bureau stated that the purchase of a partial interest in a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data. The Bureau believed that this approach, combined with proposed § 1002.109(a)(3), provided sufficient clarity for financial institutions that choose to take part in loan participations. For example, Financial Institution A receives an application from a small business for a covered credit transaction and approves the loan, and then Financial Institution A organizes a loan participation agreement where Financial Institutions B and C agree to purchase a partial interest. This is a reportable application for a covered credit transaction for Financial Institution A, but it is not a reportable application for Financial Institutions B and C. The Bureau noted that this approach differs from how loan participations are reported by banks and savings associations under the CRA. That is, under the CRA, if the loan originated by Financial Institution A met the definition of a small business loan, then for any (or all) of the financial institutions that were CRA reporters, the loans could be reported under the CRA.[471]

The Bureau believed that the statutory purposes of section 1071 encourage the broad collection of small business lending data by financial institutions. The Bureau was not aware of any reason why data with respect to covered credit transactions should not be collected because more than one financial institution holds an interest in the originated loan. Conversely, the Bureau did not believe that requiring reporting by *each* financial institution with a partial interest in a covered credit transaction would further section 1071's purposes, and because having a single loan reported by multiple financial institutions could compromise the quality of the 1071 dataset. Read in conjunction with proposed § 1002.109(a)(3), however, the Bureau believed that the covered credit transactions at issue here would nonetheless generally be reported by one financial institution provided it met the threshold for originated loans pursuant to § 1002.105(b)—*i.e.,* the financial institution that sold portions of the loan to other participants.

The Bureau did not expressly exclude loan purchases, the purchase of an interest in a pool of covered credit transactions or the purchase of a partial interest in a covered credit transaction in the proposed rule's regulatory text or commentary, but sought comment on this approach. With respect to partial interests specifically, the Bureau solicited comment on how such an exclusion may differ from reporting obligations under the CRA and, if the Bureau adopted another approach, how overlapping reporters or data might be flagged to avoid double-counting certain information.

Comments Received

The Bureau received several comments regarding loan purchases and loan participations. Commenters did not address pooled loans specifically. A trade association and two banks agreed that loan purchases should not be covered; one of these banks requested that the Bureau add commentary emphasizing this point.

In contrast, two other commenters argued that all loan purchases should be reported, citing consistency with treatment under CRA and HMDA. One commenter further stated that excluding loan purchases and participations from reporting requirements would ignore the role of financial institutions with a significant percentage of loan purchases, despite their importance in the small business lending market. The other commenter stated that 1071 data should replace CRA lending data, the CRA considers loan purchases, and thus so should the Bureau's rule for consistency.

Several farm credit lenders and a trade association said that participation interests and participation loans should be specifically excluded, noting that a participation interest is legally distinct from a loan, the purchaser of an interest

[469] *See* Regulation Z § 1026.12(a) and (b).

[470] *See id.* § 1026.3(b).

[471] *See, e.g.,* 12 CFR 228.21(f) (stating that when assessing the record of a nonminority-owned and nonwomen-owned bank, the Board considers loan participation as a factor).

is not considered a creditor, and there is risk of double counting the data. One commenter asked that the Bureau exclude loan participations from the definition of ''covered credit transaction'' because a customer never applies for any lender to participate in a covered credit transaction. In addition, some farm credit lenders noted that they frequently enter into loan participation agreements. They stated that a loan participation is significantly different from the purchase of a loan because under these agreements, the borrower's contractual relationship remains solely with the lead lender. These commenters further stated that requiring a participant to report would be akin to requiring a trust in a mortgage securitization to report HMDA data.

Final Rule

For the reasons set forth herein, the Bureau is revising the commentary to § 1002.104(b) to make clear that loan purchases, the purchase of an interest in a pool of loans, and the purchase of a partial interest in a credit transaction are not ''covered credit transactions.'' Specifically, the Bureau is adding comment 104(b)–4 to clarify that for purposes of subpart B, the term ''covered credit transaction'' does not include the purchase of an originated credit transaction, the purchase of an interest in a pool of credit transactions, or the purchase of a partial interest in a credit transaction such as through a loan participation agreement. Such purchases do not, in themselves, constitute applications for business credit that the purchasing entity makes decisions on. Relatedly, in order to illustrate reporting obligations regarding pooled loans and partial interests, the Bureau is also adding examples to the commentary to § 1002.109(a)(3). The section-by-section analysis of § 1002.109(a)(3) addresses in detail situations where multiple financial institutions are involved in a covered credit transaction.

While the Bureau acknowledges the important role of loan purchases in the small business lending market, the Bureau notes that the definition of ''covered application'' triggers data collection and reporting obligations with respect to covered credit transactions. Under the final rule, purchasing an originated loan, purchasing an interest in a pool of loans, or purchasing a partial interest in a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data regarding the application underlying the purchased loan. The Bureau has made clear in final § 1002.109(a)(3) and associated commentary that only the action taken on the *application* is reportable.

In response to commenters who urged consistency with HMDA, as noted above, the statutory language in HMDA contemplates data collection for loan purchases. Similarly, as interpreted by the agencies administering CRA, the CRA statute permits banks to fulfill their obligation to meet local credit needs by lending in low-to-moderate income communities or by purchasing loans made by others.[472] Conversely, section 1071 does not contain such language; it is focused on applications as the trigger for data collection and reporting obligations. Thus, the Bureau concludes for this rule that it is appropriate for financial institutions to have reporting obligations on the basis of making credit decisions on applications, as explained further in the section-by-section analysis of § 1002.109(a)(3)—a subsequent purchase of a loan (or an interest in a pool of loans, or a partial interest in a loan) is not, in itself, reportable.

104(b)(4) Public Utilities Credit

As noted above, the existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit, as defined in existing § 1002.3(a) through (d), from requirements of existing Regulation B. For the purpose of proposed subpart B, the Bureau proposed complete exclusions for public utilities credit from the definition of a covered credit transaction in proposed § 1002.104(b). The Bureau also proposed to define business credit in proposed § 1002.102(d) by reference to existing § 1002.2(g), which already excludes public utilities credit. The Bureau sought comment on its proposal to exclude public utilities credit but did not receive any comments in response.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b)(2) as proposed. Section 1002.104(b)(2) excludes public utilities credit, as defined in existing § 1002.3(a)(1). Existing § 1002.3(a)(1) states that the term public utilities credit refers to extensions of credit that involve public utility services provided through pipe, wire, or other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, and any discount for prompt payment are filed with or regulated by a government unit. Several existing Regulation B requirements do not apply to public utilities credit transactions.[473] Existing comment 3(a)–1 explains that the definition applies only to credit for the purchase of a utility service, such as electricity, gas, or telephone service. Credit provided or offered by a public utility for some other purpose—such as for financing the purchase of a gas dryer, telephone equipment, or other durable goods, or for insultation or other home improvements—is not excepted under § 1002.104(b)(2) but may be excepted if it constitutes trade credit under § 1002.104(b)(1), or in the example of financing for certain home improvements, if it does not constitute an extension of business credit under § 1002.104(a). Existing comment 3(a)–2 states in part that a utility company is a creditor when it supplies utility service and bills the user after the service has been provided.

The Bureau is adopting a definition of ''covered credit transaction'' that only covers business credit and that fully excludes public utilities credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under ECOA 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau believes that fully excluding public utilities credit from the rule is reasonable for the same reasons as the Board enumerated when it adopted exemptions from certain procedural requirements under subpart A. Specifically, covering public utilities credit under this rule could potentially result in ''substantial changes in the forms and procedures of public utilities companies. Costs associated with such changes would, in all likelihood, be passed along to [small business owners].''[474] The Bureau notes that many of the policies and procedures of public utilities companies are separately regulated at the State and municipal levels by public service commissions, and at the Federal level by the Federal Energy Regulatory Commission. The Bureau also believes that public utilities credit is akin to trade credit and thus is

[472] *See, e.g.,* 12 CFR 228.22(a)(2) (stating that the Board will consider both originations and purchases of loans under the lending test).

[473] *See* § 1002.3(a).

[474] 40 FR 49298, 49305 (Oct. 22, 1975).

excluding it from coverage under subpart B for the same reasons.

104(b)(5) Securities Credit

As noted above, the existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit, as defined in existing § 1002.3(a) through (d), from requirements of existing Regulation B. For the purpose of proposed subpart B, the Bureau proposed complete exclusions for securities credit from the definition of a covered credit transaction in proposed § 1002.104(b). The Bureau sought comment on its proposal to exclude securities credit but did not receive any comments in response.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b)(3) as proposed. Section 1002.104(b)(3) excludes securities credit, as defined in existing § 1002.3(b)(1). Existing § 1002.3(b)(1) states that the term securities credit refers to extensions of credit subject to regulation under section 7 of the Securities Exchange Act of 1934 or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities Exchange Act of 1934. Several existing Regulation B requirements do not apply to securities credit transactions.[475]

The Bureau is adopting a definition of ''covered credit transaction'' that only covers business credit and that fully excludes securities credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under ECOA 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau is excluding securities credit to foster consistency with existing Regulation B.

104(b)(6) Incidental Credit

As noted above, the existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit, as defined in existing § 1002.3(a) through (d), from requirements of existing Regulation B. For the purpose of proposed subpart B, the Bureau proposed complete exclusions for incidental credit from the definition of a covered credit transaction in proposed § 1002.104(b).

As the Bureau explained in the NPRM, existing § 1002.3(c)(1) states that incidental credit refers to extensions of consumer credit other than public utilities and securities credit (i) that are not made pursuant to the terms of a credit card account; (ii) that are not subject to a finance charge (as defined in Regulation Z § 1026.4); and (iii) that are not payable by agreement in more than four installments. For example, existing comment 3(c)–1 explains that if a service provider (such as a hospital, doctor, lawyer, or merchant) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of Regulation B, even though there is no finance charge and no agreement for payment in installments—meaning that it would not be covered under Regulation Z. Such extensions of incidental credit are excepted from compliance with certain procedural requirements as specified in existing § 1002.3(c). The Board created these exceptions in response to commenters that urged it to minimize burdens on businesses that ''permit their customers to defer payment of debt as a convenience and are not in the business of extending credit.''[476]

The Bureau sought comment on its proposal to exclude incidental credit and it received one industry comment in support of the proposed exclusion.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b)(4) as proposed. The Bureau is adopting a definition of ''covered credit transaction'' that only covers business credit and that fully excludes incidental credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau believes that the Board's reasoning with respect to incidental credit's limited exception under existing Regulation B is equally applicable and relevant here. Additionally, the Bureau believes that providers of incidental credit may not intend to extend credit and may not currently manage compliance with regulatory requirements associated with making extensions of credit. The Bureau believes an exclusion is appropriate to further the business and community development purpose of section 1071 because of the likelihood that these entities may incur large costs relative to their size to collect and report 1071 data in an accurate and consistent manner, which could result in entities limiting credit to their small business customers or in potential data quality issues.

Government Credit

The existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit (that is, extensions of credit made *to* governments or governmental subdivisions, agencies, or instrumentalities—not extensions of credit made *by* governments), as defined in existing § 1002.3(a) through (d), from existing Regulation B.[477]

In its NPRM, the Bureau did not propose in § 1002.104(b) to separately exclude government credit, as defined in existing § 1002.3(d)(1) to mean ''extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities.'' The Bureau sought comment on its approach to government credit but did not receive any comments on this aspect of the proposal. For the purpose of subpart B, the Bureau is finalizing complete exclusions for public utilities credit, securities credit, and incidental credit from the definition of a covered credit transaction in final § 1002.104(b), as described above, but is not adopting a similar exclusion for government credit. The Bureau is finalizing its approach because it believes that an express exclusion for extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities is not necessary because such governmental entities would not constitute small businesses under the final rule.[478]

Additional Requested Exclusions

The Bureau received numerous comments requesting the Bureau exclude additional products from coverage under the rule. These

[475] *See* § 1002.3(b).

[476] 40 FR 49298, 49304 (Oct. 22, 1975).

[477] As explained in existing comment 3–1, under § 1002.3, procedural requirements of Regulation B do not apply to certain types of credit. The comment further states that all classes of transactions remain subject to § 1002.4(a) (the general rule barring discrimination on a prohibited basis) and to any other provision not specifically excepted.

[478] Government entities are not ''organized for profit'' and are thus not a ''business concern'' under proposed § 1002.106(a).

comments and the Bureau's response are discussed below.

Point-of-sale transactions. A trade association urged the Bureau to fully exempt point-of-sale transactions from the rule, arguing that data collected in connection with such transactions would be inaccurate. In the alternative, this commenter suggested an exception from the requirement to obtain principal owners' ethnicity, race, and sex information, for credit lines below $50,000. As discussed in the section-by-section analysis of § 1002.107(c), the Bureau does not believe it would be appropriate to categorically exempt point-of-sale transactions. The Bureau also is not adopting a minimum transaction amount threshold, as discussed below.

Minimum transaction amount threshold. Some industry commenters requested the Bureau exempt all credit transactions from section 1071 collection and reporting requirements if they fell below a certain minimum transaction threshold. One commenter asked the Bureau to adopt a de minimis loan amount exemption of at least $1 million to soften the rule's impact on small entities and borrowers. A credit union stated that the Bureau should implement a minimum loan amount of $10 million. Some banks urged an exemption for ''small loans'' under $25,000, asserting a need to help institutions, especially smaller institutions, keep compliance costs down and ensure these credit products remain available to the small and agricultural businesses who need them most.

Some industry commenters, including several credit union trade associations, requested an exemption for credit transactions under $50,000. A few commenters argued such an exemption was needed for consistency with National Credit Union Administration regulations, which impose a $50,000 threshold for reporting member business loans. Two credit union trade associations argued that failing to exempt such loans would reduce their availability and also reflects a substantial underestimation of the full impact of the proposed covered financial institution threshold. Several trade associations also recommended the Bureau permit voluntary reporting of loans below $50,000. A bank stated that a $50,000 threshold would result in a significant improvement that would still allow the Bureau to obtain meaningful data. Another bank maintained that this exclusion was needed to reduce compliance burdens related to small loans that are not profitable but that are important to communities. On the other hand, another commenter stressed the importance of supporting access to microloans for financing start-up or growth and suggested separating microloans ($50,000 or less) into a separate category.

A few industry commenters suggested exempting loans under $100,000. These commenters generally argued that such an exemption was needed to keep the cost of loan origination lower for small dollar borrowers, thereby helping to make more borrowers eligible for credit. Several industry commenters urged the Bureau adopt a minimum transaction amount threshold, without specifying a dollar amount. One of these commenters noted that, due to price inflation, $100,000 would be too small of an amount for such a threshold and that if a threshold were established, it would need to be per loan and not cumulative.

For the reasons set forth herein, the Bureau is not adopting an exemption for credit transactions below a certain dollar threshold. At the time of the Federal Reserve Banks' 2021 survey of employer firms, 60 percent of employer firms had $100,000 or less in outstanding debt, with 48 percent of such firms holding $50,000 or less in outstanding debt.[479] According to SBA data, more than 87 percent of Paycheck Protection Program loans in 2021 were loans of $50,000 and below,[480] and approximately 20 percent of SBA 7(a) loans between 2010 and 2019 were in amounts less than $25,000. In terms of industry adoption of minimum loan amount thresholds, research by the FDIC shows that only a small share (14.8 percent) of small banks require a minimum loan amount for their top loan product to small businesses, compared with a majority (69.8 percent) of large banks.[481] Moreover, as discussed in the section-by-section analysis of § 1002.106(b)(1), the Bureau believes that loan size a poor proxy for small business size—in fact, FDIC staff found ''at least $19.1 billion in gross understatement of small business lending (in which small businesses with less than $1 million in gross annual revenue received loans with amounts greater than $1 million).'' [482] Based on this information, the Bureau does not believe that adopting a minimum transaction amount threshold would further the purposes of section 1071 because it would exclude substantial portions of small business lending.

Vehicle financing. One bank urged the Bureau to specify that any motor vehicle financed in the first instance by retail motor vehicle dealers are deemed consumer loans and thus exempt. A vehicle leasing trade association also suggested that vehicle financing was so similar to consumer lending that it should be exempt from section 1071 reporting requirements.

The Bureau is not categorically exempting business-purpose vehicle financing, even though it may often be offered alongside consumer-purpose credit. Per existing comment 2(g)–1, the test for deciding whether a transaction qualifies as business credit is one of primary purpose. Where a small business applies for vehicle financing primarily for business or commercial (including agricultural) purposes from a covered financial institution, the transaction is reportable. For a broader discussion of vehicle financing with respect to reporting obligations where multiple financial institutions are involved in a covered credit transaction, see the section-by-section analysis of § 1002.109(a)(3).

Letters of credit. A bank asked the Bureau to clarify if letters of credit are covered credit transactions for purposes of section 1071, and if they are, this commenter also recommended that the Bureau exclude these types of transactions from reporting.

The Bureau understands that letters of credit products are primarily used in the international trade context. Generally, a letter of credit is an instrument issued by a bank that promises, upon the presentation of certain documents and/or satisfaction of certain conditions, to direct payment to a beneficiary of the instrument. Letters of credit are often presented by buyers of goods who seek to postpone payment until their goods have been received. Some letters of credit are secured by a promissory note and are converted if the customer fails to pay.

ECOA and Regulation B do not address letters of credit. Regulation Z excludes letters of credit under its comment 2(a)(14)–1.vi. In finalizing this exclusion, the Board stated that ''[i]ssuance of letters of credit and execution of option contracts are not extensions of credit, although there may be an extension of credit when the letter of credit is presented for payment or the option is exercised, if there is a deferral of the payment of a debt at that

[479] 2022 Small Business Credit Survey at 13.

[480] Small Bus. Admin., *PPP Report: Approvals through 05/31/2021, https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf.*

[481] Small Business Lending Survey at 44, *https://www.fdic.gov/bank/historical/sbls/full-survey.pdf.*

[482] Fed. Deposit Ins. Corp., *Measurement of Small Business Lending Using Call Reports: Further Insights From the Small Business Lending Survey,* at 7 (July 2020), *https://www.fdic.gov/analysis/cfr/staff-studies/2020-04.pdf.*

time.'' [483] The Bureau agrees with the Board's assessment of these products and believes that a letter of credit is not credit under ECOA. Thus, the Bureau is not covering letters of credit under the final rule.

Government programs. Some industry commenters urged the Bureau to exempt government lending programs (such as the Paycheck Protection Program) and/or government sponsored/guaranteed loans (such as USDA loans), arguing that inclusion would discourage participation. One also argued that the fact that the fees and interest rates for Paycheck Protection Program loans were set by Congress, meant there was a reduced risk of discriminatory lending practices related to terms of the credit transaction. Another suggested that 1071 data collection and reporting was not required because many government programs already collected similar information. A few commenters specifically recommended exempting SBA lending programs, particularly section 504 loans.

The Bureau has considered these comments but is not categorically exempting credit transactions originated by, sponsored by, facilitated by, or guaranteed by government entities. According to one source, there are 65 government-sponsored, grants, loans, and programs that may benefit small businesses.[484] The Bureau understands that many small businesses rely on government programs for credit and believes that excluding such credit in this final rule would not further either of section 1071's statutory purposes.

C–PACE loans. A trade association of Commercial Property Assessed Clean Energy (C–PACE) loan providers requested an exemption due to purportedly unique features of C–PACE loans, such as prior approval by the local government, absence of acceleration, lack of control over the identity of the obligor, and absence of private remedies.

C–PACE programs generally allow commercial property owners, which could include small businesses, to receive financing to fund clean-energy, seismic strengthening, or water conservation improvements to their properties. The financial obligation arises from voluntary contract. Various private companies appear to play a significant role in financing, originating, and administering C–PACE transactions. Under State law, C–PACE is an assessment that appears on businesses' property tax bills. Although the commercial property owner signs the financing agreement, it is typically not a personal liability of the commercial property owner, and the obligation will stay with the property until fully paid. C–PACE is secured by a super-priority lien on the property—if the property is sold through foreclosure, C–PACE (like a regular property tax lien) is first in line to receive any proceeds from the sale even if a mortgage was on the property first. The Bureau understands that typically, only the arrearage on the C–PACE lien gets paid off in foreclosure, and the rest of the C–PACE indebtedness remains with the property after foreclosure.

While publicly available data on C–PACE programs appear to be limited, the Bureau understands that these programs are growing in popularity; [485] excluding these loan products from the requirements of this rule would result in incomplete data about the relevant markets and would thus not advance section 1071's business and community development purpose.

The Bureau is not excluding C–PACE financing arrangements from reporting under section 1071, as requested by one commenter. Based on its understanding of typical C–PACE financing arrangements and its expertise with respect to the nature of credit transactions, the Bureau believes that the term ''credit'' under ECOA and final § 1002.102(i) encompasses these products. Under a C–PACE financing arrangement, there is (1) a ''debt'' in the form of an obligation to pay for the cost of property upgrades and (2) a right to defer payment on that obligation for a term. Similarly, there is (1) a ''purchase[] [of] property or services'' in the form of property upgrades, and (2) a right to defer payment on the property or services. The borrower enters into C–PACE financing through a voluntary transaction. That the parties agree that payment will be made through an assessment through the property tax system does not change the Bureau's analysis. ECOA (and Regulation B) do not specify a particular vehicle or form of payment for a transaction to constitute credit, nor do they limit the form of obligation. The Bureau is not specifically defining C–PACE financing arrangements in the rule because the Bureau believes these products are covered by the definition of ''credit'' in final § 1002.102(i).

Finally, in the Bureau's judgment, an exclusion of C–PACE loans—whether by interpretation or by granting an exception—would not further the fair lending and the business and community development purposes of section 1071.[486] This is for three independent reasons. First, while the Bureau understands that C–PACE financing may present less fair lending risk compared to some other products because such financing is based on the value of the property, not the creditworthiness of the obligor (who can change along with ownership of the property), the Bureau does not believe that is a sufficient reason by itself to exclude C–PACE lending from coverage under this final rule. Section 1071 is not limited to those products with the highest fair lending risk. Second, the Bureau does not agree that data collection to provide additional insight into the product is unnecessary. Third, and most significantly, including C–PACE loans should create a more level playing field across financial institutions that provide construction financing to small businesses as well as create a dataset that better reflects demand for such financing by the smallest and most vulnerable businesses.

Overdraft lines of credit. In its NPRM, the Bureau did not address overdraft lines of credit other than asking whether they should be listed as a credit product separate from other lines of credit. The Bureau received one comment urging exclusion of overdraft lines of credit on the grounds that their inclusion would significantly expand the data collection requirements for small business deposit account applications since most such deposit accounts have an option to obtain an overdraft line of credit. This commenter also argued that collecting data on overdraft lines of credit would not further section 1071's purpose of preventing discrimination against small business credit applicants because banks conduct little, if any, underwriting when extending overdraft lines of credit on small business deposit accounts.

The Bureau is not categorically exempting overdraft lines of credit but notes that they are reportable only where there is an ''application'' under § 1002.103. Providing occasional overdraft services as part of a deposit account offering would not be reported for the purpose of subpart B pursuant to new comment 107(a)(6)–8.

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[483] 46 FR 20848, 20851 (Apr. 7, 1981).

[484] U.S. Chamber of Com., *65 Grants, Loans and Programs to Benefit Your Small Business* (Nov. 17, 2022), *https://www.uschamber.com/co/run/business-financing/government-small-business-grant-programs.*

[485] *See, e.g.,* Greenworks Lending, *C–PACE Financing Sees Massive Growth Nationally: What you should know about this alternative development financing mechanism* (June 7, 2021), *https://commercialobserver.com/2021/06/c-pace-financing-sees-massive-growth-nationally/.*

[486] ECOA section 704B(a).

Voluntary Reporting

Absent a specific requirement to collect protected demographic data (such as in section 1071), ECOA generally blocks collection of such demographic data in connection with an application for credit. The Bureau sought comment on whether financial institutions should be permitted to voluntarily collect and report applicants' protected demographic information for transactions such as leases (due to the practical difficulty cited by some stakeholders of distinguishing leases from loans), consumer-designated credit (when financial institutions have reason to believe the credit might be used for business purposes), and real estate investment loan transactions that are secured by non-owner occupied 1–4 dwelling unit properties pursuant to proposed § 1002.109.

The Bureau received comments from community groups and trade associations on this aspect of the proposal. A number of community groups stated that the Bureau should permit voluntary reporting on leases and factoring to have the most comprehensive data on the small business financing market as it relates to minority entrepreneurs. A community group purporting to address the proposed amendments to existing § 1002.5(a)(4) commented that the Bureau should permit voluntary collection not only by financial institutions not covered by the rule, but also should permit covered financial institutions to collect data on consumer credit used to fund small businesses.

The Bureau did not receive any industry comments expressing an interest in being able to voluntarily report non-covered products. In fact, a few trade associations and a business advocacy group expressly opposed such voluntary reporting. One trade association argued against voluntary reporting of non-covered transactions, citing concerns about the quality of data collected and the creation of an uneven playing field among financial institutions that would contribute to misinterpretations of the data by observers. Two other commenters also argued against the voluntary reporting of consumer-designated credit used for business purposes, asserting that such reporting would create confusion, introduce the possibility of error, and put financial institutions in a position to question their members' intentions.

For the reasons set forth herein, the Bureau is finalizing its approach to not permit voluntary reporting of non-covered products. The Bureau sought comment on voluntary reporting to address a potential pain point for industry but heard no industry interest in such a solution. The Bureau thus finds it unnecessary to change the proposed section 1071 collection system to receive data on such non-covered products. However, as discussed in the section-by-section analysis of § 1002.112(c)(3), the Bureau is adopting a catch-all safe harbor that will protect financial institutions who encounter the underlying situation that voluntary reporting was intended to address. Specifically, that safe harbor will address situations where a financial institution has a reasonable basis—at the time of collecting the protected demographic information required by this rule—to believe there is a covered application and that data collection is necessary, including situations in which it later determines that the transaction is not in fact reportable (because the ultimate transaction is not a covered product, the business is not small, or there is otherwise not a covered application).

Section 1002.105 Covered Financial Institutions and Exempt Institutions

ECOA section 704B(h)(1) defines the term ''financial institution'' as ''any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.'' The Bureau is finalizing a definition of financial institution in § 1002.105(a) consistent with that statutory language. The Bureau is defining a covered financial institution in § 1002.105(b) as a financial institution that originated at least 100 covered credit transactions from small businesses in each of the two preceding calendar years. Only those financial institutions that meet this loan-volume threshold in the definition of a covered financial institution would be required to collect and report small business lending data pursuant to proposed subpart B.

The Bureau's definitions reflect the broad nature of the data collection specified in section 1071, while recognizing the risks that financial institutions with the lowest volume of small business lending might limit their small business lending activity because of the fixed costs of coming into compliance with this rule.

The Bureau is finalizing § 1002.105 to implement ECOA section 704B(h)(1) and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.105(b) pursuant to its authority under 704B(g)(2) to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau is finalizing these provisions and using its exemption authority under 704B(g)(2) for the reasons set forth below.

105(a) Financial Institution

Proposed Rule

ECOA section 704B(h)(1) defines the term ''financial institution,'' for purposes of section 1071, as ''any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.'' Existing Regulation B, which implements ECOA, has not otherwise defined this term.

Proposed § 1002.105(a) would have restated the statutory definition of a financial institution as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. The Bureau believed that this definition reflects the broad nature of small business lending data collection specified in section 1071. Under such a definition, the rule's data collection and reporting requirements would apply to a variety of entities that engage in small business lending, including depository institutions (*i.e.,* banks, savings associations, and credit unions),[487] online lenders, platform lenders, CDFIs, Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit, nondepository lenders.

The Bureau noted that the broad scope of what may be considered a ''financial activity'' in the proposed

[487] Throughout this document, the Bureau is using the term depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1), or credit union defined pursuant to the Federal Credit Union Act, as implemented by 12 CFR 700.2. The Bureau notes that the Dodd-Frank Act defines a depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act; there, that term does not encompass credit unions. 12 U.S.C. 5301(18)(A), 1813(c)(1). To facilitate analysis and discussion, the Bureau is referring to banks and savings associations together with credit unions as depository institutions throughout this rulemaking, unless otherwise specified.

definition of financial institution would not be the principal determinative factor as to whether small business lending data collection and reporting is required; the proposed definition of a covered financial institution, the proposed definition of a covered application, and the proposed definition of a covered credit transaction, among others, all would impose limits on what entities could be subject to the rule's data collection and reporting requirements.

Proposed comment 105(a)–1 would have provided a list of examples of entities that may fit within the definition of a financial institution. This proposed comment would have made clear that nonprofit and governmental entities, governmental subdivisions, or governmental agencies, among others, who conduct financial activity fit within the definition of a financial institution. Proposed comment 105(a)–2 would have referred to proposed § 1002.101(a) to reiterate the statutory exclusion for motor vehicle dealers.

The Bureau sought comment on this proposed definition of a financial institution, and generally requested comment on whether additional clarification is needed.

Comments Received

A broad range of commenters, including lenders, trade associations, community groups, and business advocacy groups, expressed support for the Bureau's proposed general definition of financial institution. A number of commenters stated that it is an appropriately broad definition that captures a wide variety of lenders, including online lenders, platform lenders, lenders involved in equipment and vehicle financing, and commercial finance companies. Commenters asserted that a broad definition will yield meaningful data. Several commenters noted that capturing a broad array of lenders is essential for achieving the objectives of section 1071 and that a broad definition is important for regulatory parity. Other commenters stated that there should be no exceptions permitted for certain types of lenders and a community group stated that missing any segment of lending risks encouraging abusive lending institutions to violate fair lending laws. One trade association expressed opposition to the proposed definition, however, arguing that it is too broad because it includes captive vehicle finance partners.

Several commenters agreed that the rule must apply to government lenders, with one commenter specifically requesting inclusion of the Farm Service Agency. An association urged the Bureau to include as examples in the rule the largest Federal, State, and municipal lending programs.

Another trade association stated that SBA certified development companies are certified and regulated by the SBA, and the SBA already collects application information that includes the data points that the Bureau proposes to collect. The commenter further asserted that reproducing these data will likely incur significant one time and ongoing compliance costs. In contrast, a bank stated that data shows that the performance levels of the SBA and the lenders participating in their programs has produced dismal results, permitting some lenders to enjoy ''preferred'' lender status while not delivering loans to disadvantaged communities. Moreover, two commenters urged the Bureau to work with other government agencies to ensure that existing reporting is leveraged where possible.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.105(a) and its associated commentary as proposed. The Bureau emphasizes that the list of examples of entities in comment 105(a)–1 is not exhaustive and that other entities not specifically described may nonetheless fit within the definition of a financial institution under § 1002.105(a). The Bureau agrees with commenters that governmental lenders should be covered by the rule. As explained in the proposed rule, the Bureau interprets the statute to include government entities in the definition of financial institution. The definition of the term ''financial institution'' in ECOA section 704B(h)(1) includes the phrase ''or other entity.'' That term readily encompasses governments and government entities. Even if the term ''or other entity'' were ambiguous, the Bureau believes—based on its expertise and experience—that interpreting it to encompass governments and government entities promotes the purposes of section 1071.

For example, the Bureau believes that it will be helpful to identify the business and community development needs and opportunities of small businesses, including those that are women-owned, minority-owned, and LGBTQI+-owned, by collecting lending data from both a county-run assistance program for establishing new businesses and financial institutions that operate nationwide, like online lenders. The Bureau also believes that the terms ''companies'' or ''corporations'' under the definition of ''financial institution'' in ECOA section 704B(h)(1), cover all companies and corporations, including government-owned or -companies and corporations. And even if those terms were ambiguous, the Bureau believes—based on its expertise and experience—that interpreting them to cover government-owned or -companies and corporations advances the purposes of section 1071, particularly the business and community development purpose, as it will more accurately capture demand for credit.

The Bureau is not, however, listing specific examples of covered governmental lenders/programs in the rule. The Bureau does not believe such a list is necessary, and inclusion of a specific list could cause confusion if the listed programs (or those lenders' loan volumes) were to change.

In response to commenters who raised potential overlap with other reporting regimes, see part V.D.3 for a detailed discussion of this issue.

Commenters' requests for specific exclusions, such as for captive vehicle finance partners, are discussed in the section-by-section analysis of § 1002.105(b) below.

105(b) Covered Financial Institution

Background

Throughout the rulemaking process, the Bureau has received requests to adopt a variety of exemptions from collection and reporting requirements under section 1071. Reasons cited have included discouraging market disruption, ensuring data quality, alleged lack of materiality of data from smaller lenders that rarely make small business loans, and lack of capacity by the lenders sufficient to justify small business lending as a line of business in light of the cost of complying with the rule.

As detailed below, the Bureau is adopting an activity-based exemption. The Bureau defines a covered financial institution in § 1002.105(b) as a financial institution that originated at least 100 covered credit transactions from small businesses in each of the two preceding calendar years. Only those financial institutions that meet this loan-volume threshold in the definition of a covered financial institution will be required to collect and report small business lending data under this rule. The final rule does not include categorical exemptions for particular types of institutions from coverage, but the Bureau notes that its Regulation B does not apply to motor vehicle dealers.[488]

[488] Regulation B does not apply to a person excluded from coverage by section 1029 of the Consumer Financial Protection Act of 2010, title X

Proposed Rule

Activity-based exemption. In the SBREFA Outline, the Bureau stated that it was considering whether only financial institutions that engage in a certain amount of small business lending activity should be required to collect and report 1071 data.[489] The Bureau explained that in light of section 1071's potentially broad application to financial institutions, an activity-based test to determine reporting responsibility might be appropriate. In particular, the Bureau expressed concern that financial institutions with the lowest volume of small business lending might limit their small business lending activity because of the fixed costs of coming into compliance with the rule. The Bureau stated that this result could be contrary to the community development purpose of section 1071.

In the NPRM, the Bureau stated that it believed that an activity-based threshold would provide a simple basis for financial institutions that infrequently lend to small businesses to determine whether they have conducted sufficient lending activity as to be required to collect and report data under proposed subpart B. The Bureau believed that furnishing a dual activity-based and asset-based threshold, under which infrequent lenders must ascertain both measurements to determine whether reporting may be required, would cut against the goal of simplifying the rule as lenders would then have to track two metrics, not one. The Bureau believed that a dual threshold would create more regulatory complexity as compared to only tracking total annual small business originations.

In particular, the Bureau believed that a primary advantage of an activity-based threshold—ease of compliance—would be undermined if the Bureau were to implement a complex, dual threshold eligibility test. The Bureau wished to ensure that infrequent lenders were not incurring significant undue compliance costs, particularly while not reporting data. In general, tracking two thresholds is more complex than tracking one. The Bureau believed it is also more likely that financial institutions are already tracking total originations. The Bureau believed that proposing an activity-based threshold that employs data already generally collected by financial institutions could mitigate the risk that section 1071, when implemented, would result in reduced access to credit.

Activity threshold level. Proposed § 1002.105(b) would have defined a covered financial institution as a financial institution that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. Only those financial institutions that meet this loan-volume threshold in the definition of a covered financial institution would be required to collect and report small business lending data pursuant to subpart B.

The Bureau believed this definition would facilitate compliance by describing which financial institutions are required to collect and report small business data. The Bureau also proposed commentary to accompany proposed § 1002.105(b). In general, the Bureau believed that fulfilling the purposes of section 1071 necessitates collecting small business lending data from all sizes and types of financial institutions (other than those with a low volume of lending activity), particularly given the variety of entities identified in ECOA section 704B(h)(1). The Bureau proposed to exempt certain financial institutions from its small business lending rule because it remained concerned that financial institutions with the lowest volume of small business lending might limit their small business lending activity due to the fixed costs of coming into compliance with the rule. That type of market disruption could run contrary to the business and community development purpose of section 1071. Section 1071 describes its community development purpose as ''enabl[ing] communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.''[490] In the Bureau's view, ensuring that business and community development opportunities could be met as well as identified supported the Bureau's use of its exemption authority under 704B(g)(2) here.

The Bureau proposed to set the activity-based threshold based on small business originations, rather than applications. The statutory language of section 1071 generally applies to applications; however, the Bureau believed that using small business originations for purposes of defining a covered financial institution is the better approach. The Bureau expected that financial institutions track their small business application volumes in various ways, but whether an origination resulted was a clear and readily identifiable metric. Using an exemption metric based on applications would have imposed new obligations on financial institutions solely for purposes of determining whether or not they are subject to this rule. As discussed above, the Bureau believed that proposing an activity-based threshold that employed data already generally collected by financial institutions could mitigate the risk that section 1071, when implemented, would result in reduced access to credit. In addition, even those financial institutions that track total applications now may not do so in a way that fully aligns with how the Bureau proposed to define covered applications for purposes of proposed subpart B. Using the number of originations, as opposed to applications, for an activity-based threshold was also consistent with the Bureau's Regulation C.

The Bureau proposed to clarify in § 1002.105(b) that for purposes of defining a covered financial institution, if more than one financial institution was involved in the origination of a covered credit transaction, only the financial institution that made the final credit decision approving the application shall count the origination. The Bureau believed that providing this clarifying language would assist financial institutions in understanding which transactions count towards the loan-volume threshold. This approach was consistent with the Bureau's proposed § 1002.109(a)(3).

Proposed comments 105(b)–4 and –5 would have explained when a financial institution was a covered financial institution following a merger or acquisition. These proposed comments were largely consistent with the Bureau's approach to reporting obligations surrounding a merger under Regulation C,[491] with modifications to reflect the nature of the small business lending market and to provide additional clarifications.

Proposed comment 105(b)–6 would have clarified that Regulation B (including proposed subpart B) generally did not apply to lending activities that occur outside the United States.

Finally, proposed comment 105(b)–7 would have addressed financial institutions that do not qualify as covered financial institutions but may nonetheless wish to voluntarily collect and report small business lending data. This proposed comment would have reiterated that proposed

of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 2004 (2010).

[489] SBREFA Outline at 12–13.

[490] ECOA section 704B(a).

[491] *See* Regulation C comments 2(g)–3 and –4.

§ 1002.5(a)(4)(vii) through (ix) permitted a creditor that was not a covered financial institution under proposed § 1002.105(b) to voluntarily collect and report information regarding covered applications in certain circumstances. If a creditor is voluntarily collecting applicants' protected demographic information for covered applications, it shall do so in compliance with proposed §§ 1002.107, 1002.108, 1002.111, 1002.112, and 1002.114 as though it were a covered financial institution. Proposed comment 105(b)–7 would have further stated that if a creditor was voluntarily reporting those covered applications to the Bureau, it shall do so in compliance with proposed §§ 1002.109 and 1002.110 as though it were a covered financial institution.

The Bureau sought comment on its proposed 25 originations threshold incorporated into the definition of a covered financial institution. The Bureau also solicited comment on whether this threshold should alternatively be set at 50 or 100 covered credit transactions. In addition, the Bureau sought comment on whether an activity-based threshold should be based on the total number of small business applications, rather than originations. The Bureau also requested comment on whether additional clarification was needed for this proposed definition.

Two-year threshold measurement period. The Bureau proposed to define a covered financial institution using a loan-volume threshold that must be achieved in each of the two preceding calendar years.

The Bureau acknowledged that a loan-volume threshold based on a two-year period could create some operational complexity for some financial institutions. To be sure that it was not a covered financial institution, a financial institution would need to maintain records sufficient to show total small business originations for both years of the threshold period. The Bureau believed that two years was not a prohibitively long time, although it is possible that infrequent lenders may have smaller staff or fewer resources to reliably track such information for section 1071's purposes. The Bureau believed that a two-year threshold period was advisable to eliminate uncertainty surrounding data collection responsibilities. Under this proposal, a financial institution that may not frequently lend to small businesses, but that experiences an unusual and unexpectedly high lending volume in a single year would not be a covered financial institution. As discussed in part VIII below, in order to comply with the Bureau's rule, a financial institution may need to undertake substantial one-time costs that include operational changes, such as staff training, information technology changes, and develop policies and procedures. Therefore, the Bureau believed it appropriate to propose a two-year threshold period to provide more stability around reporting responsibilities. Regulations that implement HMDA and the Community Reinvestment Act provide similar periods to determine coverage.

The Bureau noted that employing a two-year approach would delay reporting for new, potentially active entrants. For example, under this proposal a large lender that enters the market and originates hundreds or even thousands of small business loans in its first two calendar years of lending would not report its covered applications. That is, under the Bureau's proposal, this financial institution would not be required to collect and report data on its covered applications for small businesses in those first two years, although the institution could choose to voluntarily collect and report data. The Bureau recognized, however, that triggering data collection and reporting requirements based on lenders' estimates of their projected future volume could be challenging to implement.

The proposed two-year threshold period could pose other challenges for financial institutions that conduct small business lending activity near the proposed 25 small business originations threshold. See the section-by-section analysis of § 1002.5(a)(4) above for a discussion of § 1002.5(a)(4)(viii), which would allow a financial institution to collect ethnicity, race, and sex information pursuant to proposed subpart B for a covered application under certain circumstances during the second year of the threshold period. See the section-by-section analysis of § 1002.114(c)(2) below for discussion of additional flexibility that the Bureau is finalizing regarding measuring lending activity prior to the rule's compliance date.

Proposed comment 105(b)–1 would have clarified the meaning of a preceding calendar year for purposes of the proposed activity-based threshold. See the section-by-section analysis of § 1002.114(c)(3) below for additional discussion regarding measuring lending activity prior to the rule's compliance date. Proposed comment 105(b)–2 would have emphasized that a financial institution qualifies as a covered financial institution based on total covered credit transactions originated for small businesses, rather than covered applications received from small businesses. Proposed comment 105(b)–3 would have explained that whether a financial institution is a covered financial institution depends on its particular small business lending activity in the two preceding calendar years, and that the obligations of a covered financial institution is an annual consideration for each year that data may be compiled and maintained under proposed § 1002.107(a).

Other requested exemptions. The Bureau did not propose to adopt alternative exemptions or exceptions to the definition of covered financial institution, other than the loan-volume threshold as described above.

With respect to government lenders, in the proposal the Bureau stated that it has not identified, nor did small entity representatives or other stakeholders provide, policy or legal rationales for excluding government lenders from the rule. The Bureau believed that collecting information on small business lending by government entities furthered the purposes of section 1071. Moreover, the Bureau believed, as described above in the discussion of proposed comment 105(a)–1, that government entities were included within the phrase ''other entity'' in the ECOA section 704B(h)(1) definition of ''financial institution.'' For example, the Bureau believed that it would be helpful to identify the business and community development needs of women-owned, minority-owned, and small businesses by collecting lending data from both an online lender and a county-run assistance program for establishing new businesses.

For the same reasons, the Bureau did not believe that exempting not-for-profit lenders from data collection was consistent with the purposes of section 1071. The Bureau believed that organizations exempt from taxation pursuant to 26 U.S.C. 501(c) play a crucial role in lending to small businesses, particularly those that are women- or minority-owned, in certain communities.

With respect to the concern that certain financial institutions may encounter difficulty absorbing compliance costs, the Bureau believed that directly considering a financial institution's activity is a more appropriate way to address this concern and not a categorical exemption. With respect to a financial institution's lending importance for a community or region (such as low income or rural) as a reason to include categorical exemptions, the Bureau believed that

such arguments emphasize the importance of collecting and analyzing such data to further the purposes of section 1071 rather than justify an exemption. Finally, with respect to the concern that certain business models or products are not conducive to data collection or reporting, the Bureau believed it would most appropriately address such concerns by providing clarification regarding how reporting rules apply to certain covered credit transactions and also not covering certain transactions. See the section-by-section analyses of §§ 1002.104(b) and 1002.109(a)(3). The Bureau proposed comment 105(a)–1, discussed above, consistent with the considerations discussed here.

Therefore, for the reasons described above, the Bureau did not propose to define a covered financial institution by providing alternative exemptions or exceptions. The Bureau sought comment on this approach, including data or information that might bear upon any such alternative exemptions in light of section 1071's purposes.

Comments Received

Commenters expressed a variety of perspectives with respect to the Bureau's proposal regarding potential exemptions. Feedback from most industry commenters generally was in support of exempting certain financial institutions from data collection and reporting obligations. Most feedback in support of pursuing exemptions focused on the potential burden of new regulatory requirements, with some commenters cautioning that collection and reporting obligations could lead to an increase in the cost of credit and could cause lenders to exit the market. A few commenters connected these potential costs with section 1071's purpose of identifying business and community development needs and opportunities (chiefly arguing that costs might lead to higher costs of lending or lower lending volume), or otherwise expressed a general belief that some exemptions were consistent with statutory purposes. In addition, many commenters, mostly community groups, urged caution with respect to the extent of any such exemptions, arguing that not capturing a significant amount of small business lending data would run contrary to the general purposes of section 1071.

Activity-based exemption. Many commenters supported the general concept of an activity-based threshold. A large bank asserted that an origination-based approach would ensure that collected data represents a comprehensive view of the small business lending landscape. A few commenters stated that a clear, bright line rule is helpful, and that an activity threshold is relatively simple for low-volume lenders to apply. Moreover, two commenters said that an activity threshold creates a level playing field, while a CDFI lender stated that such an approach will ensure that the Bureau captures data from lenders that are small in asset size but active in small business lending. Two commenters, however, noted that some lenders may not currently track applicant GAR and this may somewhat increase burden of counting originations to small businesses.

A community group urged the Bureau to guard against evasion of the activity-based threshold through the creation of subsidiaries, stating that the Bureau should include a rule that for the purposes of determining the loan threshold, loans are counted at the parent institution or holding company level.

A number of commenters opposed an activity-based threshold. Two banks stated that it was confusing because the threshold is only for originations, yet all applications are reported. One of the banks stated that a financial institution may not know whether it would meet the threshold until very close to the reporting period, while another bank stated it may be difficult to know which loans are covered for purposes of determining loan activity.

Several industry commenters asserted that an activity-based threshold is not a good metric for banks, with several banks suggesting that an asset-size coverage definition would be more straightforward and consistent. Commenters explained that lending varies each year, while assets are more predictable and forecastable. A few community banks stated that an activity-based threshold based solely on originations is misguided and results in a one-size-fits-all exemption that disregards the unique characteristics that exist in communities across the country, resulting in reduced access to credit. Several industry commenters stated that an activity-based threshold could encourage lenders to deny applications or reduce their lending to stay under the threshold. Additionally, several commenters noted that some lenders near the threshold may go back and forth between being covered or not.

Counting originations. Several lenders, trade associations, and a community group, expressed support for counting originations, not applications, for determining coverage. The community group asserted that this approach is consistent with CRA and HMDA.

A few commenters provided feedback on how originations should be counted for purposes of determining the threshold. A trade association asserted that all Paycheck Protection Program loans and similar future government programs should be exempt from the originations threshold. In addition, two commenters stated that additional credit amounts, such as line increases, should not count as a separate credit product for purposes of counting originations for the threshold. One noted that very small businesses may request multiple line increases in a year.

Activity threshold level. The Bureau received a large number of comments regarding the activity threshold level from a range of stakeholders, including lenders and community groups. Many community groups and some industry commenters, including community-oriented lenders and a few large banks, along with a minority business advocacy group and several members of Congress, supported the proposed 25 loan threshold, citing its broad coverage. Commenters stated that the proposed threshold allows for coverage of banks, nondepository lenders, ''fintech'' lenders, CDFIs, and other types of financial institutions. A community-oriented lender argued that gathering data from small business lenders or all types and sizes is critical, given that entrepreneurs of color are less likely to be approved for capital by banks, often turning to alternative lenders as a result. Another commenter stated that even a 25-origination lender will have substantial data with respect to adverse actions or declinations, up to four times as much.

Commenters asserted that this threshold was an appropriate approach to excluding *de minimis* lenders, was simple to apply, and would yield meaningful data collection. A few commenters argued that the activity threshold should not be increased above 25 loans, given the Bureau's estimated costs of compliance. Some commenters cited similarities to the 2015 HMDA rule, with one commenter further asserting that when the HMDA threshold was raised, certain lenders no longer reported data. Commenters asserted that gathering robust lending data will ensure that the rule implementing section 1071 is fulfilling the statutory purposes and community development organizations need sufficient data that cover enough of the market. In addition, one commenter urged a 10-loan threshold, asserting that is the minimum threshold that is necessary to change lending behavior

and improve access to capital for Black business borrowers. This commenter further asserted that all regulated financial institutions that maintain FDIC deposit insurance should report their small business lending results.

Many commenters, including community groups, community-oriented lenders, individual commenters, and a business advocacy group, emphasized that section 1071's statutory purposes could be frustrated if the threshold were increased. Commenters argued that it would be impossible to meet the statutory purposes of the rule unless most of the market is covered. A commenter further asserted that if the threshold were increased, the database would no longer be statistically representative of actual lending and would not be able to accurately reveal whether credit needs were being met in all communities. Commenters stated that increasing the threshold will disproportionately harm many small business owners, rural communities, banking deserts and redlined areas that may find that "small" lenders make up a significant portion of the local lending market. Commenters stated that accurately measuring access to credit, and pursuing fair lending enforcement when warranted, would be substantially diminished if too many lenders and loans are exempt from reporting, particularly in smaller cities and rural areas. Another commenter asserted that if the Bureau elected to use a higher threshold it would exclude gathering data from commercial lenders that are small, but still impact many people. Moreover, a commenter stated that the Bureau's estimates show decreased coverage of banks at higher thresholds.

Commenters stated that it is important to ensure coverage of rural areas, which may be in persistent poverty, and which are often served by small lenders. Moreover, a community group stated that the threshold must cover intermediate-sized banks, which are important to rural communities and small cities, and whose information has been missing from CRA data since 2003. Commenters stated that increasing the threshold could frustrate enforcement of the CRA, and risk the chance that the data are not representative of the actual small business lending landscape. A commenter further asserted that comprehensive data are needed to assist in fair lending actions at the local level.

In contrast, nearly all industry commenters opposed the proposed coverage threshold of 25 originations annually for two consecutive years. Commenters stated that the threshold was too low and would lead to increased costs and burden, particularly for community banks and credit unions. Numerous banks and trade associations expressed concern that too many small banks would be subject to the rule with a 25-loan activity threshold. For example, two trade associations asserted that at least 780 banks under $100 million in assets would be subject to reporting, and these institutions average 13 employees at 1.6 branches. In addition, several members of Congress asserted that the proposed threshold levels for the rule were far too stringent, and would drastically impact the ability of small institutions to make loans to small businesses and decrease access to credit for minority-owned, women-owned, and small businesses. Several commenters argued that small lenders have little data to offer relative to the costs of acquiring the data. One also asserted that it was unreasonable to subject thousands of additional small depository institutions to a complex and costly rule to collect data on approximately four percent of the small business lending market. Many of commenters suggested higher thresholds, with requests ranging from 100 to 1,000 transactions annually, using the same two-year test. In particular, a large number of commenters requested thresholds at 100, 200, 500, or 1,000 loans annually.

A number of industry commenters supported a 100-loan threshold. Many of these commenters urged the Bureau to set institutional coverage similar to HMDA at that time, both for consistency and because lenders already reporting HMDA data would incur lower compliance costs because they already have data collection systems in place. Moreover, commenters asserted that a 100-loan threshold would still capture an estimated 95 percent of businesses loans in the country.

Conversely, a CDFI lender and two business advocacy groups opposed a 100-loan threshold, arguing that the Bureau's estimates show narrower coverage of small business lending at that threshold level. Another CDFI lender stated that nearly a half billion in lending would be obscured from reporting in its community with a 100-loan threshold.

A credit union trade association stated that a 100-loan threshold was too low. This commenter asserted that researchers draw statistically significant conclusions from HMDA data which covers approximately 90 percent of the mortgage market, and because a 100-loan threshold covers more than that percentage of the small business market, the rule would gather more data than is necessary.

In the context of discussing the rule's threshold, numerous commenters, including community banks, credit unions, and trade associations, along with a group of State bank regulators, cautioned the Bureau regarding the risk of small lenders exiting the market due to the rule's burden. Commenters argued that the rule will damage small institutions' ability to remain competitive and would favor large lenders with large compliance teams. Many commenters stated that small community banks and credit unions lack the staff or resources, including automation capabilities, to comply with the reporting requirements, with numerous institutions sharing the limited number of full-time staff that they had dedicated to business and agricultural lending.

Commenters further argued that Dodd-Frank Act mortgage rules resulted in many community banks leaving the mortgage lending business, and this proposal would produce similar results. For example, several commenters argued that HMDA and TILA–RESPA integrated disclosure rules led to market exodus, and they were concerned that there would be similar market exit of local lenders following the proposed rule implementing section 1071.[492] Commenters stated that communities could be left without a hometown bank and small businesses may seek credit from unregulated lenders. Moreover, two national trade associations stated that about 30 percent of surveyed franchised light-duty and commercial truck dealerships would discontinue small business credit extensions.

Several commenters also argued that the rule would exacerbate bank consolidation, particularly in rural and underserved areas, as the additional regulatory burden on community banks would lead to more mergers and acquisitions. Commenters further asserted that consolidation would reduce lending options for consumers and small businesses, and would discourage some smaller financial institutions from making small business loans. A few commenters stated that the rule would damage relationship banking and create an environment with less competition.

Numerous commenters also asserted that the rule is likely to reduce access to credit, as small banks and credit unions do not have the economies of scale to absorb the reporting costs, and thus compliance costs will be passed

[492] CFPB, *Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z),* 78 FR 80225 (Dec. 31, 2013).

along to small business customers. Several commenters stated that they would have to reconsider their product offerings. For example, one bank stated that they might need to also reconsider their consumer product offerings and prices, and a credit union stated they might consider reducing lending to avoid being covered by the rule. In addition, one bank stated that they may need to charge additional fees for agricultural borrowers, while another bank stated that they would either need to increase their origination fee or greatly increase the minimum loan amounts. Another bank stated that as operating costs increase, they will be forced to adjust their business model by either increasing interest rates on loans, decreasing interest rates on deposits, or implement other account fees. Moreover, several commenters stated that the 25-loan threshold would limit small business lending flexibility, which could stifle lending innovation and result in lenders choosing to set minimum loan amounts.

In addition, many commenters argued that the 25-loan threshold would have a negative effect on lending in small and rural communities. Commenters stated that small banks, which are vulnerable to increased compliance costs, are often located in rural areas where lending options are limited. Several commenters stated that the rule risks underserved areas being afforded fewer loan options. Commenters further asserted that the rule's regulatory burden would drive consolidation in rural and underserved areas, limiting access to credit in these communities.

Several commenters drew comparisons to HMDA. One bank stated that when it was subject to HMDA reporting, they struggled with compliance and eventually elected to reduce lending. In addition, several commenters asserted that the proposed 25-loan threshold was inconsistent with the reporting threshold of 100 closed-end mortgages in Regulation C at the time. Commenters argued that although their institution was exempt from HMDA reporting, and although their commercial lending unit is small, they would not qualify for the proposed 25-origination exemption from reporting under section 1071. A State bankers association stated that half of their survey respondents are exempt from HMDA, while only six believed they would be exempt with a 25-loan threshold. The commenter further stated that these small financial institutions—83 percent under $250 million in assets—have no data collection infrastructure in place. Some other commenters similarly asserted that many smaller institutions do not have data collection infrastructure in place and stated that they would incur significant costs.

In addition, some commenters asserted that the Bureau did not provide a sufficient rationale for a 25-loan threshold, arguing that the Bureau has not shown why this threshold is necessary and appropriate to carry out section 1071's purposes. Several commenters argued that the Bureau could obtain sufficient data at a higher threshold. Another commenter stated that the Bureau did not fully consider coverage, in particular how much data would be forgone at each threshold. A group of trade associations further asserted that the Bureau is obligated to provide coverage estimates for nondepository institutions and that RFA estimates are not sufficient.

While the Bureau did not propose an asset-based threshold in the proposed rule, numerous industry commenters requested an asset size threshold, ranging from $50 million to $10 billion. However, some industry commenters as well as community groups counseled against an asset-based exemption, arguing that exemptions should be based instead on lending activity, and that size-based exemptions risked under-reporting in important markets. For example, one commenter stated that an asset-based threshold could affect different regions of the country and risk ''blind spots'' in the data. Some commenters said that assets are not an applicable measurement for many lenders, such as nondepository institutions. A bank trade association stated that asset-based exemptions have been exploited by market disruptors partnering with exempted institutions to create an uneven regulatory playing field.

Other requested exemptions. A number of commenters opposed exemptions for specific categories of lenders (consistent with the Bureau's proposal), with several commenters noting that capturing a broad array of lenders is essential for achieving the objectives of section 1071. Some commenters asserted that the rule must apply to government and public sector lenders, merchant cash advance companies, nondepository lenders, non-profit lenders, online lenders, and/or commercial finance providers. A State bankers association stated that the Bureau should specifically name industrial loan companies to make clear that all nonbank entities making small business loans are covered by the rule. Community groups asserted that all lenders are obligated to comply with fair lending laws, and requiring data disclosure will assist with ensuring compliance. Moreover, several industry commenters stated that a broad definition is important to ensure a level regulatory playing field and to ensure a comprehensive view of the entire small business lending market. A bank trade association urged the Bureau to pay close attention to nonbank lenders, which the commenter stated are roughly 30 percent of the current market and not currently subject to the Bureau's supervision.

In contrast, a large number of industry commenters urged the Bureau to exclude specific types of entities from coverage under the rule. Some requested that certain types of lenders such as credit unions or CDFIs be excluded from the rule entirely, while others requested certain indirect lending/multi-party business models be excluded, such as when applications are made via loan brokers, equipment dealers, or motor vehicle dealers. Numerous industry commenters noted the unique burdens they believed the rule would place on small banks and credit unions, while a subset of these commenters argued that the Bureau should exempt these smaller institutions from the rule altogether.

Several commenters requested an exemption for CDFIs, stating that they are mission-driven institutions and dedicating resources to new regulatory requirements would detract from their community focus. Moreover, some commenters argued that requiring CDFIs to report would be duplicative, as CDFIs already report lending data to the CDFI Fund that shows that they are providing financial products for small businesses in their communities. Commenters further cited the Treasury Department's certification process for CDFIs and stated that CDFIs are already held to a high standard. Several commenters cited that the Bureau decided to exempt CDFIs when implementing the Qualified Mortgage rule. Conversely, a number of community groups argued that the rule must apply to all financial institutions, including CDFIs.

A number of commenters urged the Bureau to exempt community banks from reporting requirements, stating that community banks already incur substantial regulatory burden and would be put at a competitive disadvantage under the rule. Several commenters emphasized the ''high-contact and relationship-based business lending model'' of community banks. A community bank asserted that community banks should be commended for advancing over 50 percent of the nation's small business loans and over 80 percent of the nation's agriculture loans despite holding less

than 20 percent of the nation's deposits. Another community bank stated that currently they are not subject to HMDA or CRA reporting requirements and thus this rulemaking poses the threat of significant new burdens on small community banks as well as on those community banks that are already subject to HMDA reporting.

In addition, some commenters stated that covering community banks will have the opposite effect of section 1071's purposes. Commenters asserted that community banks would incur substantial burden in gathering new data, which would make it more burdensome and expensive to offer small business loans, thus raising the cost of credit. A community bank stated that, if adopted as written, the rule's paperwork burden will harm community banks, waste critical resources, and further restrict lending. Another community bank stated that the rule as proposed may very well be the final straw of regulation that will drive small community banks out of business with devastating impact on the small communities they serve. Moreover, commenters argued that the Bureau was designed to regulate large, complex financial institutions, not community banks.

Several commenters also urged the Bureau to exempt credit unions from reporting requirements, stating that credit unions have not demonstrated a pattern of unfair lending, that they seek to help women-owned and minority-owned businesses, and that credit unions are member-owned and not-for-profit. A trade association asserted that credit unions would like to furnish more small business loans, but a reporting regime will increase costs. Some commenters stated that exempting credit unions would allow them to remain competitive lenders and would avoid imposing new burdens on members. In contrast, a number of commenters—including community groups, community-oriented lenders, a business advocacy group, and a bank trade association—opposed special treatment for credit unions, citing a 2020 Federal Reserve study that shows a higher percentage of Black and Hispanic-owned firms sought loans from credit unions and CDFIs. In addition, a commenter stated that 2018–2020 HMDA data show that 73 percent of credit union lending in Mississippi went to white borrowers and 15 percent to Black borrowers.

One farm credit lender stated that Farm Credit System institutions should be exempt from collection and reporting, while another asserted that FCA financial institutions should have a qualified exemption that permits voluntary reporting. The latter commenter stated that these financial institutions are already reporting lending on Young, Beginning, and Small lending efforts and volume to the Farm Credit Administration. In addition, one commenter asserted that a lack of understanding of the Farm Credit System by the Bureau in this rulemaking will have unintended consequences for their customers. In contrast, a community group urged the Bureau to apply the rule implementing section 1071 to agricultural lenders, stating that historic discrimination against minority and disadvantaged groups has been well documented in agriculture, and including agricultural lenders will hold financial institutions accountable to equitably serving small farms and mid-sized farms, beginning farmers, and historically underserved farmers. Another community group asserted that Farm Service Agency activity should also be covered by the rule.

Several commenters requested an exemption for institutions outside of Metropolitan Statistical Areas, with many specifying that rural institutions should be exempt from the rule. Commenters stated that rural banks and credit unions often play a vital role in their communities and acquiring data from rural lending will result in fewer institutions willing to conduct rural lending. Several industry commenters asserted that the new burden to these institutions will increase the cost of credit, and will be a significant detriment for local small businesses seeking access to credit. A bank argued that many rural loans are small dollar loans to sole proprietors such as farmers and ranchers and without an exemption, the nation's most rural and remote borrowers will have a harder time obtaining credit for their businesses.

Two banks requested exemptions for CRA reporters, arguing that financial institutions subject to Board, FDIC, or OCC regulations under the CRA are already being assessed to ensure that they are identifying and meeting the credit needs of the small businesses in their communities. In addition, one of the banks stated that CRA-examined institutions with at least a satisfactory rating for its two previous exams should be exempt from reporting requirements. In contrast, another commenter opposed exempting CRA reporters, stating that big banks and ''shadow lenders'' have the most impact on small business lending and have thwarted the effective oversight and enforcement of the CRA.

The Federal Home Loan banks argued that they should be exempt from the rule, explaining that the proposed definition of covered financial institution inadvertently would capture lending to their financial institution member/borrowers because those members are small businesses. They stated that applying the rule implementing section 1071 to them is unnecessary in light of the comprehensive FHFA regulatory regime that applies to credit extended by the Federal Home Loan banks to their small and diverse financial institution members.

A trade association urged the Bureau to exempt SBA certified development companies from the rule, stating that these financial institutions are certified and regulated by the SBA and have a mission to assist small businesses with access to capital, including businesses in underserved communities. In addition, two development companies stated that they do not have the budget to incur these new reporting costs.

A few commenters requested an exemption for minority depository institutions. A national trade association asserted that Congress has determined that such institutions play an important role in serving underserved communities and minority populations, the intent behind section 1071 is already met by minority depository institutions, and therefore, the rule should not redundantly be applied to this special class of financial institutions. One bank stated that minority depository institutions are mission-driven to support their communities, while another bank asserted that these institutions are certified by the Treasury Department for serving historically underserved communities and/or low-to-moderate income Americans.

A trade association stated that retailers by their very nature are not financial institutions and thus should not be covered by the rule. The commenter further argued that applying this rule to retailers will have a negative impact on retail employees and customers as offering credit at retail could be reduced or eliminated, affecting overall access to credit. Moreover, the commenter stated that the retail environment is different from a typical bank, in that employees are not trained in the specifics of financial products, and the environment may not be practical for obtaining more sensitive information.

Two trade associations requested an exemption for loan brokers. One argued that there could be duplicative or inaccurate reporting in cases where technology companies match an applicant with multiple third-party

lenders. The other argued that it is appropriate to have a similar approach to HMDA and data can be obtained from the lender instead of the broker.

Several commenters urged the Bureau to exempt indirect lending transactions where the applicant interacts only with a vendor partner, such as equipment dealers and manufacturers. Commenters argued that the financial institution does not directly interact with the applicant, only the dealer or manufacturer, and thus the fair lending purpose of section 1071 would not be furthered. A trade association asserted that such an exemption would be consistent with the Bureau's proposed approach to motor vehicle dealers. A business advocacy group stated that, alternatively, there should be flexibility with respect to the timing and collection of this information. They further argued that the equipment dealer or manufacturers' employees are not trained staff for the financial institution and the data may be less accurate.

Some commenters stated that indirect auto lenders should be exempt from the rule. One commenter stated that the Bureau should exclude motor vehicle dealers, and by extension, financial institutions when they are working with motor vehicle dealers. Two commenters stated that while indirect lenders may be involved in credit decisions, compliance with the rule would be difficult, as the financial institutions that evaluate and purchase the auto loan never meet the applicant. One also said that it was unclear what information indirect lenders would be required to gather.

In addition, two motor vehicle dealer trade associations urged the Bureau to exempt motor vehicle dealers. They argued that collecting new data will slow applications, raise compliance burden, and increase the risk of inaccurate data. They stated that motor vehicle dealers do not have the resources to comply with a rule in the manner that a financial institution would. Moreover, they stated that survey data indicates 30 percent of dealers might choose to leave the market rather than face these compliance costs. Two other trade associations pointed to Board regulations implementing ECOA and argued that the dealer would be prohibited under the law from asking the business owner for ethnicity, race, and sex demographic data. In addition, a bank expressed confusion over how a covered financial institution can require an exempt motor vehicle dealers to collect 1071 data. Another commenter noted that many dealers act as intermediaries between buyers and financial institutions, and requested that the Bureau work with small motor vehicle dealers to make the direct and indirect impacts of the rulemaking the least burdensome possible.

One State bankers association asserted that much valuable small business lending data will not be captured given the Dodd-Frank Act exclusion for motor vehicle dealers and urged the Bureau to advocate in Congress as necessary to include them in the rule.

A trade association urged the Bureau to exempt captive vehicle partners from reporting, arguing that these institutions are inextricably tied to entities that are exempt. The trade association further argued that it would be confusing in terms of reporting responsibility, as there are many creditors involved in a single loan and its subsequent assignment, and the finance partner does not directly interact with the applicant. Furthermore, the commenter stated that a lack of regulatory relief could lead to market exit and that captive finance companies are crucial to the economy.

Commenters urged the Bureau to exempt a variety of other entities, including institutions outside of direct CFPB supervisory authority, mission-driven banks, and financial institutions that identify as small businesses. In addition, some commenters urged the Bureau to adopt exemptions similar to HMDA using exemption factors such as asset size, location test, federally related test, and loan activity. One merchant cash advance provider stated that merchant cash advance funders should not be considered covered financial institutions because they do not extend credit or provide loans.

In addition, several commenters cited the firewall requirement and said that certain financial institutions should be exempted from the entire rule due to the challenges associated with the statutory firewall provision. One commenter said that banks under $1 billion should be exempted on this basis, a few said community banks should be exempted on this basis, and one commenter said that all but the largest lenders or all depository lenders should be exempted.

Two-year threshold measurement period. Commenters who addressed the issue were in support of a two-year threshold measurement period, with one community group citing its consistency with CRA and HMDA.

Final Rule

For the reasons set forth herein, the Bureau is revising § 1002.105(b) to set the activity-based coverage threshold at 100 originations in each of the two preceding calendar years, rather than 25 originations as proposed. The Bureau is also finalizing its proposal not to exempt particular types of institutions from the rule. The Bureau believes that a 100-loan activity threshold achieves section 1071's purposes while minimizing any risk that low volume small business lenders would reduce their lending activity. The Bureau is adding comments 105(b)–3 and -4, as explained below, as well as making other minor revisions to the commentary for additional clarity.

The Bureau is finalizing § 1002.105(b) pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071 and its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

Activity-based exemption. The activity-based threshold for coverage in the final rule will provide a simple basis for financial institutions that infrequently lend to small businesses to determine whether they have conducted sufficient lending activity as to be required to collect and report data under the final rule. Furthermore, in comparison to an asset-based exemption or a dollar-volume threshold, the Bureau believes that an activity-based exemption is a more compelling basis for exempting certain financial institutions from coverage in light of section 1071's business and community development purpose.

While several commenters expressed support for an asset-based threshold or a dual asset-based and activity-based threshold, the Bureau believes an activity-based threshold is considerably less complex. Moreover, small business lending activity is more directly related to a given financial institution's role in the small business lending market than a measurement of the financial institution's size as measured in total assets.

In addition, the Bureau believes that an activity-based exemption is a superior approach to a size-based exemption because an exemption based on asset size would apply only to depository institutions. The Bureau is unaware of a similar size metric for nondepository institutions, and commenters did not offer one. In addition, the Bureau agrees with commenters who stated that an asset-based exemption approach might create an uneven playing field and might risk

presenting a cost disadvantage for other small financial institutions.

Moreover, exempting proportionately more depository institutions than nondepository institutions may present a challenge to the comprehensiveness of the small business applicants' demographic data collected under section 1071 as well as to the lending by different types of lenders. A recent small business credit survey revealed racial disparities in applications under the SBA's Paycheck Protection Program: the data showed white-owned firms were most likely to apply for a loan through a small bank (defined as under $10 billion in assets), while Black-owned firms were three times as likely as white-owned firms to apply for a loan through an online lender.[493] Exempting depository institutions using an asset-based threshold and not similarly exempting nondepository institutions could run counter to the purposes of section 1071 and undermine the utility of the data, as well as the purposes of the Bureau, which are, in part, ''to implement and, where applicable, enforce . . . consistently'' Federal laws including ECOA.[494]

A few commenters asserted that an activity-based threshold could encourage lenders to deny applications or reduce their lending to stay under the threshold. These are speculative fears, but to the extent that institutions intend to take such action, the Bureau reminds financial institutions that inconsistencies in the way an institution applies its policies could give rise to a fair lending violation under ECOA. Denied applications must indicate the principal reason(s) for the adverse action, as required by § 1002.9(b)(2).

Regarding a commenter's concern about potential evasion of the activity-based threshold through the creation of subsidiaries, see the section-by-section analysis of § 1002.109(a)(2) which addresses reporting by subsidiaries.

Counting originations. The Bureau agrees with commenters who asserted that using a coverage threshold based on the number of originations rather than applications for purposes of defining a covered financial institution is the better approach. As one commenter pointed out, many financial institutions are already familiar with this approach due to its consistency with CRA and HMDA. Using originations provides a clear and readily identifiable metric for financial institutions. One commenter stated that the Paycheck Protection Program and similar future government programs should be exempt from the threshold. As discussed above, the Bureau is not exempting specific government programs from the activity-based threshold. However, by the time this rule is effective and implemented, lending activity conducted pursuant to the Paycheck Protection Program will have long since ceased and such loans will not be included in origination counts, rendering such commenter concerns moot.

In addition, the Bureau agrees with commenters who stated that additional credit amounts, such as line increases, should not count as a separate origination for purposes of counting the activity-based threshold. Financial institutions may receive multiple requests for additional credit amounts on existing accounts in any given year and such activity may make it more difficult for institutions to determine coverage under the rule. In order to address this issue, the Bureau is adding comment 105(b)–5 which clarifies that for purposes of determining coverage under § 1002.105(b), requests for additional credit amounts on an existing account are not counted as originations.

Moreover, as discussed in § 1002.106(b)(2), every five years the gross annual revenue threshold used to define a small business in § 1002.106(b)(1) shall be adjusted, if necessary, to account for inflation. The first time such an update could occur is early 2030, with an effective date of January 2031. The Bureau is adding comment 105(b)–4 to clarify how financial institutions reporting data should count originations in this situation, explaining that a financial institution seeking to determine whether it is a covered financial institution applies the gross annual revenue threshold that is in effect for each year it is evaluating.

Two-year threshold measurement period. Consistent with commenters who addressed the issue, the Bureau believes that a two-year threshold period is advisable to minimize uncertainty surrounding data collection responsibilities.

Activity threshold level. Supporters of the 25-loan threshold and supporters of the 100-loan threshold each argued that the Bureau should set the threshold with reference to the HMDA threshold for closed-end loans. Given the differences in statutory authorities and between home mortgages and small business loans, the Bureau does not believe that the activity-based thresholds implementing HMDA and section 1071 must be the same.[495]

Table 1 below provides the Bureau's estimated share of depository institutions, estimated share of small business loans from those institutions (measured in total number of loans), and estimated share of small business credit from those institutions (measured in dollars) that would be covered by a loan-volume threshold of 25, 50, or 100 small business loans. This information is based on FFIEC and NCUA Call Reports, as well as CRA submissions.[496] The Bureau estimates that a depository institution is covered for a particular loan-volume threshold as of 2019 if the estimated number of originations for that institution exceeded the threshold in both 2017 and 2018. Given the limitations of the existing source data (limitations acknowledged by the congressional mandate of section 1071), the Bureau cautions that these estimates cannot provide a complete sense of the possible consequences of adopting each particular threshold. These estimates apply only to depository institutions.[497]

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[493] Small Business Credit Survey of Firms Owned by People of Color at 14.

[494] 12 U.S.C. 5511(a).

[495] The Bureau's 2015 HMDA Rule set the closed-end loan threshold at 25 originated loans for each of the two preceding calendar years. Then, in 2020, the Bureau increased the threshold to 100 closed-end loans, effective the same year. However, in September 2022, the United States District Court for the District of Columbia vacated the 2020 HMDA Rule's increased reporting threshold for closed-end mortgage loans as arbitrary and capricious under the Administrative Procedure Act. *Nat'l Cmty. Reinvestment Coal.* v. *Consumer Fin. Prot. Bureau,* No. 20–cv–2074, 2022 WL 4447293 (D.D.C. Sept. 23, 2022).

Accordingly, the threshold for reporting data about closed-end mortgage loans is 25, which was the threshold set by the 2015 HMDA Rule. The court upheld the 2020 HMDA Rule's increase in the open-end credit threshold.

See also CFPB, Home Mortgage Disclosure (Regulation C); Judicial Vacatur of Coverage Threshold for Closed-End Mortgage Loans, Technical Amendment, 87 FR 77980 (Dec. 21, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_judicial-vacatur-_technical-amendment_2022-12.pdf.*

[496] On the bank Call Report and in the Community Reinvestment Act data, for small bank and small farm loans, banks report on business loans with original amounts of $1 million or less and farm loans with original amounts of $500,000 or less. For lines of credit or loan commitments, banks report the size of the line of credit or commitment when it was most recently approved. Banks include loans guaranteed by the SBA and other government entities in their small loans to businesses. Banks do not report loans to nonprofit organizations in this category. Thus, these data collections would include loans made to purchase, for example, individual vehicles and pieces of equipment for the nation's largest businesses.

[497] Under these data collections, banks report small loans made to businesses and farms (regardless of the borrower's size). Credit unions report commercial loans over $50,000 made to members (also, regardless of the borrower's size). The methodologies and assumptions used to produce these estimates are further documented in the *Supplemental estimation methodology for institutional coverage and market-level cost*

TABLE 1—ESTIMATED DEPOSITORY INSTITUTION COVERAGE BY LOAN VOLUME (AS OF 2019)

Coverage category	25 Loans	50 Loans	100 Loans
Institutions Subject to Reporting	38%–40% of all depository institutions[498].	27%–30% of all depository institutions.	17%–19% of all depository institutions.
SBL Institutions Subject to Reporting[499].	63%–67% of SBL depository institutions.	46%–50% of SBL depository institutions.	29%–32% of SBL depository institutions.
Banks and Savings Associations (SAs) Subject to Reporting.	70%–73% of all banks and SAst[500].	52%–56% of all banks and SAs	33%–36% of all banks and SAs.
SBL Banks and SAs Subject to Reporting.	71%–75% of SBL banks and SAs	53%–57% of SBL banks and SAs	33%–37% of SBL banks and SAs.
Credit Unions Subject to Reporting	7% of all credit unions[501]	4% of all credit unions	2% of all credit unions.
SBL Credit Unions Subject to Reporting.	31% of SBL credit unions	18% of SBL credit unions	8% of SBL credit unions.
Share of Total Small Business Credit by Depository Institutions (Number of Loans Originated) Captured.	98.3%–98.6%	96.7%–97.3%	94.2%–95.1%.
Share of Total Small Business Credit by Depository Institutions (Dollar Value of Loans Originated) Captured.	95.3%–96.0%	89.4%–91.0%	81.0%–83.0%.

Table 1 above shows that as the loan-volume threshold rises, the estimated share of depository institutions subject to section 1071 decreases substantially. Likewise, the estimated share of small business loans and small business credit captured by the rule would also decrease, although those decreases are less pronounced. The Bureau has no information for nondepository institutions (other than for Farm Credit System institutions based on their Call Report data[502]) such that the Bureau could provide similar estimates for comment. The Bureau requested in the NPRM such information and data that might bear on any activity-based exemption for nondepository institutions and did not receive any substantive information.

The Bureau notes that the above estimates represent small business lending data prior to the COVID–19 pandemic and ensuing policy responses. The Bureau is keenly aware that many financial institutions, including those that may not have historically participated actively in small business lending, served their communities by becoming participating lenders in the SBA's Paycheck Protection Program. This program ended on May 31, 2021. Because financial institutions' initial determinations of whether they are covered under this final rule, and if so into which compliance date tier they fall, will be based on 2022 and 2023 originations (see final § 1002.114(b)), institutions' Paycheck Protection Program lending activity will not factor into whether a given financial institution qualifies as a covered financial institution because such lending ceased in May 2021.

After considering the feedback from commenters, the Bureau seeks to minimize impact on the financial institutions with the lowest volume of small business lending due to the fixed costs of coming into compliance with this final rule. Numerous industry commenters cautioned the Bureau regarding the risk of market disruption due to the rule's burden and cost. Many argued that the relatively large fixed cost of complying with section 1071's data collection and reporting requirements would significantly increase the cost of small business credit. Commenters argued that the rule will damage small institutions' ability to remain competitive, would hasten consolidation, and would favor large lenders with large compliance teams. A number of lenders discussed the ways in which they may be forced to limit their lending, particularly in rural and underserved areas. Several lenders asserted that a 100-loan threshold was preferable, in part because HMDA reporters already have data collection infrastructure in place.

The Bureau stated in the NPRM that it was also considering a 50 or 100 origination threshold. After consideration of the comments, the Bureau believes that a 100-loan activity threshold is more appropriate. The Bureau believes that this adjustment will best address widespread industry concerns regarding compliance burdens for the smallest financial institutions and that it is consistent with the purposes of section 1071. A 100-loan threshold will ease compliance burdens for the smallest financial institutions and will still capture the overwhelming majority of the small business lending market, including the majority of agricultural lending. As demonstrated in Table 1, a 100-loan threshold captures nearly 95 percent of the share of small business loans originated by depository institutions. In short, while a 100-loan origination threshold decreases data coverage in comparison to a 25-loan origination threshold, a 100-loan origination threshold massively expands data availability relative to the status quo.[503]

Other requested exemptions. The Bureau agrees with commenters who

estimates in the small business lending rulemaking. This document is available at *https://https.consumerfinance.gov/data-research/research-reports/supplemental-estimation-methodology-institutional-coverage-market-level-cost-estimates-small-business-lending-rulemaking/.*

[498] There were 10,525 depository institutions as of December 31, 2019, including 112 credit unions that are not Federally insured.

[499] A depository institution is considered an ''SBL institution'' if it has any small business loans on its balance sheet.

[500] Based on FFIEC Call Report data, there were 5,177 banks and savings associations as of December 31, 2019.

[501] Based on the 2019 NCUA Call Report data, there were 5,348 credit unions as of December 31, 2019, including 112 credit unions that are not Federally insured.

[502] To estimate the number of Farm Credit System (FCS) members covered by the final rule, the Bureau considers the Young, Beginning, and Small Farmers Reports for all Farm Credit System lenders as of December 31, 2019. For the purposes of estimating coverage, the Bureau assumes that all loans made by FCS members to farmers are covered loans. Thus, the Bureau estimates that the rule will cover almost all FCS small business loans.

[503] See part IX.H below for additional analysis on coverage of rural vs. non-rural depository institution branches. The Bureau notes that it has no data on the geography of lending for all depository institutions. Furthermore, commenters provided no additional data. As such, the Bureau is unable to estimate coverage of rural vs. non-rural small business loans.

urged broad coverage of financial institutions under the rule. The Bureau believes that, in light of the text and purposes of section 1071, the Bureau should generally adopt the posture that all manner of small business lenders should be subject to reporting. The Bureau is not categorically exempting any particular type of financial institution from coverage. The Bureau believes that exemptions for any category of financial institution—whether credit unions, community banks, CDFIs, minority depository institutions, government lenders, non-profit lenders, agricultural lenders, retailers, or merchant cash advance providers—would create significant gaps in the data and would create an uneven playing field between different types of institutions. Inclusion of data from not-for-profit lenders is likely to be particularly helpful in identifying further opportunities for business and community development, including by for-profit creditors. Moreover, the Bureau believes that most policy arguments made by industry for being exempt from this rule are better addressed by adjusting the activity-based threshold to 100 originated loans. The higher activity threshold will help minimize compliance costs for all types of smaller financial institutions with lower lending volumes but still result in a comprehensive dataset that furthers section 1071's statutory purposes.

Comment 105(a)–2 refers to § 1002.101(a) to reiterate the statutory exclusion for motor vehicle dealers. Given the statutory exclusion, motor vehicle dealers are not required to report small business lending data to the Bureau. See the section-by-section analysis of § 1002.109(a)(3) for further discussion on reporting obligations where multiple financial institutions are involved in a covered credit transaction, including indirect lending transactions.

With respect to addressing the particularities of certain lending models, the Bureau is not categorically exempting particular financial institutions from coverage. The Bureau is, however, providing clarification regarding how reporting rules apply to certain covered credit transactions and is also not covering certain transactions. See the section-by-section analyses of §§ 1002.104(b) and 1002.109(a)(3). Regarding the request by some commenters to be exempted from this rule due to the statutory firewall requirement, see the section-by-section analysis of § 1002.108.

Section 1002.106 Business and Small Business

ECOA section 704B(h)(2) defines the term ''small business'' as having the same meaning as ''small business concern'' in section 3 of the Small Business Act.[504] The Bureau is defining a small business consistent with the statutory language. In particular, the Bureau is defining a small business to have the same meaning as the term ''small business concern'' in 15 U.S.C. 632(a), as implemented by 13 CFR 121.101 through 121.107. Notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of subpart B, the Bureau is providing that a business is a small business if its gross annual revenue for its preceding fiscal year is $5 million or less. The SBA Administrator has approved the Bureau's use of this alternate small business size standard pursuant to the Small Business Act.[505] The Bureau has also obtained approval for this gross annual revenue threshold to adjust, if need, for inflation or deflation every five years (after January 1, 2025) using the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), rounded to the nearest multiple of $500,000.

Under the final rule, financial institutions will need to consider whether an applicant is a business under § 1002.106(a) and if the applicant is a business, whether it is small under § 1002.106(b). The Bureau believes that these definitions implement the statutory language of section 1071 while reflecting the need for a wide variety of financial institutions to apply a simple, broad definition of a small business that is practical across the many product types, application types, technology platforms, and applicants in the market.

For the reasons set forth below, the Bureau is adopting § 1002.106 to implement ECOA section 704B(h)(2) and pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071.

106(a) Business

Background

ECOA section 704B(h)(2) defines the term ''small business'' as having the same meaning as ''small business concern'' in section 3 of the Small Business Act.[506] The Small Business Act provides a general definition of a ''small business concern,'' authorizes the SBA to establish detailed size standards for use by all agencies, and permits an agency to request SBA approval for a size standard specific to an agency's program. The SBA's regulations define a ''business concern'' as ''a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' [507]

Proposed Rule

Proposed § 1002.106(a) would have defined a business as having the same meaning as the term ''business concern or concern'' in 13 CFR 121.105. This proposed definition is consistent with ECOA section 704B(h)(2), which defines the term ''small business'' as having the same meaning as ''small business concern'' in section 3 of the Small Business Act.[508] The SBA issued 13 CFR 121.105, entitled ''How does SBA define 'business concern or concern,''' pursuant to the Small Business Act. The Bureau referred to the entirety of that section for additional information. In particular, the Bureau noted that this definition would include elements such as being ''a business entity organized for profit'' that has ''a place of business located in the United States'' and ''operates primarily within the United States or . . . makes a significant contribution to the U.S. economy.'' [509]

The Bureau sought comment on its proposed definition of a business, and generally sought comment on whether additional clarification is needed.

Comments Received

Comments received focused primarily on the Bureau's proposed business size standard, which are discussed in the section-by-section analysis of § 1002.106(b) below. The Bureau did receive some comments, however, on its proposed approach to the definition of business concern from a few banks, trade associations, a business advocacy group, and an online lender. These commenters requested that the Bureau consider certain modifications or adjustments to the definition of a business concern, such as clarifying that the term does not include non-profit entities, government agencies, certain trusts, foreign entities, and certain real estate holding companies.

[504] 15 U.S.C. 632.

[505] 15 U.S.C. 632(a)(2)(C).

[506] 15 U.S.C. 632.

[507] 13 CFR 121.105.

[508] 15 U.S.C. 632.

[509] 13 CFR 121.105(a)(1).

One bank generally supported the proposed definition but requested clarification that the definition of business concern excludes ''passive businesses'' and non-natural borrowing entities that are established by applicants solely for tax, anonymity, and other such purposes not intended to earn profit through business production, operations, or service delivery. This commenter noted that it is common for consumer borrowers to establish limited liability companies or trusts solely to acquire properties and conduct similar transactions, or for use in remaining anonymous to preserve their physical safety, and requested that these scenarios be explicitly excluded because these entities' obligations and contributions do not align with those of small businesses.

A few commenters recommended that applications from nonprofit organizations also be exempted. A few commenters specifically requested the Bureau exclude any not-for-profit organizations, which might include non-operating entities, holding companies, trusts, special purpose vehicles, pass-through entities, holding companies that are not organized for profit, and limited liability companies that are not formed for business purposes.

Two commenters asked the Bureau to confirm that public agencies and government institutions are excluded from the coverage of the final rule. One commenter asked the Bureau to exclude foreign-owned entities from the final rule. A bank asked for clarification on whether a ''small business'' can be taxed under the owner's Social Security number (as opposed to an employer identification number) or whether people that have a ''hobby'' business or farm that report income under Schedule C or F within their tax returns are considered a small business.

A trade association suggested the Bureau exclude applications from trusts (which could be a single purpose trust, such as a land trust that is established only to hold specific real estate, a traditional estate planning vehicle or, though more infrequently, a business trust) from coverage under the final rule. This commenter stated that including trusts could raise difficult issues regarding who should be considered for data collection purposes (the settlors, beneficiaries, trustees or some combination thereof), what is the ''net profit or loss'' of the trust, as well as who is entitled to that net profit or loss. The commenter argued that such burdens would not be justified by the minimal information that would be generated with respect to reporting of lending to trusts.

One commenter argued for the inclusion of a test that would discern between independent contractors and what it called ''actual'' small businesses, as it believes that the credit needs and experiences of independent contractors and many small businesses can differ greatly. Another suggested the Bureau confirm that the proposed definition of ''small business'' excludes subsidiaries of large corporate entities.

A trade association for community banks recommended the Bureau exclude farms from the definition of ''small business,'' arguing that the underwriting criteria for small farm loans differ from other small business loans and that this distinction is acknowledged in several Federal laws such as CRA and HMDA. This commenter argued that the proposed originations-based coverage threshold would likely lead to many small lenders reducing their agricultural lending below the threshold, thereby limiting the access to credit for small farms, and concluded that an exemption was needed to acknowledge the uniqueness of agricultural lending.

Final Rule

For the reasons discussed herein, the Bureau is finalizing § 1002.106(a) as proposed, to define the term business as having the same meaning as the term ''business concern or concern'' in 13 CFR 121.105.

As noted above, this definition includes elements such as being ''a business entity organized for profit'' that has ''a place of business located in the United States'' and ''operates primarily within the United States or . . . makes a significant contribution to the U.S. economy.'' [510] This definition also provides that a business concern may take a number of different legal forms, including a trust, sole proprietorship, partnership, limited liability company, corporation, joint venture, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.[511] The Bureau is not providing interpretations of this SBA regulation in subpart B, as requested by some commenters, because the Bureau believes that existing SBA interpretations are responsive to commenters' request for clarification. For example, financial institutions are not required to collect and report data for not-for-profit applicants, because they are not ''organized for profit'' and are thus not a ''business concern.'' [512] Moreover, the Bureau expects that applications from foreign businesses will fall outside the scope of the rule's data collection and reporting requirements unless they have a place of business located in the United States and they either operate primarily within the United States or they make a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor.

The Bureau also does not believe it would be appropriate to deviate from the term ''business concern or concern'' in 13 CFR 121.105 by adopting additional exclusions such as one for passive businesses. As discussed above, section 1071 defines small business as referring to the definition of small business concern in section 3 of the Small Business Act. The Bureau thus must look to this definition, and the SBA's implementing regulations, in defining both a business and a small business for purposes of this final rule. (The SBA Administrator's approval for the Bureau's alternate size standard for this rulemaking is discussed in the section-by-section analysis of § 1002.106(b) below.)

In addition, the Bureau believes that covering applications from all types of businesses in its rule (including passive businesses [513] and non-operating entities) is important for advancing both of section 1071's statutory purposes. The Bureau is thus not adopting such exclusions requested by commenters. However, because the Bureau understands that passive businesses and non-operating entities are generally affiliated with other businesses (for example as subsidiaries of large corporate entities), and because financial institutions are permitted to consider affiliate revenue in determining whether a business is small for purposes of this rule, the Bureau anticipates that applications from most

[510] 13 CFR 121.105(a)(1).

[511] 13 CFR 121.105(b).

[512] *See id.,* which states that a business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

[513] The SBA defines a business as passive if: (i) it is not engaged in a regular and continuous business operation (the mere receipt of payments such as dividends, rents, lease payments, or royalties is not considered a regular and continuous business operation); or (ii) its employees are not carrying on the majority of day to day operations, and the company does not provide effective control and supervision, on a day to day basis, over persons employed under contract; or (iii) it passes through substantially all of the proceeds of the financing to another entity. 13 CFR 107.720(b)(1).

of these kinds of businesses ultimately will not be reportable since many such businesses will not be ''small'' businesses under the rule implementing section 1071. (See the section-by-section analysis of § 1002.106(b) for additional related discussion.)

The Bureau does not agree that trusts must be excluded, as suggested by one commenter, on the grounds that covering applications from trusts could raise difficult issues regarding who should be considered the principal owner for data collection purposes. Treatment under the final rule differs, for certain data points, based on whether the applicant's owner is a trust or whether the applicant itself is a trust. When a financial institution seeks to extend credit to a small business applicant whose ownership interests or assets are owned by a trust, the trust or trustee often needs to be the applicant for the credit. In such situations, because only individuals who are direct owners are considered principal owners under final § 1002.102(o), entities such as trusts would not be principal owners and thus the financial institution would not need to collect or report principal owners' ethnicity, race, and sex or the number of principal owners. And as outlined in new comment 102(o)–2, if the applicant for a covered credit transaction is a trust, a trustee is considered the principal owner of the trust for reporting purposes. The Bureau also notes that only a trust organized for profit would meet the definition of a ''business concern'' and fall within the scope of the rule. The Bureau believes that these clarifications sufficiently address the commenter's concerns and that covering different types of business structures in its final rule is important for advancing both of section 1071's statutory purposes. Thus, the Bureau is not defining business in a way that would exclude trusts from the final rule.

In response to comments asking the Bureau to confirm that public agencies and government institutions are excluded from the coverage of the final rule, the Bureau notes that an express exclusion for extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities is not necessary because such governmental entities do not constitute businesses under the final rule. Specifically, government entities are not ''organized for profit'' and are thus not a ''business concern'' under final § 1002.106(a).

With respect to the suggestion that the Bureau develop a test to identify independent contractors (and presumably exclude them), the Bureau notes that it is not requiring financial institutions to collect or report an applicant's business structure. Independent contractor arrangements can take many forms; the Bureau does not believe it would be appropriate to exclude from coverage under section 1071, for example, a business that acts as an independent contractor to another business, simply by virtue of that arrangement. Finally, the Bureau notes that the SBA has routinely treated independent contractors as business concerns [514] and based on both of section 1071's statutory purposes, the Bureau is not convinced that it should define business in a way that would deviate from the SBA's approach and exclude independent contractors from the final rule.

In response to a commenter's request for clarification on whether a ''small business'' can be taxed under the owner's Social Security number (as opposed to an employer identification number) or whether people that have a ''hobby'' business or farm that report income under Schedule C or F within their tax returns are considered a small business, the Bureau notes that generally, tax documentation is not dispositive for the SBA's definition of a small business concern. In many instances (for example, with startup businesses), the business may not have any tax returns available or the business may be a sole proprietorship that is taxed under its owner's Social Security number. As long as the business is a ''small business concern'' in 15 U.S.C. 632(a) (as implemented in 13 CFR 121.101 through 121.107) and its gross annual revenue for its preceding fiscal year is $5 million or less, it is a small business under this final rule.

For reasons discussed in the section-by-section analysis of § 1002.104(a), the Bureau is not adopting a categorical exclusion for farms from the definition of ''small business.'' Credit used for agricultural purposes is generally covered by the broad definition of ''credit'' under ECOA. ECOA's definition of credit is not limited to a particular use or purpose and Regulation B expressly covers agricultural-purpose credit; ECOA does not provide an exception for agricultural credit; and it assigns enforcement authority to regulators of agricultural lending such as the Secretary of Agriculture and the Farm Credit Administration.[515] Moreover, agricultural businesses are encompassed in section 1071's statutory definition of small business.[516] With respect to the concerns that the Bureau's proposed originations-based threshold would likely lead to many small lenders reducing their agricultural lending below the exemption threshold, the Bureau notes that it is increasing the exemption threshold as discussed in the section-by-section analysis of § 1002.105(b) above. Moreover, the Bureau believes that covering agricultural businesses in its rule is important for advancing both of section 1071's statutory purposes, particularly given historical and/or continuing discrimination against Black farmers and the need for transparency into agricultural lending both for fair lending enforcement and business and community development. The Bureau is thus not defining small business in a way that would exclude such businesses from the final rule.

106(b) Small Business Definition

106(b)(1) Small Business

Background

Section 1071 data collection purposes, requirements, and potential impacts. A key component of the Bureau's fair lending work under the Dodd-Frank Act is to ensure fair, equitable, and nondiscriminatory access to credit for both individuals and their communities.[517] Section 1071 of the Dodd-Frank Act, which amended ECOA, requires financial institutions to collect and report to the Bureau data regarding applications for credit for women-owned, minority-owned, and small businesses. ECOA section 704B(h)(2) states that ''[t]he term 'small business' has the same meaning as the term 'small business concern' in section 3 of the Small Business Act (15 U.S.C. 632).'' Section 1071 was adopted for the dual statutory purposes of facilitating fair lending enforcement and enabling communities, governmental entities, and creditors to identify business and community development needs and

[514] For example, in an interim final rule implementing changes related to loans made under the Paycheck Protection Program, the SBA stated ''SBA has determined that changing the calculation for sole proprietors, *independent contractors,* and self-employed individuals will reduce barriers to accessing the [Paycheck Protection Program] and expand funding *among the smallest businesses.*'' 86 FR 13149, 13150 (Mar. 8, 2021) (emphasis added).

[515] *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a).

[516] ECOA section 704B(h)(2) (defining a small business as having the same meaning as the term ''small business concern'' in section 3 of the Small Business Act (15 U.S.C. 632)). Section 704B(h)(2) defines small business by reference to the Small Business Act definition of a small business concern, which includes independently owned and operated ''enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries.'' 15 U.S.C. 632(a)(1).

[517] *See* 12 U.S.C. 5493(c)(2)(A).

opportunities of women-owned, minority-owned, and small businesses.[518]

As set forth in section 1071, the data that financial institutions are required to collect and report to the Bureau include, among other things, the gross annual revenue of the business in its preceding fiscal year, the type and purpose of the loan, the census tract for the applicant's principal place of business, and the ethnicity, race, and sex of the principal owners of the business.[519] ECOA section 704B(f)(2)(C) further provides that information compiled and maintained under the statute shall be ''annually made available to the public generally by the Bureau, in such form and in such manner as is determined by the Bureau, by regulation.'' The Bureau believes that the collection and subsequent publication of robust and granular data pursuant to section 1071 regarding credit applications for small businesses will provide much-needed transparency to an otherwise opaque market and help ensure fair, equitable, and nondiscriminatory access to credit.

The Bureau understands that access to fair, equitable, and nondiscriminatory credit is crucial to the success of small businesses. Small businesses—including women-owned and minority-owned small businesses—need access to credit to smooth out business cash flows and to enable entrepreneurial investments that take advantage of, and sustain, opportunities for growth. The market these businesses turn to for credit is vast, varied, and complex. Overall, small businesses have many options when it comes to financing, including a wide range of products and providers. Yet market-wide data on credit to small businesses remain very limited, particularly with respect to applicants' protected demographic information at the core of section 1071. The Bureau believes that its rulemaking implementing section 1071 of the Dodd-Frank Act will provide critical data for financial institutions, community groups, policy makers, and small businesses.

SBA size standards. The Small Business Act permits the SBA Administrator to prescribe detailed size standards by which a business concern may be categorized as a small business, which may be based on the number of employees, dollar volume of business, net worth, net income, a combination of these, or other appropriate factors.[520]

As implemented by the SBA, these size standards generally hinge on average annual receipts or the average number of employees of the business concern and are customized industry-by-industry across 1,012 6-digit NAICS codes. Specifically, the SBA typically uses two primary measures of business size for size standards purposes: (i) average annual receipts [521] for businesses in services, retail trade, agricultural, and construction industries, and (ii) average number of employees for businesses in all manufacturing, most mining and utilities industries, and some transportation, information and research and development industries.[522] To measure business size, the SBA also uses financial assets for certain financial industries, and for the petroleum refining industry it uses refining capacity and employees. The SBA's size standards are used to establish eligibility for a variety of Federal small business assistance programs, including for Federal government contracting and business development programs designed to assist small businesses in obtaining Federal contracts and for the SBA's loan guarantee programs, which provide access to capital for small businesses that are unable to qualify for and receive conventional loans elsewhere.

Under the Small Business Jobs Act of 2010,[523] the SBA is required to review all size standards no less frequently than once every five years.[524] The SBA's lowest size standards based on average annual receipts are currently used for agricultural industries. At the time of the Bureau's NPRM, the SBA used a $1 million average annual receipts standard for 46 out of 64 agricultural industries.[525]

The SBA has since maintained or increased its size standards across all industries. Following the SBA's implementation of revised size standards in May and June 2022 [526] and its inflation adjustment of monetary-based industry size standards in November 2022,[527] a $1 million standard is no longer used for any industry. The size standards for agricultural industries now range from $2.25 million to $34 million, and the size standards for non-agricultural industries now range from $8 million to $47 million. In April 2022, the SBA also proposed increasing 150 size standards for businesses in manufacturing and other sectors (excluding wholesale trade and retail trade) that are based on the number of employees.[528] The SBA also increased size standards for 57 industries in the wholesale trade and retail trade sectors.[529]

The Small Business Act further provides that no Federal agency may prescribe a size standard for categorizing a business concern as a small business concern absent approval by the SBA Administrator.[530] The SBA's rule governing its consideration of other agencies' requests for approval of alternate size standards requires that the agency seeking to adopt an alternate size standard consult in writing with the SBA's Division Chief for the Office of Size Standards in advance of issuing an NPRM containing the proposed alternate size standard.[531] The Bureau met this requirement and also provided a copy of the published NPRM to the Division Chief for the Office of Size Standards. The Bureau subsequently obtained approval from the SBA Administrator for its alternate small business size standard contained in this final rule.

Market considerations. A wide variety of financial institutions, with varying levels of sophistication and experience, extend credit to small businesses. This rulemaking applies to a broad range of financial institutions. Banks and credit unions that serve a breadth of customers

[518] ECOA section 704B(a).

[519] ECOA section 704B(e)(2).

[520] 15 U.S.C. 632(a)(2)(A) and (B).

[521] Effective January 6, 2020, the SBA changed its regulations on the calculation of average annual receipts for all its receipts-based size standards from a three-year averaging period to a five-year averaging period. 84 FR 66561 (Dec. 5, 2019).

[522] The SBA now uses a 24-month average to calculate a business concern's number of employees for eligibility purposes in all its programs. 87 FR 34094 (June 6, 2022).

[523] Public Law 111–240, 124 Stat. 2504 (2010).

[524] 15 U.S.C. 632 note.

[525] *See* Small Bus. Admin., *Table of size standards* (effective Oct 1, 2022), *https://www.sba.gov/document/support-table-size-standards*.

[526] Through a series of rules that became effective on May 2, 2022, the SBA implemented revised size standards for 229 industries (all using average annual receipts standards) to increase eligibility for its Federal contracting and loan programs. *See* 87 FR 18607 (Mar. 31, 2022); 87 FR 18627 (Mar. 31, 2022); 87 FR 18646 (Mar. 31, 2022); 87 FR 18665 (Mar. 31, 2022). The SBA did not reduce any size standards—it either maintained or increased the size standards for all 229 industries, in many cases with size standard increases of 50 percent or more. Effective July 14, 2022, the SBA also increased size standards for 22 wholesale trade industries and 35 retail trade industries. 87 FR 35869 (June 14, 2022).

[527] 87 FR 69118 (Nov. 17, 2022) (adjusting monetary-based industry size standards (*i.e.,* receipts- and assets-based) for inflation that occurred since 2014 by adding an additional 13.65 percent inflation increase to these size standards).

[528] 87 FR 24752 (Apr. 26, 2022) (establishing 250 employees and 1,500 employees, respectively, as the minimum and maximum size standard levels for Manufacturing and other industries (excluding Wholesale and Retail Trade), up from the current minimum of 100 employees and the current maximum of 1,500 employees in the SBA's existing size standards).

[529] 87 FR 35869 (June 14, 2022).

[530] 15 U.S.C. 632(a)(2)(C); *see also* 13 CFR 121.903(a)(5).

[531] 15 U.S.C. 632(a)(2).

typically organize their commercial lending operations into segments based on a combination of risk, underwriting, product offering, and customer management factors that are appropriate to each segment. The three most frequent organizational groupings are retail/small business, middle market, and large corporate banking. Commercial customers are generally assigned to an organizational grouping based on their revenue potential and aggregate credit exposure, with smaller accounts assigned to the retail/small business banking area. The overwhelming preponderance of small businesses are found in the retail/small business banking group, which may also conduct consumer banking.

Today, the distinguishing characteristic that many larger financial institutions (principally banks with $10 billion or more in assets) use to assign small businesses into the retail/small business banking group is gross annual revenue.[532] While cut-offs vary by financial institution, the Bureau understands that a common demarcation for small/retail customers are those with less than $5 million, or sometimes up to $10 million, in gross annual revenue. The maximum amount of a retail/small business banking term loan or credit line is typically $5 million or less.

Financial institutions that do not conduct SBA lending generally do not collect or consider the number of employees of a small business applying for credit, but they often capture gross annual revenue information, including for regulatory compliance purposes. Specifically, retail/small business lenders routinely collect applicants' gross annual revenue information because notification requirements under existing Regulation B vary for business credit applicants depending on whether they ''had gross revenues of $1 million or less in [their] preceding fiscal year.'' [533] For a business applicant with gross annual revenues of $1 million or less, a creditor must provide a notification following an adverse action, such as a credit denial, that is generally similar to that provided to a consumer in both substance and timing.[534] As a result, small business lenders often adopt compliance management systems similar to those found among consumer lenders.

The Bureau believes it is important for a financial institution to be able to quickly determine at the beginning of the application process whether an applicant is a ''small business'' for purposes of this final rule. Financial institutions generally cannot inquire about an applicant's protected demographic information (including the ethnicity, race, and sex of an applicant's principal owners) without being legally required to do so.[535] As discussed in the *Overview* of this part V, this final rule will only require (and thus only permit) such inquiries for small business applicants.[536] While the Bureau is allowing financial institutions flexibility in when they seek this protected demographic information, the Bureau believes that financial institutions generally have the best chance of obtaining it and supporting the purposes of section 1071, if they ask for it in the earlier stages of the application process. As a result, a financial institution may need to know, even before the application is initiated, which application path the applicant must follow—a 1071-governed or a non-1071-governed application path.

Early feedback. From very early on in its discussions with stakeholders regarding section 1071, the Bureau has received feedback focused primarily on how the Bureau might define a business size standard. For example, in response to the Bureau's 2017 request for information, many stakeholders expressed concern about the difficulties in determining the appropriate NAICS code for businesses and in applying the NAICS-based standards in determining whether a business loan applicant is a small business. Commenters who addressed the issue of a small business definition were universally in favor of the Bureau adopting something less complex than the SBA's size standards based on 6-digit NAICS codes. Commenters noted that the use of these standards is relatively complex and would introduce burdens for this rule with limited benefit.

Likewise, during the SBREFA process, small entity representatives generally preferred a simple small business definition and expressed concern regarding the complexity of the SBA's NAICS-based size standards. Some small entity representatives supported an approach for defining a small business that would use an applicant's gross annual revenue for determining whether it was ''small'' (thresholds under consideration at SBREFA were $1 million and $5 million). For most small entity representatives, nearly all their small business customers had less than $5 million in gross annual revenue; most were under $1 million. Several small entity representatives remarked that a $1 million gross annual revenue threshold would be too low, noting that it would exclude many businesses defined by SBA regulations as ''small''; some of these small entity representatives said that a $5 million gross annual revenue threshold would be acceptable. Some small entity representatives advocated for higher revenue thresholds, such as $8 million or $10 million. Some small entity representatives supported a more complex approach that would distinguish between applicants in manufacturing and wholesale industries (500 employees) and all other industries ($8 million in gross annual revenue). One small entity representative also supported another approach, which was closest to the SBA's existing size standards, stating that it reflects the SBA's substantially different definitions of a small business across different industries. Feedback from stakeholders other than small entity representatives also reflected broad support for the Bureau pursuing a simplified version of the SBA small business definition.

Proposed Rule

Proposed § 1002.106(b) would have defined a small business as having the same meaning as the term ''small business concern'' in 15 U.S.C. 632(a), as implemented in 13 CFR 121.101 through 121.107. Proposed § 1002.106(b) would have further stated that, notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of proposed subpart B, a business is a small business if its gross annual revenue, as defined in proposed § 1002.107(a)(14), for its preceding fiscal year is $5 million or less. The Bureau's proposal noted it was seeking SBA approval for this alternate small business size standard pursuant to the Small Business Act.[537]

Proposed comments 106(b)–1 and 106(b)–2 would have clarified the obligations of covered financial institutions when new information changed the determination of whether an applicant is a small business, giving rise to requirements under proposed subpart B and/or prohibitions under

[532] *See* Fed. Deposit Ins. Corp., *Small Business Lending Survey,* at 11 (2018), *https://www.fdic.gov/bank/historical/sbls/full-survey.pdf* (FDIC Small Business Lending Survey) (finding that a substantial majority of large banks use gross annual revenue (61.8 percent) as a limit to define small businesses).

[533] 12 CFR 1002.9(a)(3)(i).

[534] *Id.* The notification requirements for applicants with gross annual revenues in excess of $1 million are generally more flexible in substance and also do not impose a firm deadline for provision of a Regulation B notification. 12 CFR 1002.9(a)(3)(ii).

[535] *See* 12 CFR 1002.5(a).

[536] Such inquiries are also permitted for co-applicants of small businesses pursuant to final § 1002.5(a)(4)(x).

[537] 15 U.S.C. 632(a)(2)(C).

existing Regulation B. The Bureau acknowledged that a financial institution's understanding of an applicant's gross annual revenue may change as the application proceeds through underwriting.

Proposed comment 106(b)–3 would have explained that a financial institution may rely on an applicant's representations regarding gross annual revenue (which may or may not include an affiliate's revenue) for purposes of determining small business status under proposed § 1002.106(b).

The Bureau sought comment on this proposed definition of a small business, including the $5 million gross annual revenue size standard, as well as whether additional clarification is needed for any aspect of this proposed definition. The Bureau also sought comment on whether another variation of the proposed size standard would better serve the purposes of section 1071, such as a lower revenue size standard or a higher one, potentially at the $8 million or $10 million level. The Bureau also sought comment on whether, in addition to the above-described gross annual revenue-based size standard, a small business definition that also included any business that was furnished a loan pursuant to an SBA program (regardless of the applicant's gross annual revenue) would further the purposes of section 1071.

Similarly, the Bureau sought comment on whether a threshold based on $8 million gross annual revenue or 500 employees (depending on the type of business) would align more closely with section 1071's purposes. Likewise, the Bureau sought comment on whether a variation of the proposed size standard, such as using an applicant's average gross annual revenue averaged over two or five years, would better serve the purposes of section 1071. In addition, the Bureau sought comment on defining a small business consistent with the entirety of existing SBA regulations, including any advantages or disadvantages that using such a definition might pose specifically in the context of this rulemaking. Specifically, the Bureau sought comment on how the proposed size standard would fit in with a financial institution's current lending or organization practices. The Bureau sought comment on whether the proposed size standard would introduce additional difficulties or challenges for SBA lenders.

Comments Received

The Bureau received many comments supporting the use of a simple gross annual revenue threshold from a range of lenders and trade associations, along with a community group, a technology service provider, a business advocacy group, several members of Congress, and others. Many commenters said that a gross annual revenue threshold was simple, objective, relatively easy to apply at the time of application, and/or will make compliance easier. One bank more generally emphasized the need for a simplified definition of small business that is easily determinable at the time of application. Another commenter noted that determining the appropriate NAICS codes and the number of employees is not easy early on in the application process. A bank stated that revenue thresholds provide a consistent and transparent line of delineation. Some commenters asserted that a gross annual revenue threshold was preferable to the SBA's more complex size standards that change over time. One commenter asserted that a gross annual revenue threshold was the only feasible way to implement section 1071 and that trying to apply SBA size standards would massively complicate the data collection process, lead to the introduction of errors that would undermine data accuracy and interfere with financial institutions' ability to extend credit to business applicants in a prompt and efficient manner. One agricultural lender argued that having to determine whether a business is small for the purposes of the rule could delay communicating a credit decision in violation of ECOA and the Farm Credit Act, while another commenter hypothesized that financial institutions may decline loan requests due to inadequate financial documentation for a small business determination. Another commenter expressed general support for a broad definition of small business.

Despite the broad support for a gross annual revenue threshold, commenters disagreed on where to set the threshold. Some commenters supported the proposed threshold of $5 million or less in gross annual revenue. A trade association stated that the proposed approach was sufficiently broad and could encompass as great a portion of the population of minority- and women-owned businesses as practical. One agricultural lender asked for additional context and insight for the $5 million threshold and an explanation regarding how a number larger than $1 million, which the Bureau had previously considered during the SBREFA process, meets the intent of Congress under section 1071. A bank advocated for a $250,000 gross annual revenue threshold, asserting that most businesses that surpass this threshold have access to or already utilize an attorney or accountant, either one of which should be able to adequately advise on the presence of any discriminatory terms.

The Bureau received some comments expressing general disapproval of its proposed approach to the gross annual revenue threshold. A few banks argued that a $5 million threshold is too high, with one adding that this was particularly true in community bank areas and another suggesting that the Bureau did not adequately support its proposal with statistics. A few industry commenters asserted that an expansive small business definition would burden their organizations with significant costs and that the Bureau should instead reduce the number of businesses that are reportable under the regulation. A women's business advocacy group suggested the Bureau have ''multiple levels'' in its small business definition. Several commenters noted a preference for a gross annual revenue threshold lower than $5 million, without specifying an amount. A credit union suggested the Bureau ensure that both annual revenue and asset size [538] be taken into consideration.

Most commenters that suggested an alternative small business definition expressed preference for a $1 million gross annual revenue threshold. Some industry commenters asserted that a $1 million threshold would be less burdensome, less costly, and/or would simplify compliance as compared to the proposed $5 million threshold. One said that anything other than a $1 million threshold may be too complex for applicants and/or financial institutions, which could lead to less than expected levels of data integrity and misalignment with the 1071 statutory purposes. Several industry commenters and a business advocacy group argued that a gross annual revenue threshold of $1 million or less is more in line with congressional intent and purpose. A bank asserted that it would be more feasible to implement a firewall between underwriter and customer because a $1 million threshold would avoid a complete change in how the bank underwrites and processes small business loan applications.

Some commenters said that a $1 million threshold would better align with existing Regulation B adverse action notification requirements, with one adding that misalignment leads to compliance costs. A bank suggested the Bureau amend the existing Regulation B

[538] It is unclear whether the commenter was referring to the asset size of the small business or asset size of the financial institution.

requirements on adverse actions to ensure consistency with this rule and avoid confusion with loan officers and loan processers.

Many more commenters advocated for alignment with CRA regulations that use $1 million or less in annual revenue to define a small business, with some arguing that misalignment with the CRA would lead to increased compliance costs. Some industry commenters stressed the need for consistency between reporting regimes, asserting that the proposed threshold did not align with other regulatory requirements such as CRA. One commenter suggested that inconsistency with CRA would add another nuance to data validation. A State bankers association suggested that a $1 million threshold would also better align with Small Business Development Center and Small Business Investment Company program guidelines. A credit union trade association suggested that a $1 million gross annual revenue threshold would be consistent with the SBA's definitions for some types of small businesses, including most agricultural small businesses.

Some commenters said that a $1 million threshold would cover most (over 95 percent) of small businesses as defined by the SBA size standards in effect at the time of the NPRM. Similarly, many commenters argued that the proposed $5 million threshold would be overinclusive and a $1 million threshold would better exclude non-small businesses. One bank said this overinclusiveness would be particularly notable in middle/rural America, while another argued that the proposed definition would create inequity and inflated costs for banks serving small-to-midsize markets by picking up a disproportionate number of businesses as small businesses under the rule.

Two credit union trade associations argued that the proposed $5 million threshold would increase the size of the 1071 data collection, the risk to data privacy, and the costs associated with compliance for covered financial institutions. Two other commenters suggested that a $1 million threshold would accomplish the goals of section 1071 without unnecessary drawbacks.

In contrast, some commenters requested a more expansive size standard for defining small businesses under the rule. A number of community groups expressed a preference for a $7.5 million threshold, citing language from the SBA's website [539] indicating that most non-manufacturing businesses with average annual receipts under $7.5 million will qualify as a small business. A few other commenters expressed a preference for a $8 million threshold. A CDFI lender maintained that a $8 million threshold was the most common SBA size standard threshold for average annual receipts, would cover more manufacturing and wholesale businesses, and received broad support from small entity representatives (though they recommended eliminating the 500 employees standard for manufacturing and wholesale that was part of that option under consideration at SBREFA). Another commenter opined that a threshold of $8 million (adjusted every five years according to the SBA's recalibrations) would better cover the small business market, account for differences in business types (such as manufacturing) and regional economic conditions, and would more closely align with what lenders already consider small businesses. Finally, a joint letter from community groups, community oriented lenders, and business advocacy groups asserted that a threshold lower than $8 million would lead to significantly less data against which to compare lending patterns and to identify lending trends and gaps.

Existing SBA size standards. Several commenters recommended the Bureau use the SBA's definition and size standards. One credit union trade association asserted that the SBA definition is already used by credit unions and all financial services providers as the industry standard and thus using an alternative definition would only create confusion and inconsistent Federal regulations, thereby harming credit unions' ability to serve their members. A bank argued that having different definitions and requirements across similar regulatory obligations would result in more burden and costs due to the unique review and maintenance of each obligation.

Loan size. Some industry commenters suggested defining a small business by the credit amount requested. Several said that small businesses should be defined by loans of $1 million or less. A bank asserted that this would be a much more reasonable definition of what a small business is and will encompass the majority of its commercial lending to small businesses. A few commenters argued that this would better align with CRA and call report requirements. Another commenter noted that loan size does not fluctuate over time like revenue and it is easy to identify at the beginning of the application process. Some credit union commenters suggested requiring reporting for small business loans up to $10 million. A few other industry commenters suggested adopting a maximum amount applied for ''exclusion'' of $750,000 in order to exempt applications from non-small businesses. These commenters asserted that such an exclusion would harmonize this rule with the SBA's maximum direct loan amount. A few commenters expressed disapproval of a $1 million loan size threshold, noting many small businesses borrow amounts far more than $1 million while many large businesses borrow amounts far below that threshold.

Small farm definition. The Bureau received comments from many agricultural lenders suggesting that the $5 million gross annual revenue threshold would be overinclusive when applied to farms and that agricultural lending needs a different small business definition for purposes of section 1071 in order to capture only truly small farms. One commenter asserted that under the Small Business Act's implementing regulations, the Bureau must take into account differing industry characteristics. Specifically, many agricultural lenders suggested that the Bureau's definition of ''small business'' align with the Farm Credit Administration's (FCA) definition of ''small farmer,'' which is a ''farmer, rancher, or producer or harvester of aquatic products who normally generates less than $250,000 in annual gross sales of agricultural or aquatic products.'' [540] A few also urged the Bureau not to ignore the USDA small farm definitions.[541] One commenter noted that even a $1 million threshold would be too high because 96 percent of farms had less than $1 million in annual sales of agricultural products. Several commenters suggested that the FCA

[539] Small Bus. Admin., *Basic requirements, https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements* (last visited Mar. 20, 2023).

[540] Farm Credit Admin., *Bookletter 040—Revised: Providing Sound and Constructive Credit to Young, Beginning, and Small Farmers, Ranchers, and Producers or Harvesters of Aquatic Products,* at 2 (Aug. 10, 2007), *https://ww3.fca.gov/readingrm/Handbook/FCA%20Bookletters/BL-040%20REVISED.docx.*

[541] The USDA Economic Research Service (USDA–ERS) measures farm size by annual gross cash farm income—a measure of the farm's revenue (before deducting expenses) that includes sales of crops and livestock, payments made under agricultural Federal programs, and other farm-related cash income including fees from production contracts. Econ. Rsch. Serv., U.S. Dep't of Agric., *Farm Structure and Contracting* (last updated Mar. 8, 2022), *https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure-and-contracting/.* Within this classification system, small family farms have gross cash farm income less than $350,000, with subcategories of low-sales farms (gross cash farm income less than $150,000) and moderate-sales farms (gross cash farm income between $150,000 and $349,999). *Id.*

definition would facilitate compliance because staff and compliance professionals at Farm Credit lenders are already very familiar with that standard and because it would be confusing and burdensome for staff to manage two competing regulatory definitions of "small" customers.

Several commenters noted that approximately half of Farm Credit System loans outstanding were to "small farmers" and that this level of coverage would more than accomplish section 1071's statutory purposes. One agricultural lender noted that over 76 percent of its loan volume portfolio would fall within the proposed $5 million "small business" definition (approximately 3,770 loans) but 10.7 percent of the loan volume portfolio falls under the FCA definition (approximately 2,730 loans).

Other suggested size standards. A trade association representing online lenders recommended the Bureau adopt an easy-to-administer definition based on 4-digit NAICS codes. This commenter argued that while a singular revenue or number of employees standard to designate small businesses might be simpler for the Bureau, it would not be a true reflection of the small business market. The commenter asserted that employing the first 4 digits of the NAICS codes would provide measurements that differentiates broadly by industry, but provides a standard that gives lenders flexibility, allowing them to use data supplied by the borrower without having to undertake a costly and time-consuming verification process of the data provided.

Many community groups, community-oriented lenders, and a minority business advocacy group urged the Bureau to adopt the 500 employee/ $8 million test set forth in the SBREFA Outline. A few of these commenters said this was an easily implemented definition that covered the bulk of small businesses as defined by the SBA without the complexities of the SBA's NAICS-code based definitions, whereas the Bureau's proposal would exclude 270,000 businesses that the SBA classifies as small businesses, with many such businesses disproportionately located within retail trade and construction industries, where small businesses are more likely to be owned by people of color.

One comment letter suggested defining a small business as having a gross annual revenue of $1 million and including a threshold for the number of employees required for a business to be deemed small. They referenced the SBA's size standards, which use a 100-employee threshold for some industries, but suggested the Bureau use a similar definition or alter its small business definition to include more minority- and women-owned small businesses.

Other issues. A few comments addressed the role of affiliate revenue in business size determinations. A bank suggested aligning treatment of affiliate revenue with current CRA requirements [542] to avoid reporting disparities from institution to institution for similarly situated applicants. Pointing to SBA rules and guidance, two other industry commenters asserted that subsidiaries of large companies should be excluded from the definition of "small business" if the aggregate revenues for all affiliates, as defined in 13 CFR 121.103, exceed the gross annual revenue threshold.

Two commenters asked for clarification related to business size determinations involving multiple applicants. One suggested the Bureau clarify that loans jointly made to multiple borrowers are not reportable where one or more of the borrowers may qualify as a small business under the rule but is not the primary business seeking the funding. Another commenter suggested the Bureau (i) allow lenders to treat all co-borrowers as one applicant such that the gross annual revenue of all co-borrowers would be aggregated for purposes of assessing whether the loan is a small business loan and (ii) clarify how to identify loans to a "minority-owned business" or a "women-owned business" when one, but not all, co-borrowers meet the definitions of these terms.

A group of insurance premium finance trade associations noted that their members do not obtain any financial information or information about for-profit status regarding any applicant and suggested the Bureau permit their members to ask the insured business if it is a small business (after furnishing the regulation's operative definition) when the signed premium finance agreement is submitted to the lender or immediately after the lender receives the signed premium finance agreement.

[542] The CRA requires an institution to rely on the revenues that it considered in making its credit decision when indicating whether a small-business or small-farm borrower had gross annual revenues of $1 million or less—in the case of affiliated businesses, the institution would aggregate the revenues of the business and the affiliate to determine whether the revenues are $1 million or less only if the institution considered the revenues of the entity's parent or a subsidiary corporation of the parent as well as that of the business. *See* Fed. Fin. Insts. Examination Council, *A Guide to CRA Data Collection and Reporting,* at 13 (Jan. 2001), *https://www.ffiec.gov/cra/pdf/cra_guide.pdf.*

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.106(b)(1) (proposed as § 1002.106(b)) to define a small business as having the same meaning as the term "small business concern" in 15 U.S.C. 632(a), as implemented in 13 CFR 121.101 through 121.107. As discussed above, the Bureau believes that adopting existing statutory and regulatory small business definitions, which are widely understood and already the subject of notice and comment, is consistent with the purposes of section 1071 and will facilitate compliance. Final § 1002.106(b)(1) further states that, notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of subpart B, a business is a small business if its gross annual revenue, as defined in final § 1002.107(a)(14), for its preceding fiscal year is $5 million or less. The Bureau believes this definition implements the statutory language of section 1071 while reflecting a need for financial institutions to apply a simple, broad definition of a small business across industries. The Bureau has obtained SBA approval for this alternate small business size standard pursuant to the Small Business Act.[543]

The Bureau believes that adopting this gross annual revenue standard is consistent with the purposes of section 1071 and addresses the concerns that the Bureau has heard with respect to determining whether applicants are small businesses for purposes of complying with section 1071, particularly regarding determining the applicant's NAICS code, and the implications thereof. Due to concerns expressed by other stakeholders, which are described above, and upon its own further consideration as discussed in this section-by-section analysis under *Alternatives Considered* below, the Bureau is not adopting suggested alternative standards, including, but not limited to a $1 million gross annual revenue standard, a $7.5 or $8 million gross annual revenue standard, a threshold based on loan size, a different standard for agricultural lending, nor the existing SBA size standards.

The Bureau agrees with the many commenters who said that a definition of small business for purposes of section 1071 based on a gross annual revenue threshold was simple, objective, relatively easy to apply at the time of application, and/or will make compliance easier. The Bureau understands that a majority of large banks already use gross annual revenue

[543] 15 U.S.C. 632(a)(2)(C); 13 CFR 121.903.

thresholds to delineate small business lending within their own institutions.[544] The Bureau also agrees that a gross annual revenue threshold is the preferred way to implement section 1071 to avoid overly complicating the data collection process, leading to the introduction of errors that would undermine data accuracy, or interfering with financial institutions' ability to extend credit to business applicants in a prompt and efficient manner. The Bureau believes that a simplified definition of small business that does not require determining the appropriate NAICS codes and/or the number of employees will satisfy lenders' needs to easily determine small business status early in the application process and avoid delays in communicating a credit decision.

While the Bureau received broad support for a simple gross annual revenue threshold generally, it received narrower support for a threshold of $5 million or less in gross annual revenue. The Bureau believes that a $5 million threshold strikes the right balance in terms of broadly covering the small business financing market to fulfill section 1071's statutory purposes while meeting the SBA's criteria for an alternative size standard.[545] As described above, the SBA is generally increasing size standards across industries and no longer uses a $1 million annual receipts standard for any industry. As a result, the Bureau's $5 million standard is sufficiently inclusive relative to the SBA size standards. Moreover, while there is no clear consensus on a simplified size standard that uniformly covers all small business financing markets,[546] the Bureau understands that among the banks that already use a gross annual revenue threshold to delineate small business lending, the majority of banks of all sizes use a threshold above $1 million in firm gross annual revenue.[547] In fact, larger banks typically use even higher thresholds (for banks with less than $1 billion in assets, 25.1 percent use a threshold greater than $5 million in firm gross annual revenue, while 37.0 percent of banks with $1 billion to $10 billion in assets use a gross annual revenue threshold of $5 million or more).[548]

The Bureau has considered the potential effect of applying a $5 million gross annual revenue threshold to both non-agricultural and agricultural industries and compared that standard to coverage under the SBA's existing size standards. Among non-agricultural industries, the Bureau estimates[549] that over 1.5 million (27 percent) small businesses would not be covered by an alternative $1 million gross annual revenue threshold and at a $2 million threshold, the rule would have been underinclusive by 12 percent. (This and other size standards suggested by commenters are discussed in detail under *Alternatives Considered* below.) At a $8 million threshold, the percentage of underinclusivity falls to approximately 4 percent, or approximately 235,000 non-agricultural businesses.

Applying an $8 million threshold to agricultural businesses, the Bureau's analysis[550] shows that over 20,000 such businesses that are *not* considered small under the SBA's size standards would have their applications reported to the Bureau.[551] With the finalized $5 million gross annual revenue threshold, relative to current SBA size standards, *all* small farms' applications will be reported to the Bureau, along with applications from 14,000 agricultural businesses that are not considered small under the SBA's size standards. Thus, the Bureau believes that its $5 million gross annual revenue threshold strikes an appropriate balance between covering the applications of most businesses that are considered small under the SBA's size standards, while minimizing the number of businesses above the SBA's size standards whose applications will be reported to the Bureau, and in a way that satisfies the SBA's criteria for approving an alternative size standard under its regulations.

The Bureau also notes that in their proposal to amend their regulations implementing the CRA, the Board, FDIC, and OCC proposed to define the terms ''small business'' and ''small farm'' consistent with the Bureau's definitions in its NPRM.[552] Thus, per the CRA proposal, once 1071 data are available, the agencies would transition from the current CRA definitions of small business and small farm loans to definitions that cover loans to small businesses and small farms with gross annual revenues of $5 million or less.[553] Given the many comments that the Bureau received advocating for CRA alignment, the Bureau strongly supports the CRA agencies' efforts and believes that finalizing its proposed small business definition will streamline reporting and minimize compliance risks for financial institutions that are also reporting covered credit transactions under CRA and would simplify data analysis for CRA-reportable transactions. See part II.F.2.i above for further discussion of the CRA and its relationship to this rule.

With respect to a commenter's suggestion that the Bureau increase the existing Regulation B threshold for notification to business credit applicants for consistency with this rule, the Bureau does not believe such a change would be appropriate at this time. Given the fact that these notification requirements have been in place for close to 50 years and financial institutions have invested in compliance infrastructure around these requirements, the Bureau believes that the notification threshold in existing Regulation B should not be amended without additional research and input from stakeholders.

To address ECOA and existing Regulation B's general prohibition against inquiring about protected demographic information in connection with a credit transaction,[554] and to clarify the obligations of covered financial institutions under subpart B, the Bureau is adopting final comments 106(b)(1)–1 and 106(b)(1)–2 to address situations when new information may arise that could change the determination of whether an applicant is a small business. The Bureau acknowledges that a financial institution's understanding of an applicant's gross annual revenue may

[544] *See* FDIC Small Business Lending Survey at 11.

[545] *See* 15 U.S.C. 632(a)(2)(C); 13 CFR 121.903.

[546] *See, e.g.,* FDIC Staff Report at 10 (discussing various gross annual revenue thresholds ranging from $1 million to $10 million and resolving ''[g]iven the lack of consensus on the correct definition of a small business, [to] present results using both thresholds wherever possible'').

[547] *Id.* at 9.

[548] *Id.*

[549] The Bureau used the most recent Statistics of U.S. Businesses (SUSB) from Census (from 2017) to estimate the total number of businesses that would be under- or over-included for section 1071, relative to the SBA's size standards and based on various revenue-based size standard alternatives. We use SBA size standards as of May 2022 which reference 2017 NAICS codes; these NAICS codes are consistent with the SUSB data. The 2017 SUSB only contains information on employer businesses.

[550] The Bureau's analysis of agricultural industries used the 2017 Census of Agriculture from the USDA, relative to the SBA's size standards, based on various revenue-based size standard alternatives. The Bureau notes that because the Census of Agriculture does not have the granularity of the SUSB, it made some additional strong assumptions. The Census of Agriculture also does not have the same employer/non-employer distinction as the SUSB and therefore includes information on all farms.

[551] In the Census of Agriculture, there is just a $5+ million category so this number would not change for thresholds above $5 million.

[552] 87 FR 33884, 33890 (June 3, 2022).

[553] *Id.* at 33899.

[554] *See* existing § 1002.5(a)(2); 15 U.S.C. 1691(b)(5).

change as the institution proceeds through underwriting. The Bureau is finalizing comment 106(b)(1)–1 (proposed as 106(b)–1) with updated cross-references to other portions of the final rule. Final comment 106(b)(1)–1 explains that if a financial institution initially determines an applicant is a small business as defined in final § 1002.106(b) based on available information and obtains data required by final § 1002.107(a)(18) and (19), but the financial institution later concludes that the applicant is not a small business, the financial institution may process and retain the data without violating ECOA or Regulation B if it meets the requirements of final § 1002.112(c)(4). The Bureau is finalizing comment 106(b)(1)–2 (proposed as 106(b)–2) with certain revisions for additional clarity. Final comment 106(b)(1)–2 explains that if a financial institution initially determines that the applicant is not a small business as defined in final § 1002.106, but then later concludes the applicant is a small business prior to taking final action on the application, the financial institution must report the covered application pursuant to final § 1002.109. In this situation, the financial institution shall endeavor to compile, maintain, and report the data required under final § 1002.107(a) in a manner that is reasonable under the circumstances.

The Bureau is finalizing comment 106(b)(1)–3 (proposed as comment 106(b)–3) to explain that a financial institution is permitted to rely on an applicant's representations regarding gross annual revenue (which may or may not include an affiliate's revenue) for purposes of determining small business status under final § 1002.106(b)(1). The comment further clarifies that, if the applicant provides updated gross annual revenue information or the financial institution verifies such information, the financial institution must use the updated or verified information in determining small business status. The Bureau has changed the heading of this comment and has removed some of the introductory language to this comment for clarity as suggested by several commenters; this change is not intended to alter the meaning of this comment.

The Bureau has considered comments regarding the role of affiliate revenue in business size determinations. The Bureau agrees that subsidiaries of large companies should be excluded from the definition of ''small business'' provided that the aggregate revenues for all affiliates, as defined in 13 CFR 121.103, exceed the $5 million gross annual revenue threshold—and, indeed, this is consistent with what the Bureau proposed. The Bureau is not, however, adopting the mandate in the SBA regulations, which provide that the average annual receipts size of a business concern with affiliates *must* be calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.[555] The Bureau understands that the SBA totals the average annual receipts of the applicant and all of its affiliates in determining size because in order to be eligible for certain Federal programs and certain Federal contracts and subcontracts, a firm must be a ''small business concern.'' [556] Because the size standard used for this rule is only to determine whether data collection is required pursuant to section 1071 and has no bearing on eligibility for Federal small business assistance, the Bureau does not believe it is necessary to mandate that financial institutions consider affiliate revenue in determining an applicant's small business status.

The Bureau believes that this approach to use of affiliate revenue in size determinations will address concerns related to treatment of passive businesses and non-operating entities, such as special purpose vehicles. The Bureau understands that passive businesses and non-operating entities are generally affiliated with other businesses (for example as subsidiaries of large corporate entities). The Bureau notes that final § 1002.102(a) adopts the SBA's expansive view of what constitutes affiliation,[557] and it is therefore unlikely that a special purpose entity or other large project financing investment entity would be formed without any affiliation with an established entity—rather, they are likely created as subsidiaries of an existing business or as joint ventures between existing businesses.[558] Thus, financial institutions will be able to exclude businesses that are, in fact, middle- or large-sized applicants from data collection and reporting under this final rule by considering these businesses' affiliate revenues, which will likely exceed the $5 million gross annual revenue threshold for purposes of the definition of a small business. For example, if a financial institution receives an application for financing from a special purpose vehicle or shell company established for the purpose of acquiring significant commercial real estate (such as a hospital building), the financial institution could rely on information provided by the applicant regarding its, and its affiliates, gross annual revenue for purposes of determining small business status under § 1002.106(b). As discussed in greater detail below, the Bureau also believes that its approach to affiliate revenue further obviates the need to define a small business by the credit amount requested as suggested by some commenters.

The Bureau has considered the comments regarding business size determinations involving multiple unaffiliated applicants and does not agree with the suggested approach to allow financial institutions to treat all co-applicants as one applicant by aggregating their gross annual revenues for purposes of assessing business size. The Bureau does not believe that (in situations not involving affiliated entities) such an approach would be consistent with the SBA's definitions of business concern and small business concern. The Bureau is addressing commenters' requests for clarification on this issue by adding new comment 106(b)(1)–4, which provides that if a covered financial institution receives a covered application from multiple businesses who are not affiliates, as defined by final § 1002.102(a), where at least one business is a small business under final § 1002.106(b), the financial institution shall compile, maintain, and report data pursuant to final §§ 1002.107 through 1002.109 regarding the covered application for only a single applicant that is a small business. The comment clarifies that the financial institution shall not aggregate unaffiliated co-applicants' gross annual revenues for purposes of determining small business status under final § 1002.106(b) and provides a cross reference to final comment 103(a)–9 for additional details.

[555] 13 CFR 121.104(d)(1).

[556] Small Bus. Admin., *Small Business Compliance Guide,* at 4 (July 2020), *https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf.*

[557] 13 CFR 121.103; *see also* Small Bus. Admin., *Small Business Compliance Guide* (July 2020), *https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf* (affiliation can be based on (1) ''control (when one controls or has the power to control the other, or a third party or parties controls or has the power to control both)''; (2) ownership; (3) ''stock options, convertible securities, and agreements to merge''; (4) management; (5) identity of interest''; or (6) ''franchise and license agreements'').

[558] Similarly, where a substantial portion of its assets and/or liabilities of a special purpose entity is the same as a predecessor entity, the SBA's definition of a business concern specifically dictates that the annual receipts and employees of the predecessor must be taken into account in determining size of the new business concern. 13 CFR 121.105(c).

In response to the group of insurance premium finance trade associations that highlighted their members' challenges with determining small business status, the Bureau notes that insurance premium financing arrangements are excluded under final § 1002.104(b)(4) for the reasons set forth in the corresponding section-by-section analysis.

Alternatives Considered

Gross annual revenue of $1 million. In the NPRM, the Bureau did not propose a $1 million gross annual revenue threshold, expressing concern that such a threshold likely would not satisfy the SBA's requirements for an alternative size standard across industries and would exclude too many businesses designated as small under the SBA's size standards. Nevertheless, as discussed above, many commenters requested the Bureau adopt a $1 million gross annual revenue threshold.

The SBA no longer uses a $1 million annual receipts standard for any industry and the Bureau does not believe that a gross annual revenue threshold of $1 million would be more in line with congressional intent and purpose. Congress did not specify a gross annual revenue threshold for defining a small business under section 1071 but instead pointed to the SBA's definition of small business concern.[559] However, Congress set forth a process to allow the Bureau to prescribe an alternative size standard, if approved by the SBA Administrator.[560] Given the fact that the SBA no longer uses a $1 million standard for any industry[561] and is thus unlikely to approve an alternative size standard at that threshold for all industries, the Bureau believes that its small business definition is a more appropriate alternative size standard.

While it is true that a $1 million threshold would better align with existing Regulation B adverse action notification requirements, the Bureau believes that the flexibilities built into the final rule for small business size determinations will obviate the need for changes to adverse action operations, including compliance with existing Regulation B adverse action notification requirements. The Bureau also notes that the concerns raised by many commenters regarding alignment with CRA regulations would likely be resolved if the CRA proposal, which expressly seeks alignment with the Bureau's alternative small business definition, is finalized. With respect to suggested alignment with Small Business Development Center and Small Business Investment Company program guidelines, the Bureau points to the fact that credit transactions made under programs with lower thresholds are by default small business transactions for the purposes of the final rule and thus not inconsistent.

The Bureau has considered the comments arguing that a $5 million threshold would be overinclusive and a $1 million threshold would better exclude non-small businesses. Based on the Bureau's analysis, neither a $1 million threshold nor $5 million threshold would be overinclusive among non-agricultural industries relative to the SBA's current size standards. On the other hand, the Bureau estimates that, in terms of the number of SBA ''small'' firms whose applications would not be reported to the Bureau, a $1 million threshold would be 4.5 times more underinclusive than a $5 million threshold. Moreover, research conducted by FDIC staff found that among banks with $1 billion to $10 billion in assets, more than one-third of self-described small business lending would be excluded under the $1 million gross annual revenue definition and that among banks with more than $10 billion in assets, nearly two-thirds would be excluded.[562] Based on this study, FDIC staff concluded that ''for the typical bank, a [gross annual revenue] threshold of $1 million is overly conservative and would exclude many firms that should properly be considered small businesses.'' The Bureau agrees with this conclusion, and likewise believes that a $1 million gross annual revenue threshold would not satisfy the SBA's requirements for an alternative size standard across industries and would exclude too many businesses designated as small under the SBA's size standards.

Gross annual revenue of $7.5 to $8 million. The Bureau is not adopting a $7.5 million or $8 million gross annual revenue threshold, as suggested by a number of commenters. While the Bureau agrees that a threshold of $7.5 to 8 million would more expansively cover SBA small businesses (the Bureau estimates that under a $8 million threshold, applications from approximately 130,000 more SBA ''small'' firms would be reported to the Bureau as compared to a $5 million threshold), the Bureau does not believe that this definition more closely aligns with what lenders already consider small businesses based on comments received in support of a lower than $5 million threshold. Moreover, the Bureau notes that while an $8 million threshold would be less underinclusive among non-agricultural industries relative to SBA size standards, it would be more overinclusive among agricultural businesses.

Loan size. The Bureau does not believe that it would be appropriate to define a small business based on the size of the loan applied for (*i.e.,* by adopting a maximum ''amount applied for'' exclusion) such as one in the amount of $750,000 (for SBA alignment) or $1 million (for CRA alignment), as suggested by some commenters. The Bureau likewise is not defining a small business based on whether a loan is for an amount up to $10 million, as suggested by some commenters, or any other size.[563] As explained in the NPRM, the Bureau believes that such potential definitions do not bear a sufficient relationship to the size of the business or its operations. For instance, under a definition similar to existing CRA requirements, application data for businesses with low revenue that may be applying for large loans would be excluded. The Bureau does not believe that adopting such an approach would further the purposes of section 1071. The Bureau likewise agrees with commenters cautioning against using the CRA definition based on loan size, because many small businesses borrow amounts far more than $1 million while many large businesses borrow amounts far below that threshold.[564]

[559] In ECOA section 704B(h)(2), Congress provided that ''[t]he term 'small business' has the same meaning as the term 'small business concern' in section 3 of the Small Business Act (15 U.S.C. 632).''

[560] 15 U.S.C. 632(a)(2)(C).

[561] Through a series of rules that became effective on May 2, 2022, the SBA implemented revised size standards for 229 industries (all using average annual receipts standards) to increase eligibility for its Federal contracting and loan programs. *See* 87 FR 18607 (Mar. 31, 2022); 87 FR 18627 (Mar. 31, 2022); 87 FR 18646 (Mar. 31, 2022); 87 FR 18665 (Mar. 31, 2022). The SBA did not reduce any size standards—it either maintained or increased the size standards for all 229 industries, in many cases with size standard increases of 50 percent or more. Effective July 14, 2022, the SBA also increased size standards for 22 wholesale trade industries and 35 retail trade industries. 87 FR 35869 (June 14, 2022). Effective December 19, 2022, the SBA added an additional 13.65 percent inflation increase to the monetary small business size standards. 87 FR 69118 (Nov. 17, 2022).

[562] FDIC Staff Report at 10.

[563] It is possible that these commenters intended to advocate for a $10 million gross annual revenue threshold. For the reasons stated above, the Bureau does not believe a definition of small business using a $10 million gross annual revenue threshold would fulfill section 1071's statutory purposes.

[564] *See, e.g.,* FDIC Small Business Lending Survey at 17 (finding that at banks with assets of $1 billion to $10 billion, at least $19.1 billion in gross understatement of small business lending (in which

Existing SBA size standards. Despite some recommendations that the Bureau use the SBA's definition and size standards, the Bureau believes the SBA's size standards are not suitable for this data collection initiative and prefers to establish a small business definition specifically tailored to this rulemaking implementing section 1071.

A simple, easy-to-implement small business definition is necessary in light of the general prohibition in existing Regulation B against creditors' inquiring about protected demographic information in connection with a credit transaction unless otherwise required by Regulation B, ECOA, or other State or Federal law, regulation, order, or agreement.[565] ECOA section 704B(e)(2)(G), as implemented by this rule, requires a financial institution to collect and report the ethnicity, race, and sex of the principal owners of the business. Thus, in order to avoid potential liability under ECOA and existing Regulation B, a financial institution must accurately determine that a business credit application is subject to section 1071 *before* inquiring about the applicant's protected demographic information. The Bureau does not believe the SBA's existing size standards allow for the quick and accurate determination of small business status required for this 1071 data collection initiative. Specifically, the Bureau does not believe this determination can be quickly and accurately made if, as required under the SBA's existing size standards, the financial institution must determine the appropriate 6-digit NAICS code for the business and then apply the NAICS-based size standards to determine whether an applicant for business credit is a small business.

As discussed above, commenters expressed concern to the Bureau about the difficulties in determining the appropriate 6-digit NAICS code for businesses and in applying the SBA's NAICS-based size standards. They generally preferred a simple small business definition and expressed concern that the SBA's approach to defining a small business—which bases classification on an applicant's 6-digit NAICS code—is relatively complex in this context. The Bureau believes that removing a NAICS code-based small business determination as a step in determining small business status will both facilitate compliance and better achieve the purposes of section 1071. The Bureau understands that one reason that commenters expressed a strong desire for a simple approach to determining whether an applicant is small is that this initial determination may drive the application process. To comply with section 1071 requirements, financial institutions may use a different application process, or different or additional application materials, with small business credit applicants than they do with applicants that are not small businesses. Thus, quickly and accurately determining whether an applicant is a small business at the outset of the application process may be a crucial step, one that financial institutions would benefit from being able to seamlessly accomplish. Considering the requirements and prohibitions in ECOA with respect to protected demographic information, the Bureau understands the import that financial institutions have placed on both the speed and accuracy of this determination.

Notwithstanding its decision to not rely on NAICS codes in its small business definition, the Bureau believes that NAICS codes possess considerable value for section 1071's fair lending purpose as well as its business and community development purpose. As discussed in the section-by-section analysis of § 1002.107(a)(15) below, the Bureau is therefore requiring financial institutions to collect and report 3-digit NAICS sector codes for applications subject to this final rule. However, the Bureau believes that gathering NAICS code information at some point during the application process, while still the subject of some concern for financial institutions, differs in kind from requiring NAICS information as a necessary step to beginning an application (and correctly determining which type of application to initiate). In addition, the NAICS information now required by the final rule is a 3-digit NAICS code instead of a 6-digit code as proposed; this information will provide valuable data to analyze fair lending patterns and identify business subsectors with unmet credit needs, while limiting the burden this collection may impose on financial institutions and small business applicants.

The Bureau also believes that its simplified alternative size standard will provide reporting results that are largely consistent with what would be reported by adopting the full SBA size standards. The Bureau used data from the U.S. Census's 2012 Statistics of U.S. Businesses (SUSB) and the U.S. Department of Agriculture's 2012 Census of Agriculture to analyze how various alternative approaches would change the number of businesses considered ''small'' under this rule relative to the SBA definition.[566] Among the 7.2 million small employer businesses and farms, the Bureau estimates that 365,000 businesses that would be small under the SBA's existing size standards will not be covered by the Bureau's $5 million gross revenue standard. The Bureau further estimates that the Bureau's rule will cover some 14,000 agricultural businesses that would not be small under the SBA's existing size standards. The Bureau believes that such variation with respect to the SBA's current size standards is an appropriate trade-off for the reasons described herein.

The Bureau notes, however, that some industries will have greater divergence between which businesses are small under the Bureau's $5 million gross annual revenue alternative size standard and which businesses are small under the SBA's existing size standards. That is, applications for businesses that are small under the SBA's existing size standards will be reported to the Bureau less from some industries than others. In general, there will be a larger proportion of businesses whose applications will not be reported in industries with a higher revenue-based size standard. The industries most affected by this are the retail trade and construction industries. Other industries disproportionately affected may include manufacturing, wholesale trade, health care and social assistance, and professional, scientific, and technical services. The Bureau received limited public feedback with respect to such concerns.

The Bureau also believes that a simplified size standard will be important for financial institutions that may not frequently engage in small business lending in determining whether they are covered under this final rule. As discussed in the section-by-section analysis of § 1002.105(b), small business lending data collection and reporting is required only for financial institutions that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. Financial institutions that do not frequently lend

small businesses with less than $1 million in gross annual revenue received loans with amounts greater than $1 million)).

[565] ECOA provides that it is not discrimination for a financial institution to inquire about women-owned or minority-owned business status, or the ethnicity, race, and sex of principal owners pursuant to section 1071. 15 U.S.C. 1691(b)(5).

[566] The 2012 SUSB is the most recent Census product to have categories of revenue and employees granular enough to conduct this analysis. The Bureau constructed the 2012 equivalents of the second and third alternatives due to the vintage of the SUSB data available and used the SBA's 2012 size standards for the analysis. The 2012 SUSB only covers employer firms or businesses with at least one employee.

to small businesses will seek to track precisely how many such transactions they have originated. The Bureau believes that it is important to empower financial institutions to quickly ascertain whether a covered credit transaction was originated for a small business, so that infrequent lenders can continue to monitor whether compliance with this final rule is required.

The Bureau believes that its $5 million gross annual revenue standard is a more efficient and appropriate measure of applicant size for purposes of determining whether small business lending data collection is required pursuant to section 1071. The Bureau understands that the SBA generally bases business concern size standards on average annual receipts or the average number of employees of the business concern, as customized industry-by-industry across 1,012 6-digit NAICS codes. The SBA typically uses two primary measures of business size for size standards purposes: (i) average annual receipts [567] for businesses in services, retail trade, agricultural, and construction industries, and (ii) average number of employees [568] for businesses in all manufacturing industries, most mining and utilities industries, and some transportation, information, and research and development industries.[569] The Bureau understands that the SBA's size standards are used to establish eligibility for a variety of Federal small business assistance programs, including for Federal government contracting and business development programs designed to assist small businesses in obtaining Federal contracts and for the SBA's loan guarantee programs, which provide access to capital for small businesses that are unable to qualify for and receive conventional loans elsewhere. The Bureau notes that its $5 million size standard will only be used to determine whether small business lending data collection is required pursuant to section 1071, and has no bearing on eligibility for Federal small business assistance. Moreover, the Bureau believes it is far more likely that an applicant will be able to readily respond to a question regarding its gross annual revenue for the preceding fiscal year—something already contemplated by existing Regulation B for all business credit to determine whether adverse action notice requirements apply [570]—than offer the closest metric currently in use by SBA regulations, which is generally average annual receipts across the previous five fiscal years.[571]

The Bureau believes that requiring application of existing SBA size standards for this rule could result in many financial institutions having to undergo extensive operational and/or compliance management system changes. The Bureau believes that it will reduce burden for financial institutions, particularly those without sophisticated compliance management systems or familiarity with SBA lending, to comply with a gross annual revenue size standard for the section 1071 small business definition that better aligns with current lending practices.

If the Bureau were to adopt a small business definition using the existing SBA size standards that vary by industry based on 6-digit NAICS codes, financial institutions would only be able to request an applicant's protected demographic information further along in the application process, once they have obtained the multiple pieces of data that would be necessary to determine whether the applicant is small and, therefore, the 1071 process applies. This delay could make it more difficult for financial institutions to collect applicants' protected demographic information (particularly for applications that are withdrawn or closed for incompleteness early in the application process), which is important to both of section 1071's statutory purposes. These data collection considerations differ from those applicable to SBA lending programs, whereby a lender often cannot (and should not) make an accurate eligibility determination for an SBA loan until later in the application process, often after a loan has already been initially decisioned and after the lender has collected information related to size, time in business, and other data.

In order to allow financial institutions to expeditiously determine whether this rule applies, the Bureau is seeking to minimize complexity for financial institutions in determining whether a covered application is reportable because the applicant business is a small business—a necessary determination for the collection of protected demographic information pursuant to section 1071. The Bureau believes, and most commenters agreed, that this rule will benefit from a universal, easy-to-apply reporting trigger that does not need to be supported by additional documentation or research. Such a reporting trigger must be easily understood by small business owners who may be completing an application online, or by the tens of thousands of customer-facing personnel who take small business applications in an industry with a recent turnover rate of over 20 percent.[572] The Bureau also believes that a gross annual revenue reporting trigger will facilitate better compliance with section 1071 requirements because it aligns with many larger financial institutions' current lending and organizational practices, which use gross annual revenue to assign small businesses into their retail/small business banking groups.[573]

Requiring financial institutions to rely on the SBA's existing size standards for purposes of 1071 data collection and reporting requirements could pose risks to the efficient operation of small business lending. Based on the overwhelmingly consistent feedback the Bureau has received from stakeholders on this issue, the Bureau believes that using the SBA's existing size standards for the purposes of section 1071—wherein the financial institution must quickly determine the appropriate 6-digit NAICS code for businesses and then apply a variety of standards, including potentially gathering information to determine five years of the applicant's average annual receipts or employee information—would not align with current lending and organizational practices. Application of the SBA's existing size standards, at the beginning of the application process, could slow down the application process, particularly at institutions that otherwise would often be able to render credit decisions in a matter of minutes; the Bureau believes that financial institutions may be compelled to raise the cost of credit or originate fewer covered credit transactions as a result.

[567] The Bureau understands that the SBA changed its regulations on the calculation of average annual receipts for all its receipts-based size standards, and for other agencies' proposed receipts-based size standards, from a three-year averaging period to a five-year averaging period, outside of the SBA Business Loan and Disaster Loan Programs. 84 FR 66561 (Dec. 5, 2019).

[568] Generally, the average number of employees of the business concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 24 calendar months. *See* 13 CFR 121.106(b)(1).

[569] To measure business size, the SBA also uses financial assets for certain financial industries, and for the petroleum refining industry, it uses refining capacity and employees.

[570] *See* 12 CFR 1002.9(a)(3).

[571] 13 CFR 121.104(a) and (c).

[572] Jim Dobbs, *Employee churn surges at banks despite pay hikes,* Am. Banker (Sept. 9, 2022), *https://www.americanbanker.com/news/employee-churn-surges-at-banks-despite-pay-hikes*.

[573] *See* Fed. Deposit Ins. Corp., *Small Business Lending Survey,* at 12 (2018), *https://www.fdic.gov/resources/publications/small-business-lending-survey/2018-survey/section2.pdf* (finding that a substantial majority of large banks use gross annual revenue (61.8 percent) as a limit to define small businesses).

Such an outcome could needlessly affect access to credit for small businesses. The Bureau believes that eliminating credit opportunities or reducing access to credit for small businesses, including women-owned and minority-owned small businesses, in this way would frustrate the statutory purpose of section 1071 to ''enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.'' [574]

The Bureau expects that many financial institutions, for efficiency, will bifurcate their business credit application procedures based on an initial determination of whether the application will be subject to this rule. The Bureau therefore believes that many financial institutions will not proceed with taking applicant information until the financial institution is able to determine that the applicant is small (in which case, this rule requires it to collect and report the applicant's protected demographic information) or that the applicant is not small (where ECOA generally prohibits the financial institution from collecting protected demographic information). If this process necessitates determining the correct NAICS code for the applicant, and in many cases, requesting five years of average annual receipts or the 24-month average number of employees from the applicant pursuant to SBA's existing size standards, the Bureau believes that businesses seeking credit would encounter, at a minimum, otherwise avoidable delays in application processing.

Section 1071 is also unique in that Congress specified that the data collection regime include a particular form of revenue for the businesses at issue. As discussed in the section-by-section analysis of § 1002.107(a)(14) below, section 1071 requires a financial institution to collect ''the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application.'' [575] The Bureau considered whether under section 1071 a financial institution should have to apply two different revenue-based rules (first, one for determining whether the business is small under the existing SBA size standards and therefore 1071 data must be collected and reported; and, second, if the business is small, another for reporting the business's gross annual revenue in the last fiscal year), or whether applying only one revenue-based standard for implementing section 1071 could be sufficient. Requiring financial institutions to apply different standards could be unnecessarily confusing and burdensome, as well as also increase the potential for errors in data collection and reporting. Moreover, as discussed below, section 1071 amends ECOA, which already incorporates the concept of gross annual revenue as implemented under existing Regulation B's adverse action notice requirements.

Small farm definition. The Bureau is not adopting a different small business definition for farms. Many agricultural lenders suggested aligning with the Farm Credit Administration's (FCA) small farmer definition for agricultural financing transactions, primarily arguing that: (i) the proposed $5 million threshold is substantially overinclusive as applied to the farming community and would cover almost all the customers of FCS lenders; (ii) aligning with the FCA's ''small farmer'' definition would facilitate compliance and reduce burden because FCS lenders are very familiar with the standard; and (iii) this change would take into account the unique nature of the agricultural industry, which is disproportionately dominated by family farms.

The Farm Credit Act of 1971 authorizes the FCS to provide financing and services to farmers and ranchers through FCS banks and associations. The Act also provides the FCA, an independent Federal agency, authority to regulate and examine these institutions and it requires them to report annually to FCA about the operations and achievements of the associations' lending and service programs for young, beginning, and small farmers and ranchers. FCA's definition of ''small farmer'' is ''a farmer, rancher, or producer or harvester of aquatic products who normally generates less than $250,000 in annual gross sales of agricultural or aquatic products.'' [576] The FCA has not updated this threshold since it was first adopted in 1998 although it has since considered whether to change it.[577]

The NPRM made clear the Bureau's intention to cover agricultural credit, and the Bureau did not propose a separate small farm definition or any other adjustments specifically for agricultural credit. Prior to the SBA increasing its size standards for small farms, the Bureau acknowledged in the NPRM that its proposed $5 million size standard could result in data reporting on applications from approximately 77,000 businesses that would not be considered small under the SBA size standards in effect at that time, the vast majority of which would be farms (for which, at that time, the SBA predominantly used a $1 million standard). Conversely, the Bureau estimated that 270,000 primarily non-agricultural businesses that would be small under the SBA's size standards in effect at the time of the NPRM would not be covered under the proposed $5 million gross annual revenue standard.

As noted above, the SBA's size standards for agricultural industries have increased since the NPRM and now range from $2.25 million to $34 million average annual receipts—which now means that the $5 million gross annual revenue standard the Bureau is finalizing is markedly more aligned with SBA's size standards for farms than it was at the time of the NPRM. The Bureau believes that these recent changes to the SBA size standards, which were based on extensive research and a notice and comment rulemaking, further suggest that a definition of small farms based on $250,000 in annual gross sales, preferred by certain commenters, would not sufficiently cover small agricultural businesses.

The Bureau does not believe that the Small Business Act requires the Bureau to adopt a separate definition for small farms, as implied by one commenter. The Small Business Act provides that the SBA Administrator must ''ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator.'' [578] The Bureau believes, and explained to the SBA when obtaining its approval, that this rule will benefit from a universal, easy-to-apply reporting trigger that reflects the need for a wide variety of financial institutions to apply a simple, broad definition of a small business that is practical across the many product types, application types, technology platforms, and applicants in the market.

[574] ECOA section 704B(a).

[575] *Id.*

[576] Farm Credit Admin., *Bookletter 040—Revised: Providing Sound and Constructive Credit to Young, Beginning, and Small Farmers, Ranchers, and Producers or Harvesters of Aquatic Products,* at 2 (Aug. 10, 2007), *https://ww3.fca.gov/readingrm/Handbook/FCA%20Bookletters/BL-040%20REVISED.docx*.

[577] 84 FR 5389, 5390 (Feb. 21, 2019) (''Several agricultural and economic cycles have occurred since 1998, and we are considering whether the $250,000 gross sales amount continues to be appropriate or should be revised or indexed to reflect the changes, including the economic conditions presently affecting agricultural producers.'')

[578] 15 U.S.C. 632(a)(3).

In particular, the Bureau believes that the size standard finalized here is consistent with factors that the SBA has previously identified as relevant to the proper exercise of its discretion in this respect—the SBA considers (1) current economic conditions, (2) its mission and program objectives, (3) the SBA's current policies, (4) impacts on small businesses under current and proposed or revised size standards, (5) suggestions from industry groups and Federal agencies, and public comments on the proposed rule, and (6) whether a size standard based on industry and other relevant data successfully excludes businesses that are dominant in the industry.[579]

While the Bureau received widespread support for a simple gross annual revenue threshold, it also understands, as explained by some commenters, that many agricultural lenders generally do not collect gross annual revenue for underwriting or regulatory compliance purposes, which could complicate use of a gross annual revenue threshold to determine small business status. Nonetheless, ECOA section 704B(e)(2)(F) requires financial institutions to collect and report gross annual revenue under section 1071. As discussed in its section-by-section analysis of § 1002.107(a)(14), the Bureau is finalizing comment 107(a)(14)–2, which first clarifies that pursuant to final § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including the gross annual revenue of the applicant. The final comment then states that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is ''not provided by applicant and otherwise undetermined.'' The Bureau believes that permitting this reporting flexibility for agricultural lenders and other financial institutions will reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and the gross annual revenue could not be collected.

While the Bureau acknowledges arguments that the FCA definition might facilitate compliance among FCS lender staff and other compliance professionals who are already familiar with that definition, the Bureau does not believe it would be appropriate to deviate from its otherwise widely supported cross-industry approach. While the Bureau acknowledges that the market share of total farm business debt held by FCS lenders is significant (44.4 percent at the end of 2020[580]), the Bureau is mindful that many other types of non-FCS lenders participate in this important small business lending market. Such lenders would not be able to leverage familiarity with the existing FCA definition and may engage in other types of non-farm lending that would not be subject to this definition. As a result, these lenders may not equally benefit from applying the FCA definition to agricultural small businesses. Indeed, the Bureau understands that an association of community banks issued a letter to oppose efforts to obtain special treatment for FCS lenders, stating that ''[i]t would be totally inappropriate to exempt FCS lenders from onerous regulatory burdens while subjecting smaller lenders, such as community banks, to those regulations even as both types of lenders are serving the same customer base in many instances.''[581] The Bureau believes a consistent small business definition that applies to all financial institutions will result in consistency across the 1071 data, more robust fair lending analyses, and arguably an even playing field for compliance across all financial institutions.

The Bureau acknowledges that a $5 million gross annual revenue threshold will be somewhat overinclusive relative to SBA and Census of Agriculture standards. Some agricultural lenders lament that the threshold would cover almost all their lending and several commenters argued in favor of the FCA definition instead for section 1071 purposes because, they said, it would capture a substantial amount of data while mitigating some of the impact of the compliance cost. As discussed above, the Bureau believes that its $5 million gross annual revenue threshold strikes an appropriate balance between covering the applications of most businesses that are considered small under the SBA's size standards, while minimizing the number of businesses above the SBA's size standards whose applications will be reported to the Bureau, and in a way that satisfies the SBA's criteria for approving an alternative size standard under its regulations. In striking this balance, the Bureau considered section 1071's statutory purposes, and it believes that a broader scope of coverage with regard to agricultural businesses is warranted, given the historical and/or continuing discrimination against Black farmers and the need for transparency into agricultural lending both for fair lending enforcement and business and community development.

Other suggested size standards. The Bureau is not adopting a small business definition based on 4-digit NAICS codes, as suggested by one commenter. As explained above in its discussion of existing SBA size standards, the Bureau believes needing to obtain even a 4-digit NAICS code at the beginning of the application process would often result in a financial institution not being able to determine whether an applicant for business credit is small (and thus subject to the data collection requirements of this final rule) until later in the application process. Similarly, the Bureau believes that a small business definition based on both number of employees and gross annual revenues (*e.g.,* the 500 employee/$8 million standard set forth in the SBREFA Outline and suggested by commenters or one commenter's 100 employee/$1 million standard) would mean that a financial institution would only be able to request an applicant's protected demographic information further along in the application process, once they have obtained the multiple pieces of data that would be necessary to determine whether the applicant is small and, therefore, only at that later stage would it be able to determine that such data collection is required. This delay could interfere with financial institutions' ability to collect these data, particularly for applications that are withdrawn or closed for incompleteness early in the application process, which would limit the usefulness of the data for section 1071's statutory purpose of fair lending enforcement.

106(b)(2) Inflation Adjustment

Inflation is a general increase in the overall price level of the goods and services in the economy; deflation marks a general decrease in the same. A price index, of which there are several types, measures changes in the price of a group of goods and services. The Board's Federal Open Market Committee currently finds that an annual increase in inflation of 2 percent in the price index for personal

[579] *See* 85 FR 62372, 62373 (Oct. 2, 2020) (discussing the SBA's revised size standard methodology).

[580] Farm Credit Admin., *2021 Annual Report,* at 16 (2022), *https://www.fca.gov/template-fca/about/2021AnnualReport.pdf.*

[581] Letter from Indep. Cmty. Bankers of Am., to Senate Chairs Stabenow and Brown and Ranking Members Boozman and Toomey (June 23, 2022), *https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-congress/senate-letter-opposing-fca-independent-authority-act.pdf?sfvrsn=8d2f1c17_0.*

consumption expenditures, produced by the Department of Commerce, is most consistent over the longer run with the Board's mandate for maximum employment and price stability.[582] The United States Bureau of Labor and Statistics, which publishes several price indices, found that from December 2020 to December 2021, ''consumer prices for all items rose 7.0 percent, the largest December to December percent change since 1981.''[583]

In order to keep pace with changes to the SBA's own size standards and the potential impact of future inflation or deflation, the Bureau stated in the NPRM that it was considering whether it might update its proposed $5 million gross annual revenue size standard over time (perhaps at the end of a calendar year in order to allow financial institutions to use the same threshold consistently throughout the year). The Bureau sought comment on how this should be done and the frequency at which it should occur.

Two community groups and a CDFI lender requested that the Bureau address adjustments of its gross annual revenue threshold for defining a small business under the rule. The community groups suggested annual adjustments for inflation, while the CDFI lender suggested an adjustment every five to ten years to account for future inflation and keep pace with changes to the SBA's own size standards. Conversely, a bank argued against incremental adjustments, stating that the Bureau should set its small business definition once in the final rule. Another bank suggested that the Bureau wait to determine if the threshold needs adjusting after it has sufficient data to analyze after several years of collection.

For the reasons set forth herein, the Bureau is finalizing new § 1002.106(b)(2) to provide that every five years after January 1, 2025, the gross annual revenue threshold set forth in § 1002.106(b)(1) shall adjust based changes to the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), as published by the United States Bureau of Labor Statistics (CPI–U). Any such adjustment will be rounded to the nearest multiple of $500,000. If an adjustment is to take effect, it will do so on January 1 of the following calendar year.

New comment 106(b)(2)–1 clarifies the Bureau's inflation adjustment methodology. The comment explains that the base for computing each adjustment (both increases and decreases) is the January 2025 CPI–U; this base value will be compared to the CPI–U value in January 2030 and every five years thereafter. The comment provides several examples illustrating this comparison. New comment 106(b)(2)–1 makes clear that if, as a result of rounding to the nearest multiple of $500,000, there is no change in the gross annual revenue threshold, there will be no adjustment.

New comment 106(b)(2)–2 provides that if publication of the CPI–U ceases, or if the CPI–U otherwise becomes unavailable or is altered in such a way as to be unusable, then the Bureau shall substitute another reliable cost of living indicator from the United States Government for the purpose of calculating adjustments pursuant to final § 1002.106(b)(2).

The Bureau agrees with several commenters that it should provide for a mechanism to update the rule's $5 million gross annual revenue size standard over time to account for the potential impact of inflation or deflation. In order to minimize operational disruptions, the Bureau is not adopting an annual adjustment for inflation; instead, a determination regarding the need to adjust the threshold will occur every five years, beginning in 2030, to account for future inflation or deflation on a schedule similar to the SBA's own size standards, which are required to be reviewed no less frequently than once every five years under the Small Business Act.[584] Recently, the SBA added a 13.65 percent inflation increase to its receipts- and assets-based size standards.[585] Moreover, in order to mitigate commenters' concerns discussed in the section-by-section analysis of § 1002.107(a)(14) regarding complexity and difficulty of collecting gross annual revenue information, the Bureau will round any such adjustment to the nearest multiple of $500,000. The Bureau believes that this rounding, in combination with the approach in final comment 107(a)(14)–1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information, and providing language that a financial institution may use to ask the applicant for such information—will make it easier for financial institutions to more quickly determine small business status for the purpose of rule applicability. The Bureau also believes that this approach is consistent with existing Bureau procedures for inflation adjustments (albeit in a more streamlined way), provides transparency for replication, and will result in less-frequent changes in the reporting requirements of financial institutions, thereby reducing the disruption that an annual inflation adjustment might cause in this situation.

The Bureau is providing commentary to ensure transparency regarding its inflation methodology, which will allow financial institutions to better anticipate and prepare for potential inflation or deflation adjustments. To further explain its methodology, the Bureau is providing the following illustration, which assumes that compliance with the rule was required beginning July 1, 2014, subject to the same five-year adjustment schedule described above. In this illustration, the base for computing each adjustment would be January 2015, which had a CPI–U value of 233.707. Here, the CPI–U value for January 2020 (257.971) would be used for the first five-year inflation update since January 2015 and would update the gross annual revenue threshold to reflect the change in the CPI between January 2015 and January 2020. As demonstrated with the formulas below, the percentage change between those two years' CPI–U values would be calculated (about 10.4 percent) and then would be applied to the $5 million gross annual revenue threshold to get a value of $5,519,112. This would be rounded to $5,500,000 and would become the new threshold effective in January 2021.

[582] Bd. of Governors of the Fed. Rsrv. Sys., *What is inflation and how does the Federal Reserve evaluate changes in the rate of inflation?* (last updated Sept. 2016), *https://www.federalreserve.gov/faqs/economy_14419.htm*.

[583] U.S. Bureau of Labor Stat., *Consumer Price Index: 2021 in review* (Jan. 2022), *https://www.bls.gov/opub/ted/2022/consumer-price-index-2021-in-review.htm*.

[584] Pub. L. 111–240, 124 Stat. 2504 (2010); *see also* 13 CFR 121.102(c) (requiring the SBA examine the impact of inflation on monetary size standards (*e.g.,* receipts, tangible net worth, net income, and assets) and make necessary adjustments at least once every five years).

[585] 87 FR 69118 (Nov. 17, 2022).

$$\text{GAR effective January 2021} = \$5\ million\ x\ \left(\frac{\text{CPI-U January 2020}}{\text{CPI-U January 2015}}\right)$$

$$= \$5\ million\ x\ \left(\frac{257.971}{233.707}\right)$$

$$= \$5\ million\ x\ (1.1038)$$

$$= \$5{,}519{,}112$$

$$rounded\ to\ the\ nearest\ \$500{,}000$$

$$= \$5{,}500{,}000$$

All subsequent adjustments would be made in the same manner. For instance, using the above illustrative example, the following calculation would be performed in January 2025 (ten years after January 2015, five years after January 2020):

$$\text{GAR effective January 2026} = \$5\ million\ x\ \left(\frac{\text{CPI-U January 2025}}{\text{CPI-U January 2015}}\right)$$

$$rounded\ to\ the\ nearest\ \$500{,}000$$

The CPI–U series[586] used for the Bureau's inflation adjustment methodology is public and can be used by anyone wishing to perform the calculation themselves. Additionally, the Bureau of Labor and Statistics provides an inflation calculator for this exact CPI–U series, which allows any entity to easily calculate an adjusted gross annual revenue threshold without the need for manual calculations.[587]

In addition to new comment 106(b)(2)–2, discussed above, which clarifies the timing of its inflation adjustments, the Bureau believes that the adjustment schedule set forth below will also be helpful to explain the inflation adjustment timing:

TABLE 2—INFLATION/DEFLATION ADJUSTMENT SCHEDULE

Date	Inflation/deflation adjustment schedule
January 2025	Base month/year for computing each adjustment.
January 2030	Reference month/year for the first five-year inflation adjustment.
Spring–Summer 2030.	Calculation performed to determine changes in the CPI–U between January 2025 and January 2030.
January 2031	If necessary, effective date for the adjusted gross annual revenue threshold amount.
January 2035	Reference month/year for the second five-year inflation adjustment.
Spring–Summer 2035.	Calculation performed to determine changes in the CPI–U between January 2025 and January 2035.
January 2036	If necessary, effective date for the adjusted gross annual revenue threshold amount.

Section 1002.107 Compilation of Reportable Data

107(a) Data Format and Itemization

Background

ECOA section 704B(e) requires financial institutions to ''compile and maintain'' records of information provided by applicants ''pursuant to a request under subsection (b),'' and requires them to ''itemiz[e]'' such information to ''clearly and conspicuously disclose'' a number of data points enumerated in the statute in section 704B(b) and (e)(2).[588] In addition, section 704B(e)(2)(H) provides the Bureau with authority to require ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' Section 1071's statutory purposes are twofold: (1) to facilitate enforcement of fair lending laws; and (2) to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[589]

Proposed Rule

The Bureau proposed to adopt the data points enumerated in ECOA section 704B(b) and (e)(2)(A) through (G) largely consistent with its proposals under consideration at SBREFA, but with certain changes as discussed in the proposed rule. Consistent with its

[586] Specifically, the Bureau of Labor and Statistics series is CUUR0000SA0 and a chart with its values for all months and years is available at *https://data.bls.gov/timeseries/CUUR0000SA0.* The CPI–U is released on a month lag, so the value for January is available in February.

[587] This calculator is available at *https://www.bls.gov/data/inflation_calculator.htm* and uses the CUUR0000SA0 as the basis for its calculation. To use this calculator for the illustrative example above, enter 5,000,000 in the $ field, enter January 2015 as the starting date, and January 2020 in the subsequent date field. Click on calculate, and the result is $5,519,111.54, the same number as above, which would be rounded to the nearest $500,000, *i.e.,* $5,500,000.

[588] As discussed in greater detail above in E.2 of the *Overview* to this part V, the Bureau interprets the phrase ''pursuant to a request under subsection (b)'' in section 1071 as referring to all of the data points contemplated by ECOA section 704B(e), not merely whether the applicant is a minority-owned, women-owned, or small business.

[589] ECOA section 704B(a).

approach in the SBREFA Outline,[590] the Bureau proposed data points pursuant to its statutory authority set forth in section 704B(e)(2)(H) relating to pricing, time in business, NAICS code, and number of workers. In addition, based on feedback from small entity representatives and other stakeholders and in the course of developing the proposed rule, the Bureau identified several additional data points that it believed would be important to the quality and completeness of the data collected and would aid significantly in furthering the purposes of section 1071. The Bureau proposed to adopt additional data points regarding application method, application recipient, denial reasons, and number of principal owners. In addition, the Bureau relied on ECOA section 704B(e)(2)(H), as well as its authority under 704B(g)(1), to propose certain clarifications to the data points enumerated in section 704B(b) and (e)(2)(A) through (G).

In regard to the specific method by which a financial institution would collect the data points, the proposed rule would have required a covered financial institution to compile and maintain data regarding covered applications from small businesses, and required that the data be compiled in the manner prescribed for each data point and as explained in associated Official Interpretations (included in the proposed rule) and the Filing Instructions Guide that the Bureau anticipated later providing on a yearly basis. The proposed rule then explained that the data compiled would include the items described in proposed § 1002.107(a)(1) through (21). The Official Interpretations, sometimes referred to as official comments or official commentary, would provide important guidance on compliance with the regulation and were discussed in relation to each data point as well as other regulatory provisions. The Filing Instructions Guide would provide instructions on the operational methods for compiling and reporting data, including which codes to report for different required information. The Filing Instructions Guide would be updated yearly, as is the Filing Instructions Guide that is used with HMDA compilation and reporting.[591] Proposed comment 107(a)–1 would have provided general guidance on complying with § 1002.107(a).

The Bureau crafted the proposed rule in consideration of the concerns and input of the small entity representatives and other stakeholders. First, the proposed rule would generally not have required a financial institution to verify applicant-provided information and limited the data points proposed pursuant to ECOA section 704B(e)(2)(H) to those that the Bureau believed would be most useful for the purposes of section 1071. In addition, the Bureau considered the costs, including data quality scrubs, automation and training, that would be imposed by the collection and reporting of the proposed data points; these were discussed in the proposed rule and that discussion is now updated in part IX below. The Bureau attempted to craft the collection and reporting requirements to be as clear and operationally manageable as possible, and requested comment on potential methods for increasing clarity and manageability.

In regard to concerns from small entity representatives and other stakeholders about being required to collect applicants' protected demographic information for purposes of section 1071, the Bureau noted that several small entity representatives reported collecting this kind of information currently in certain situations (because they are CDFIs, or because they are participating in certain SBA or similar guarantee programs). In addition, the Bureau crafted the proposed rule to provide flexibility for financial institutions in the collection and reporting of this information. The Bureau also did not propose an exemption for small financial institutions from reporting data points adopted pursuant to ECOA section 704B(e)(2)(H), as suggested by some small entity representatives and commenters, though it did propose an exemption from the rule for certain institutions with limited small business credit originations.

The Bureau sought comment on its proposed approach to the collection and reporting of data points, including the specific requests for input above and in the section-by-section analysis of each of the proposed data points.

Comments Received

The Bureau received numerous comments discussing the general data point collection and reporting requirements from banks, trade associations, credit unions, farm credit institutions, community groups, lenders, research institutions, an association of State bank supervisors, and a Federal agency. This comment summary section will discuss the comments regarding the overall data points first, then focus on those that dealt specifically with the data points proposed pursuant to ECOA section 704B(e)(2)(H) (often making statements similar to those on the overall data points). Comments regarding individual data points are discussed below in the section-by-section analyses that follow.

General data point comments. Several community groups and a business advocacy group supported the overall data points requirements, stating that robust data are essential for understanding underwriting, gaps in lending, unmet community needs, and other issues that stand in the way of equitable, responsible lending. A business advocacy group stated that the recent enhancement of HMDA data proves the importance of robust data because of its strongly positive impact on lending to minorities. That commenter also stated that the rule should start out with the collection of granular data because discrimination often involves not only credit denials but also less favorable credit terms.

A joint comment letter from community groups, community oriented lenders, and business advocacy groups stated that CDFIs and mission-driven lenders, who will have to comply with the data point reporting requirements, view the costs as reasonable considering the benefits of the rule. Two community-oriented lenders made similar statements, saying that they already collect most of this information for underwriting and compliance with other requirements. One also stated that it does not plan to raise fees or restrict access to credit as a result of the rule. One rural community group stated that the data points will be important for understanding agricultural lending and for that reason supported the inclusion of agricultural lending under the rule.

Several industry commenters stated that the data points were too numerous and would be burdensome to collect and report. These commenters stated that setting up the compliance system would be particularly costly and that the cost would have to be passed on to customers, and one suggested that the Bureau should reconsider moving forward with the rule. These commenters also stated that financial institutions do not currently collect these data points. A trade association for online lenders stated that collecting these data points would interfere with online lenders' business model and the Bureau should obtain this information from other sources, such as the SBA, the Minority Business Development Agency, and the Treasury Department. A bank stated that 1071 data disclosure

[590] SBREFA Outline at 34–35.

[591] *See generally* Fed. Fin. Insts. Examination Council, *The Home Mortgage Disclosure Act, https://ffiec.cfpb.gov/* (last visited Mar. 20, 2023).

will help address significant racial and gender gaps but asked that the Bureau consider the depth and breadth of the data collected because community banks are faced with what it referred to as seemingly continuous data collection (for HMDA, Bank Secrecy Act, etc.) and regulatory exams. The bank also asked that the collection method be ''SMART'' (specific, measurable, attainable, realistic, and timely) in order to reduce burden.

Several banks suggested that HMDA data yield useful fair lending analyses in the residential mortgage market because those loans are underwritten similarly. In contrast, they stated, small business loans are more complex and unique and have to be manually underwritten to consider numerous variables in accordance with the individual institution's standards, rendering any fair lending analyses flawed and unreliable. One of these commenters suggested that if fair lending analysis is to be performed using only the data points proposed, lenders will be forced to revamp and substantially limit the inputs used in decision making, ultimately leading to a smaller number of product offerings and fewer approvals for small business loans overall.

Industry commenters also made several other suggestions and requests regarding the proposed data points. Two commenters asked that the Bureau eliminate or reduce the use of free-form text to report additional information, suggesting that the information gathered would be burdensome, hard to trend, open to different interpretations, and unreliable. Two commenters stated that it was important that applicants provide their information voluntarily. A trade association asked for reporting flexibility when information is not available, recommending the use of ''declined to answer'' if the applicant declined, and ''not available'' for all other circumstances in which the applicant did not provide the information notwithstanding the lender's inquiry.

One commenter asked for a rule provision stating that the collection and reporting requirements under the rule are not intended to limit the range of data that a financial institution may collect, use, and share for its own purposes. That commenter stated that technology companies currently use numerous data points when making credit decisions that enable them to extend credit to a wider range of applicants, and limiting their ability to do so could limit access to credit for small businesses.

Issues regarding data points proposed pursuant to ECOA section 704B(e)(2)(H). The Bureau received numerous comments from lenders, community groups, and individual commenters supporting inclusion of the data points proposed pursuant to ECOA section 704B(e)(2)(H). Several of these commenters stated that such data points are important because the dataset must include key underwriting variables in order to fulfill section 1071's fair lending purpose. One commenter stated that these data points are necessary to ensure proper analysis and not allow lenders, as HMDA reporters have done, to hide behind data *not* collected as a reason for lending disparities. Two commenters stated that such data points are necessary because robust data are needed to illuminate who lenders are serving and who they are excluding.

Several commenters stated that the Bureau must require the collection and public dissemination of a database detailed enough to meaningfully achieve section 1071's fair lending and community development purposes. Others suggested that the data points proposed pursuant to ECOA section 704B(e)(2)(H) will allow comparisons of small businesses in general with very small businesses, which they view as the bedrock of communities. One commenter said that such data points will help CDFIs better understand the small business credit market, especially in low-income communities, and whether and how discrimination in small business lending is occurring. That commenter and another also stated that robust data will help policymakers and the public to better understand lending gaps and unmet community needs.

One lender stated that the proposed data points will provide insight on the quality of the capital accessed by different demographic groups of small business applicants, which will be useful in not only identifying potentially discriminatory lending practices, but also highlight capital gaps in the marketplace that lenders may be able to fill. It also said that the data will show how financial institutions compare across key metrics and help determine if an institution has equitable lending, providing an unprecedented snapshot of the lending landscape for small businesses.

The Bureau received a large number of comments, mainly from industry, objecting to the inclusion of data points proposed pursuant to ECOA section 704B(e)(2)(H). Commenters made many objections, but the most common was that such data points are not collected now and would add significantly to the burden imposed by the rule, raising costs for borrowers. Many commenters also stated that several of these data points would be of little use and some suggested that they could result in inaccurate data. Many commenters suggested that the extra burden would reduce the availability of small business credit, and some stated that the extra burden of such data points would limit community banks' survivability and speed up consolidation and the closing of branches in rural and underserved communities. Other commenters also stated that these data points would be particularly difficult for institutions that do not have any reporting requirements under HMDA, credit unions, auto finance lenders, CDFIs, and/or smaller lenders in general. Several commenters stated that because farm credit associations are often customer owned, the increased costs would be imposed directly on the borrowers. One commenter stated that the data points proposed pursuant to ECOA section 704B(e)(2)(H) can fluctuate during loan processing, and would create tracking issues and reporting errors. Some commenters suggested that small business applicants would not want to provide so much information, which would slow down and interfere with the lending process.

Numerous commenters stated that small business lending is complex and nuanced and very different from residential lending, and the partial information provided by the data points would lead to inaccurate interpretations and potentially interfere with current credit approval methods. Several of these commenters stated that if statistical disparities are detected using the more straightforward data points adopted pursuant to ECOA section 704B(e)(2)(A) through (G), those disparities can be researched on an institution, transaction, or file basis, providing the same information that the Bureau has proposed to collect pursuant to 704B(e)(2)(H), but within context and without raising false positive flags. Those commenters and others stated that including too many unreliable and nuanced data point analyses will result in numerous false positives and inaccurate and unfair conclusions by community groups and their members, and potentially regulators. A State bankers association stated that these data could be used against banks as a competitive advantage for credit unions and other non-traditional lenders. Conversely, a credit union trade association stated that any rule to implement section 1071 will widen the competitive gulf between credit unions and big banks and ''fintechs'' that have the economies of scale and the

technological sophistication to automate complex functions, and the data points proposed pursuant to ECOA section 704B(e)(2)(H) would make this problem worse. Another commenter stated that it would be unfair to compare some such data points between regulated and non-regulated entities because regulated entities have additional costs.

Some commenters who objected to the inclusion of data points pursuant to ECOA section 704B(e)(2)(H) suggested that the Bureau should first require the data points enumerated in 704B(e)(2)(A) through (G), then add any other appropriate data points over time. They explained that this approach would allow the Bureau to assess the burden and potential restriction of small business credit imposed by the data points in 704B(e)(2)(A) through (G) before moving forward with further requirements only if appropriate and beneficial. Some commenters also pointed out that HMDA reporting evolved over many years and the ''all at once'' approach in the proposal is a mistake and will not allow lenders time to adjust.

Several small lenders and their trade associations stated that if the Bureau opts to require some or all of the data points proposed pursuant to ECOA section 704B(e)(2)(H), then it should consider partial collection of data for community banks and other small lenders. A trade association for community banks suggested that the cost of such data points would include expensive data quality scrubs to avoid negative exam findings, which would be disproportionately borne by smaller financial institutions. That commenter was also concerned that the rule could require the standardization and homogenization of small business lending, damaging the customized and relationship-based lending for which community banks are valued. The commenter went on to state that if community banks are forced to standardize, it will especially harm the vulnerable small businesses that most benefit from the high-touch, relationship-based lending that they offer.

Some commenters stated that the data points proposed pursuant to ECOA section 704B(e)(2)(H) would create serious privacy risks. Several commenters suggested that this was especially a concern in rural areas where the applicant might be identified through certain data points, such as the combination of the NAICS code and census tract, and this risk might lead some small businesses to not apply for credit. Some of these commenters also stated that it would be disadvantageous for financial institutions to have access to pricing terms of their competitors. One of these commenters stated that collecting more data points would increase business borrower perception that this information is being used in the credit decision.

One commenter suggested that data collection mandates in excess of what the law requires may be found to be ''arbitrary and capricious,'' if a court decides that the Bureau has ''relied on factors which Congress has not intended it to consider'' or ''offered an explanation for its decision that runs counter to the evidence before the agency.'' The commenter did not explain whether or how the proposed data points might be viewed this way. Another commenter stated that the full scope of data that the rule would require financial institutions to report is inconsistent with the operation of business credit markets, and that Congress established a limited scope data collection regime in section 1071. That commenter further stated that if Congress intended to require all covered financial institutions to proactively deliver the same data required in fair lending enforcement actions, Congress would have written that into the law. Although not specifically mentioning the relevant legal standard for inclusion of such data, several industry commenters argued that some or all of the data points proposed pursuant to ECOA section 704B(e)(2)(H) would not fulfill the purposes of section 1071.

Final Rule

As discussed in the section-by-section analyses that follow, the Bureau has made changes to many of the proposed data points in order to carry out the purposes of section 1071 more effectively and to reduce any difficulties the rule might impose on small business lenders. In particular, the Bureau has sought to: (1) improve the usefulness of the data points for fair lending analysis and for business and community development purposes; and (2) facilitate compliance by, among other things, focusing on the reporting of information the financial institution already collects or possesses. The Bureau's NPRM approach, comments received, and final rule (including changes to specific data points) are discussed for each data point in turn. The Bureau notes that proposed § 1002.107(a)(19), ''women-owned business status,'' has been combined with proposed § 1002.107(a)(18), ''minority-owned business status,'' and the final § 1002.107(a)(18) data point now addresses ''minority-owned, women-owned, and LGBTQI+-owned business statuses.'' As a result, the data points in proposed § 1002.107(20) and (21) have been renumbered as final § 1002.107(19) and (20).

The Bureau is finalizing the introductory text to § 1002.107(a), regarding data format and itemization, to reflect the number of data points in the final rule. Final § 1002.107(a) provides that a covered financial institution shall compile and maintain data regarding covered applications from small businesses, and that the data shall be compiled in the manner prescribed in the individual data point provisions and the Filing Instructions Guide for subpart B for the appropriate year. Furthermore, the data compiled shall include the items described in final § 1002.107(a)(1) through (20). The Bureau believes that these methods will facilitate compliance and yield quality data, and did not receive comments on the specific text of § 1002.107(a) or associated commentary.

The Bureau is finalizing comment 107(a)–1 to provide general guidance on complying with § 1002.107(a). Comment 107(a)–1 explains that a covered financial institution (i) reports the data enumerated in § 1002.107(a) even if the credit originated pursuant to the reported application was subsequently sold by the institution; (ii) annually reports data for covered applications for which final action was taken in the previous calendar year; and (iii) annually reports data for a covered application on its small business lending application register for the calendar year during which final action was taken on the application, even if the institution received the application in a previous calendar year. The Bureau believes that these operational instructions will clarify a financial institution's collection and reporting requirements and so facilitate compliance. The Bureau also believes that these instructions will help to ensure the accuracy and consistency of the data collected and reported. The Bureau did not receive comments on comment 107(a)–1.

The final rule adds new comment 107(a)–2, which explains that a covered financial institution may use technology such as autocorrect and predictive text when requesting applicant-provided data under subpart B that the financial institution reports via free-form text fields, provided that such technology does not restrict the applicant's ability to write in its own response instead of using text suggested by the technology. The Bureau believes that the ability to use autocorrect and predictive text will facilitate the use of free-form text boxes. The Bureau considered commenters' objections to the use of free-form text

boxes for collecting and reporting data under this final rule. Although the Bureau is aware that data collected with predetermined lists is easier to report and work with, the Bureau believes that free-form text responses will provide useful information that would not otherwise be collected, as they have done for HMDA data, and the use of autocorrect and predictive text will facilitate use of free-form text boxes and reduce inadvertent errors or typos.

The Bureau is finalizing comment 107(a)–3 (which was numbered as comment 107(a)–2 in the proposal) as proposed, except that the final rule adds a web address instead of the placeholder in the proposed rule. Final comment 107(a)–3 explains that additional details and procedures for compiling data pursuant to § 1002.107 are included in the Filing Instructions Guide, which is available at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/*. As explained above, the Bureau did not receive comments on the use of the Filing Instructions Guide.

The Bureau is also adding new comment 107(a)–4, to make clear that the Bureau may add additional response options to the lists of responses contained in certain of the individual data-point comments, via the Filing Instructions Guide, and instructs financial institutions to refer to the Filing Instructions Guide for any updates for each reporting year. For example, a credit purpose provided frequently in the free-form text box for that data point could be added to the response options via listing in the Filing Instructions Guide. The Bureau believes that such flexibility will enhance the quality and currency of the data collected. In addition, because financial institutions must refer to the Filing Instructions Guide when compiling, maintaining and reporting their data, the Bureau does not believe that this flexibility will add operational difficulty to the reporting of data under this final rule.

General data point issues. In regard to the comments suggesting that the overall data point collection regime is too burdensome, the Bureau notes that most of the data points are enumerated in the statute and the Bureau has implemented the data points in such a way as to reduce the burden of compilation and reporting as much as feasible while fulfilling the purposes of section 1071. The Bureau does not require verification of applicant-provided data, allows responses of ''not applicable'' and ''not provided by applicant and otherwise undetermined'' when appropriate, and provides several safe harbors to facilitate compliance. In addition, the Bureau believes that it has set up the compilation and reporting system in a way that is specific, measurable, attainable, realistic and timely, as requested by a commenter. In addition, see the discussion below regarding other data points considered for further information on the question of the rule's burden and the issue of accuracy of fair lending analysis and small business credit data.

In regard to the suggestion that the Bureau use other sources to obtain information regarding small business credit instead of via this rulemaking, as explained above the Bureau does not believe that currently available sources are sufficient to carry out the purposes of section 1071, and Congress required the Bureau to promulgate a rule to collect the data. In addition, the Bureau notes that the data collected under this rule are not exclusive, and financial institutions may collect any other data allowable under current law to use in processing or underwriting small business credit. For this reason, the Bureau does not believe that this final rule will interfere with online lenders' business practices, which a commenter was concerned about, or the business practices of other entities that offer small business credit. In addition, the Bureau does not believe that compilation of data under this final rule will interfere with relationship banking by community banks, because they will continue to be able to relate to and serve customers as they have done previously, and may continue to make credit decisions in any legally appropriate fashion that they have done in the past.

As for the commenter's concern that applicant responses be voluntary, the Bureau notes that although financial institutions are required to have processes and procedures in place to collect these data, applicants are free to choose not to answer their requests. For the collection of demographic data, applicants may select an option of ''I do not wish to respond'' or similar. For many of the other data points, so long as a financial institution maintains procedures reasonably designed to collect applicant-provided data, a financial institution may report ''not provided by applicant and otherwise undetermined.'' In regard to the commenter's request that the Bureau allow responses of ''declined to answer'' and ''not available,'' the Bureau believes that the reporting options of ''not provided by applicant and otherwise undetermined'' and ''not applicable'' are more suited to this data collection, and notes that the commenter did not explain why the suggested responses would be better.

Issues regarding data points adopted pursuant to ECOA section 704B(e)(2)(H). The Bureau is finalizing its proposed data points with certain changes as described in the respective section-by-section analyses of those data points below. The Bureau is relying on ECOA section 704B(e)(2)(H), as well as its authority under 704B(g)(1), to make clarifications to certain of the data points set forth in 704B(b) and (e)(2)(A) through (G), as described in the section-by-section analyses of those data points below.

Pursuant to its statutory authority set forth in ECOA section 704B(e)(2)(H), the Bureau is adopting data points for pricing, time in business, NAICS code, number of workers, application method, application recipient, denial reasons, and number of principal owners. The Bureau has determined that these data points will serve the purposes of section 1071, improve the utility of the data for stakeholders, and reduce the occurrence of misinterpretations or incorrect conclusions based on analysis of an otherwise more limited dataset. In finalizing these data points, the Bureau considered the additional operational complexity and potential reputational harm described by commenters that collecting and reporting these data points could impose on financial institutions. The Bureau seeks to respond to industry concerns by adopting a limited number of data points that will offer the highest value in light of section 1071's statutory purposes. For this reason, the Bureau is not adopting certain additional data points suggested by commenters such as credit score, applicant's disability status, or business structure (see the discussion below).

In addition, the Bureau did not choose to take an incremental approach to adding data points, as several commenters suggested, or permit collecting and reporting of certain data points to be phased in over time. The Bureau believes the information from the data points adopted pursuant to ECOA section 704B(e)(2)(H) will enhance the usefulness of the data points enumerated in 704B(e)(2)(A) through (G), and further section 1071's purposes for the reasons stated above and in the descriptions of those data points in the section-by-section analyses below, and so should be collected and reported as soon as possible. In addition, data from these data points will be an important part of the privacy risk assessment that the Bureau will conduct after the first full year of data are received. In response to the

commenters who expressed concern about privacy risks, the Bureau notes that when making modification and deletion decisions prior to publication of the data, it intends to consider re-identification risk and other cognizable privacy risks. See part VIII below for additional information.

As explained above, numerous industry commenters stated that data points adopted pursuant to ECOA section 704B(e)(2)(H) would make the rule more burdensome, result in greater costs for not only financial institutions but also their small business customers, and potentially lead to a reduction in credit availability. The Bureau does not believe that the effects on the small business credit market from the data points adopted pursuant to ECOA section 704B(e)(2)(H) will be so pronounced. Rather, such data points will add only incremental costs to the rule,[592] and the Bureau has carefully crafted all the data points in the final rule to provide flexibility by allowing reporting of information that is already present in the credit file or easily gathered from the applicant. In addition, the final rule does not require verification, allows for responses of ''I do not wish to respond'' or similar, ''not applicable,'' and ''not provided by applicant and otherwise undetermined'' when appropriate, and provides several safe harbors to facilitate compliance and reduce costs in the compilation and reporting of the data points.

Numerous industry commenters also stated that the small business credit market is different from the residential housing market disclosed in HMDA data, and the varied and complex nature of the small business application, underwriting and approval processes will cause the data collected pursuant to ECOA section 704B(e)(2)(H) to suggest false positives for discrimination. Although the potential risk of misinterpretation exists with all public data, the Bureau notes that any fair lending analysis of the public dataset should be considered preliminary to meaningful further investigation, and inferences from the public data alone are not determinative of unlawful discrimination.[593] Furthermore, the Bureau believes that the additional information from these data points is more likely to eliminate false positives than to create them. For example, knowing applicants' time in business will help to avoid comparing credit outcomes for established businesses with outcomes for riskier start-ups and expecting them to be similar. In this way, regulators engaged in fair lending analysis, and the financial institutions they are examining or researching, will be able to avoid unnecessary further investigation.

Many industry commenters also suggested that information from data points adopted pursuant to ECOA section 704B(e)(2)(H) will be unreliable and not useful for data users. However, the Bureau considers the information required to be reported to be very useful in fulfilling the fair lending and business and community development purposes of section 1071, as explained in the section-by-section analysis of each of these data points below. Although, as one commenter pointed out, some of these data may change in the course of credit processing, HMDA data and the data from the data points specified in ECOA section 704B(e)(2)(A) through (G) often do the same. The Bureau believes that financial institutions will use the appropriate information from the credit file and report accurately, as the overwhelming majority of HMDA reporters do now.

As explained above, some commenters stated that many applicants will not want to provide the requested information and some may be concerned that the information will be used in the credit decision if too much information is requested. The Bureau does not believe that these problems will be widespread, and to the extent that they do manifest, the financial institution can use the appropriate responses to indicate that the applicant did not wish to provide information. The Bureau also believes that applicants for small business credit expect to be asked for numerous pieces of information, and the applicant-provided data points adopted pursuant to ECOA section 704B(e)(2)(H) (NAICS code, number of workers, time in business, and number of business owners) do not appear likely to raise red flags.

Other commenters were concerned that different types of financial institutions would fare differently regarding the data points adopted pursuant to ECOA section 704B(e)(2)(H), and this difference would create competitive distortions. The Bureau does not believe that the structure of a financial institution will have a large effect on the difficulty of reporting such data points. Because all covered financial institutions have the same responsibilities under this final rule, the Bureau believes that the effects on different financial institution types will be similar. Numerous commenters also stated that small financial institutions, such as community banks and small credit unions, would be disadvantaged because they lack the economies of scale to allow them to readily absorb the rule's costs. Several of these commenters requested an exemption for these institutions from any data points adopted pursuant to ECOA section 704B(e)(2)(H), but the Bureau has determined that such an additional exemption that focuses specifically on such data points is not appropriate. As explained in the section-by-section analysis of § 1002.105 above, the proposed exemption for certain institutions with limited small business credit originations is now finalized at a higher transaction level than proposed, exempting a larger number of small financial institutions from section 1071's data collection and reporting obligations. Furthermore, the usefulness of the data collected would be reduced if the dataset is incomplete for some financial institutions. In addition, the Bureau will provide assistance to small institutions and compliance vendors during the implementation period to help them transition to the new rule's requirements.

In regard to the commenters who discussed legal issues involved in this rulemaking, the Bureau notes that each of the data points adopted pursuant to ECOA section 704B(e)(2)(H) fulfills the purposes that Congress stated in section 1071, fair lending and business and community development, as explained in the section-by-section analyses that follow. In addition, the Bureau has carefully considered the evidence before it, including from the SBREFA process and public comments, and has based its decisions regarding these data points on that evidence in relation to the factors that Congress intended it to consider. Furthermore, as explained above, the Bureau does not consider that the full data collected, whether pursuant to ECOA section 704B(e)(2)(A) through (G) or pursuant to section 704B(e)(2)(H), should be used alone to determine whether a lender is complying with fair lending laws. When regulators conduct fair lending examinations, they will

[592] See part IX.F.5 below for a discussion of the economic impacts of an alternative that only includes the data points specified in ECOA section 704B(e)(2)(A) through (G).

[593] In regard to the HMDA dataset for 2020, the Bureau publicly stated that ''HMDA data are generally not used alone to determine whether a lender is complying with fair lending laws. The data do not include some legitimate credit risk considerations for loan approval and loan pricing decisions. Therefore, when regulators conduct fair lending examinations, they analyze additional information before reaching a determination about an institution's compliance with fair lending laws.'' *See* CFPB, *FFIEC Announces Availability of 2020 Data on Mortgage Lending* (June 17, 2021), *https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2020-data-on-mortgage-lending/*.

consider additional information before reaching a determination about an institution's compliance. The Bureau considers the scope of data reported to be well within the parameters of congressional intent apparent in section 1071.

Other Data Points Considered

As mentioned above, small entity representatives and other stakeholders suggested some additional data points for the Bureau's consideration, and the Bureau considered others in the development of the proposed rule. Because of the operational complexities likely to be posed by each of these potential data points, as well as the reasons explained below, the Bureau chose not to propose to include any of the following data points in the rule. Nonetheless, the Bureau sought comment on whether the following potential data points or any others would further the purposes of section 1071 and thus should be considered for inclusion in the final rule.

Type of business/entity structure (sole proprietorship, C-corporation, limited liability company, partnership, etc.). This information could be useful in providing context to the ethnicity, race, and sex data regarding applicants' principal owners. However, the Bureau believed that collecting the number of principal owners, as proposed in § 1002.107(a)(21), would better serve this purpose.

Credit score. Collecting credit score and other credit information could be particularly useful for the fair lending purpose of section 1071. However, because of the different types of scores and different situations in which a financial institution would or would not access scores, the Bureau believed that this data point could be quite complicated and involve complex sub-fields, which could pose operational difficulties for financial institutions in collecting and reporting this information. These complexities could also make it difficult for data users to understand and interpret credit score data.

Credit reporting information, including whether credit information was accessed. This data point could also be complicated and involve complex sub-fields, making it difficult for financial institutions to collect and report. As with credit score, these complexities could also make it difficult for data users to understand and interpret these data. In addition, it was not clear that this information would be useful without also collecting credit score.

Percentage ownership of each principal owner and percentage ownership by women and by minorities. This information could be useful in providing context to the ethnicity, race, and sex data regarding applicants' principal owners. However, the Bureau was concerned that requesting this type of percentage data could be confusing to applicants and could result in inconsistent responses across applicants and institutions. The Bureau believed that collecting the number of principal owners (those individuals who each directly own 25 percent or more of the equity interests of a business), as proposed in § 1002.107(a)(21), would better serve this same purpose.

Whether the applicant has an existing relationship with the financial institution and the nature of that relationship. This information could provide additional context for a financial institution's credit decision, and thus could be useful for both of section 1071's statutory purposes. However, the Bureau believed that the usefulness of the data collected might not justify the additional operational complexity of identifying and tracking such relationships for reporting.

Customer number, and/or unique (but anonymous) identification number for applicants or associated persons for tracking of multiple applications. This information could be useful to track multiple applications by a single small business within a particular financial institution, whether submitted at one time or over the course of the year. However, the Bureau believed that the potential difficulties posed by requiring the reporting of this information—particularly for applications that have been withdrawn or abandoned—would not be warranted in light of the utility of the data.

Comments Received

Type of business/entity structure. The Bureau received comments from some lenders, community groups, and others requesting the inclusion of a data point for type of business structure. The Bureau did not receive any comments specifically opposing the inclusion of type of business structure, though the Bureau understands the overwhelming industry opposition to all data points adopted pursuant to ECOA section 704B(e)(2)(H) likely implicates this one.

Commenters stated that collecting type of business structure would allow for better analysis of credit outcomes, because different structures may indicate varying levels of sophistication and can be viewed differently by creditors. One commenter pointed out that Black and Latino business owners are more likely to have non-employer businesses, and type of business structure could help identify those businesses and track their access to credit. That commenter also stated that without the information about business structure, it will not be possible to identify gaps in capital access between sole proprietorships (often minority owned) and other forms, and so collecting business structure will help ensure that future capital programs, whether private or public, adequately include or target business structures. One commenter stated that business structure, along with credit score, would be important for rooting out patterns of discriminatory or exclusionary lending practices in the deep South. A CDFI lender stated that being able to differentiate between sole proprietors versus corporations is also key for philanthropic efforts that may aid the work of mission-based lenders working with specific underserved communities, and added that it already collects this information for the SBA 7(a) program, Paycheck Protection Program, and the CDFI Fund. Discussing the Bureau's suggestion that collecting the number of principal owners would provide the desired context, a commenter stated that under the proposal, only a natural person who directly owns at least 25 percent of a business is counted as a principal owner, and thus a partnership, corporation, and sole proprietorship could appear similarly situated despite presenting different credit needs.

Credit score. The Bureau received numerous comments from community groups, community-oriented lenders, business advocacy groups, and others requesting the inclusion of a data point for credit score. The Bureau did not receive any comments specifically opposing the inclusion of credit score, though the Bureau understands the overwhelming industry opposition to all data points adopted pursuant to ECOA section 704B(e)(2)(H) as likely implicating this one.

Commenters stated that including a data point for credit score, along with other key underwriting criteria, was important for effective fair lending analysis. A joint letter from community and business advocacy groups stated that the Federal Reserve Banks in their annual small business surveys have found large disparities in credit access even after controlling for credit scores, and other commenters agreed that this was the case. Many compared the situation to HMDA, where credit scores were only recently required, suggesting that the lack of credit scores allowed lenders to avoid accountability. A number of community groups stated

that, in addition to fair lending, credit scores allow users to understand the characteristics of applicants that are denied credit so as to identify areas of unmet need. A joint letter from community groups and community oriented lenders stated that more than half of Black individuals and 41 percent of Latinos have low or no credit scores, which impacts their ability to access financing. One community group stated that since the Bureau implemented the expanded HMDA data collection rules, they have determined that in their county Black mortgage applicants are more than 10 percent likelier than white applicants to be denied for credit history, and that having more robust information would allow them to better advocate to their financial partners for more equitable credit scoring models in small business lending. A CDFI lender stated that lenders rely heavily on credit scores to assess borrower risk and creditworthiness, and they are used in many cases to screen for pre-qualified and/or pre-approved applicants before moving further in the application process. Several rural community groups stated that credit score reporting would be important for analyzing potential discrimination in farm credit.

Numerous commenters suggested that requiring credit scores would not be as complicated or difficult as the Bureau stated in the proposed rule, pointing out that HMDA currently requires credit score reporting and this rule could use a similar method. Commenters said lenders that rely on an individual or composite credit score of business owners should be required to report that score and the scoring model used, as is currently required under HMDA. A CDFI lender stated that it would be straightforward for lenders to disclose borrower credit scores, type (personal or business), and scoring model and version in accordance with HMDA procedures, including the options to select not applicable and write in the name and credit scoring model if not listed. Once commenter suggested requiring only personal credit scores because business scores were not yet industry standard. A community group suggested that the Bureau use the Federal Reserve Bank of Atlanta's small business credit survey method, which they said accommodates a single score irrespective of how it was used by the lender. Another CDFI lender stated that it already collects credit score for the CDFI Fund. Several commenters stated that privacy would not be a problem, and some suggested that credit scores could be released in ranges or other non-specific methods to avoid any issue.

Disability status. Although the Bureau did not propose or seek comment on the possibility of including the disability status of applicant owners as a data point, a number of commenters requested that the Bureau do so. An advocacy group for persons with disabilities stated that this population is twice as likely as people without disabilities to be living in poverty, twice as likely to use costly nonbank lending, and twice as likely to be unbanked. They stated further that people with disabilities that are part of the labor force are more likely to own small businesses than those without disabilities, and that for a growing number of adults with disabilities, establishing small businesses has become a viable path to improve their economic stability and security. Finally, they stated that the absence of disability data renders people with disabilities invisible and creates an obstacle to understanding and analyzing potential discriminatory lending practices and creates a challenge in advocating for and designing effective policies. Other commenters referred to and supported this organization's comment letter.

Some commenters stated that discrimination against people with disabilities is clearly present in society, and several suggested that including a disability data point would further enforcement and implementation of section 1071, the Americans with Disabilities Act, and various bank vendor procurement programs, amongst other laws and initiatives. One commenter stated that people with disabilities often face significant economic disparities such as lower net worth or thinner credit history that may create barriers to entrepreneurship. A CDFI lender stated that it already collects this information for the SBA 7(a) program.

Additional agricultural data. Although the Bureau did not propose or seek comment on the issue, two rural community groups requested that the final rule include additional data points regarding agricultural credit. One of these commenters stated that the Bureau should require reporting of farm marketing strategies, years of farmer experience, and certain kinds of farm production certifications (USDA Organic, animal welfare, labor standard certification, etc.) to help determine if all farm operations are treated equally in the lending process. The other requested that information regarding base acre payments (farm program benefit payments) be reported because information on program benefits attached to base acres is valuable to minority farmers' farm credit loan making and servicing. That commenter also asked that the Bureau require reporting on collateral requirements, on differences in appraised value or loans or loan modifications rejected based on failure to appraise, on refinancings precipitated by required graduation from Farm Service Agency loans, and on all forms of loan modifications that have historically been a central factor in farm loss for farmers of color.

Other requested data points. The Bureau received requests for several other additional data points that were not proposed and on which it did not seek comment. Commenters suggested that the Bureau require reporting on veteran status, limited English proficiency status, and senior citizen status in order to monitor risks to these groups. A CDFI lender stated that it already collects veteran status for SBA 7(a) loans and other programs. They also stated that it collects information on low-income owned or controlled status for the CDFI Fund, though did not specifically ask the Bureau to require reporting of that information or veteran status.

Commenters also requested that the Bureau require reporting of the appraised value of collateral in relation to the loan amount, the origination date, community of residence (using ZIP code, school zone or other demographic data), the type of purchaser of the originated credit, and a legal entity identifier (LEI) for the small business applicant.

Final Rule

The Bureau is adopting a limited number of data points pursuant to the authority set forth in ECOA section 704B(e)(2)(H) that it believes will offer the highest value in light of section 1071's statutory purposes. The Bureau believes that the potential additional data points that it sought comment on would pose operational complexities, as would the other data points suggested by commenters. For these reasons, and the reasons explained below, the Bureau is not including any of the following data points in this final rule.

Type of business/entity structure. The Bureau believes that collecting the number of principal owners will be more useful than type of business structure in providing additional useful context to the ethnicity, race, and sex data regarding applicants' principal owners. In addition, the Bureau believes that the number of workers and gross annual revenue data points will provide useful context regarding the size and sophistication of the applicant, which

appears to address the primary reason that commenters wanted type of business structure to be collected.

Credit score. Although the Bureau agrees with commenters that this data would be useful for fair lending analyses, it nonetheless could be quite complicated and involve complex sub-fields, which could pose operational difficulties for financial institutions, especially given the use of business credit scores as well as personal credit scores in small business lending.

Disability status. The Bureau did not propose or seek comment on including this data point, and so does not have the benefit of robust stakeholder input as to whether and how to implement it. More importantly, ECOA does not include disability as one of the enumerated bases on which discrimination is prohibited, and so it is not clear that the Bureau has the legal authority to include this data point.

Additional agricultural data. The Bureau did not propose or seek comment on including these data points, and so does not have the benefit of robust stakeholder input as to whether and how to implement them. In addition, the Bureau does not have sufficient other information to assess the importance or feasibility of requiring that these data points be reported.

Other requested data points. The Bureau did not propose or seek comment on including these data points regarding veteran, limited English proficiency, and senior citizen status, and so does not have the benefit of robust stakeholder input as to whether and how to implement them. In addition, the Bureau does not have sufficient other information to assess the importance or feasibility of requiring that these data points be reported.

Credit reporting information, including whether credit information was accessed. Commenters did not focus on this potential additional data point that the Bureau sought comment on, instead focusing their requests on the related potential credit score data point discussed above. For the reasons discussed above, the Bureau is not including this data point in the final rule.

Percentage ownership of each principal owner and *percentage ownership by women and by minorities.* The Bureau did not receive comments on this potential additional data point that the Bureau sought comment on. For the reasons discussed above, the Bureau is not including this data point in the final rule.

Whether the applicant has an existing relationship with the financial institution and the nature of that relationship. The Bureau did not receive comments on this potential additional data point that the Bureau sought comment on. For the reasons discussed above, the Bureau is not including this data point in the final rule.

Customer number, and/or unique (but anonymous) identification number for applicants or associated persons for tracking of multiple applications. The Bureau did not receive comments on this potential additional data point that the Bureau sought comment on. For the reasons discussed above, the Bureau is not including this data point in the final rule.

107(a)(1) Unique Identifier

Proposed Rule

ECOA section 704B(e)(2)(A) requires financial institutions to collect and report ''the number of the application . . . .'' Regulation C includes a similar reporting requirement for a universal loan identifier,[594] though some insured credit unions and depositories whose lending activity falls below applicable thresholds are partially exempt and only need to report a non-universal loan identifier.[595] Both the universal loan identifier and the non-universal loan identifier use only alphanumeric characters, and do not allow use of identifying information about the applicant or borrower in the identifier. The universal loan identifier is ''unique'' in the national HMDA reporting market because it uses a unique LEI for the reporting institution and then the identifier is required to be unique within that institution.[596] The universal loan identifier must be no more than 45 characters and the non-universal loan identifier must be no more than 22 characters.[597]

The Bureau proposed to require that financial institutions report an alphanumeric identifier starting with the LEI of the financial institution. This unique alphanumeric identifier would have been required to be unique within the financial institution to the specific covered application and to be usable to identify and retrieve the specific file corresponding to the application for or extension of credit. The Bureau also proposed commentary with additional details, as discussed below.

For clarity, the Bureau included language in proposed comment 107(a)(1)–1 that would have explained that the identifier can be assigned at any time prior to reporting the application. Proposed comment 107(a)(1)–1 would also have provided the formatting requirements for the unique identifier. The Bureau proposed an identifier of 45 characters or fewer, as is currently required for HMDA. The Bureau made clear in the proposal that the unique identifier would not need to stay ''uniform'' throughout the application and subsequent processing. Proposed comment 107(a)(1)–1 would have also explained that refinancings or applications for refinancing must be assigned a different identifier than the transaction that is being refinanced.

Proposed comment 107(a)(1)–2 would have made clear that the unique identifier must not include any directly identifying information regarding the applicant or persons (natural or legal) associated with the applicant. The Bureau was aware that internal identification numbers assigned by the financial institution to the application or applicant could be considered directly or indirectly identifying information, and requested comment on this issue. The Bureau also noted that due to privacy risks the Bureau was proposing to not publish unique identifier in unmodified form; the Bureau sought comment on potential modifications to or deletion of this data point in the published application-level data. Proposed comment 107(a)(1)–2 would have also cross-referenced proposed § 1002.111(c) and related commentary, which would have prohibited any personally identifiable information concerning any individual who is, or is connected with, an applicant, in records retained under proposed § 1002.111.

As stated above, the Bureau proposed to require that the unique identifier begin with the financial institution's LEI. Pursuant to proposed § 1002.109(b)(1)(vi), any covered financial institution that did not currently use an LEI would have been required to obtain and maintain an LEI in order to identify itself when reporting the data. Although a ''check digit''—a portion of an identifying number that can be used to check accuracy—is required for the HMDA universal loan identifier, the Bureau did not propose to require its use in the 1071 unique identifier.

The Bureau sought comment on its proposed approach to the unique identifier data point. In addition, the

[594] 12 CFR 1003.4(a)(1)(i).

[595] 12 CFR 1003.3(d)(5).

[596] 12 CFR 1003.4(a)(1)(i)(A), (B)(2). The non-universal loan identifier is only required to be unique within the annual loan/application register in which the covered loan or application is included. 12 CFR 1003.3(d)(5)(ii).

[597] The universal loan identifier length limit is included in the Bureau's yearly HMDA Filing Instructions Guide. *See* CFPB, *Filing instructions guide for HMDA Data collected in 2023* (2022), *https://ffiec.cfpb.gov/.* The length limit for the non-universal loan identifier is in Regulation C § 1003.3(d)(5).

Bureau requested comment on the use of the LEI in the unique identifier and the possible use of a check digit.

Comments Received

The Bureau received comments on the unique identifier data point from several lenders and trade associations. Some commenters supported the data point as proposed; several stated that it was a reasonable and appropriate means of implementing the statutory requirement. Another lender noted that it already reports this type of data for Paycheck Protection Program and CDFI Fund lending. A trade association stated that community banks prefer not to be required to create this identifier too early in the credit origination process. A national auto finance trade association noted that its members generally assign application or loan numbers to new credit applications, but not necessarily to credit line increases, and suggested that financial institutions will have this data without needing the Federal Reserve to issue a parallel rule to implement section 1071 for motor vehicle dealers.[598]

A community bank stated that the cost of creating a customer identification numbering system that does not use the employer identification number, taxpayer identification number, or Social Security number (SSN) would be passed on to the borrower. That commenter requested that the Bureau allow use of the last four digits of the employer identification number, taxpayer identification number, or SSN for identification purposes. They also expressed confusion as to how an LEI (which it may not currently have) could be incorporated with the loan number in its system for reporting, and stated that the Bureau did not provide sufficient guidance on how to incorporate the unique identifiers into its current system.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(1) with a minor edit for clarity. Financial institutions will report an alphanumeric identifier, starting with the LEI of the financial institution, that is unique within the financial institution to the specific covered application. The identifier must be usable to identify and retrieve the specific file or files corresponding to the application for or extension of credit.

The Bureau is finalizing comment 107(a)(1)–1 with a minor change. As apparent from the instructions in comment 107(a)(1)–1, the Bureau chose to follow the well-known and workable HMDA format to avoid introducing new complications. With respect to the concerns raised by one commenter about the unique identifier data point, the Bureau notes that a *customer* identification number is not required. The unique identifier refers to the application or origination being reported, not the customer who applies for or borrows the funds. In addition, comment 107(a)(1)–1 makes clear that financial institutions may assign the unique identifier at any time prior to reporting the application, facilitating compliance. The Bureau believes that final § 1002.107(a)(1) will accommodate different institutions' numbering systems because the unique identifier can be created separately from those internal systems. In order to foster uniformity of format and avoid confusion as to what constitutes a ''unique'' identifier, comment 107(a)(1)–1 now requires that any alphabetical characters in the unique identifier be upper-case.

The Bureau is finalizing comment 107(a)(1)–2 with a minor change described below. Final comment 107(a)(1)–2 states that the unique identifier must not include any directly identifying information regarding the applicant or persons (natural or legal) associated with the applicant. In regard to the use of directly identifying information, such as an SSN or taxpayer identification number, the Bureau notes that section 1071 specifically forbids financial institutions from using personally identifiable information concerning any individual who is, or is connected with, an applicant in compiling and maintaining data for reporting.[599] Although the Bureau has preliminarily determined not to release unique identifier data reported to the Bureau in unmodified form in the public, application-level dataset, inclusion of a small business's employer identification number or a natural person's SSN or taxpayer identification number could present a risk of fraud or identity theft. Thus, for clarity, the Bureau is including in comment 107(a)(1)–2 that SSN and employer identification number, in whole or partial form, are examples of directly identifying information that must not be used.

The final rule requires that the unique identifier begin with the financial institution's LEI. Final § 1002.109(b)(1)(vi) requires any covered financial institution that does not currently use an LEI to obtain and maintain an LEI in order to identify itself when reporting data to the Bureau. The Bureau does not believe that including the financial institution's LEI in its unique identifiers will pose particular difficulties for reporting institutions; as noted above, the unique identifier can be assigned at any time prior to reporting an application. The Bureau also believes that including the LEI will increase the specificity and usefulness of the identifier and the record it identifies.

The Bureau did not receive comments discussing the possible inclusion of a ''check digit,'' which is required for the HMDA universal loan identifier but was not proposed as part of the 1071 unique identifier. The Bureau believes that, based on its expectations for small business lending data submission platform, a check digit will be unnecessary, as well as potentially complicated for small financial institutions to implement, and thus it is not included in the final rule.

107(a)(2) Application Date

Proposed Rule

ECOA section 704B(e)(2)(A) requires financial institutions to collect and report the ''date on which the application was received.''

The Bureau proposed to require reporting of application date in § 1002.107(a)(2) as the date the covered application was received by the financial institution or the date on a paper or electronic application form. Proposed comments 107(a)(2)–1 and –2 would have clarified the need for a financial institution to take a consistent approach when reporting application date, and would have provided guidance on how to report application date for applications not submitted directly to the financial institution or its affiliate (indirect applications). The Bureau also proposed a safe harbor in § 1002.112(c)(4), which would have provided that a financial institution does not violate proposed subpart B if it reports on its small business lending application register an application date that is within three calendar days of the actual application date pursuant to proposed § 1002.107(a)(2).

The Bureau sought comment on its approach to collecting application date in proposed § 1002.107(a)(2) and associated commentary. The Bureau also sought comment on how best to

[598] ECOA authority over motor vehicle dealers lies with the Board, not the Bureau, because Regulation B does not apply to a person excluded from coverage by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 2004 (2010).

[599] ECOA section 704B(e)(3).

define the ''application date'' data point in light of the Bureau's definition of ''covered application'' in proposed § 1002.103.

Comments Received

The Bureau received feedback on its proposal to require reporting of application date in § 1002.107(a)(2) from several lenders, trade associations, and a community group. Most commenters to address this data point supported proposed § 1002.107(a)(2). A trade association stated that application date is currently collected in its financial institutions' work flows. A trade association urged the Bureau to define application date in a manner that is consistent with existing Regulation B, so to avoid inconsistency, though it did not identify any aspect of proposed § 1002.107(a)(2) that would be inconsistent with existing Regulation B. Similarly, a bank urged the Bureau to align application date with HMDA—to increase efficiency for the customer, facilitate compliance, and avoid duplicative collections—but did not identify whether or how proposed § 1002.107(a)(2) would differ from how financial institutions report application date under Regulation C. A community bank urged the Bureau to provide a concrete definition of application date, explaining that a subjective definition would discourage banks from small business lending, and that application date is often difficult to pinpoint as there frequently is no written application and the application process may occur over time, both in-person and by phone.[600]

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(2) to require reporting of application date as the date the covered application was received or the date on a paper or electronic application form. The Bureau believes the flexibility to report either the date the covered application was received or the date shown on a paper or electronic application form will accommodate institutions' varied practices. While several commenters urged the Bureau to align reporting of application date with existing Regulation B and Regulation C, the commenters did not identify how the proposed definition would differ from those regulatory provisions, and the Bureau believes they do not conflict. For example, a financial institution may report application date based on the date a ''covered application'' was received, and final § 1002.103(a) defines a covered application largely based on Regulation B's definition of an application in existing § 1002.2(f). Similarly, Regulation C § 1003.4(a)(1)(ii) requires reporting of the date the application was received or the date shown on the application form. While a commenter urged the Bureau to provide a concrete definition of application date, the commenter never indicated whether or how the proposed definition was vague.[601]

Final § 1002.107(a)(2) states that application date may be the date ''the covered application was received;'' the Bureau has removed the phrase that followed in proposed § 1002.107(a)(2), which read ''by the financial institution . . . '' to reflect that not all covered applications will be received directly by the financial institution. The Bureau is also adopting new comment 107(a)(2)–2 to provide guidance on when an application is ''received'' for covered applications submitted directly to the financial institution or its affiliate.

Comment 107(a)(2)–1 is finalized with minor revisions for clarity and consistency, to provide guidance on maintaining a consistent approach to reporting application date. Final comment 107(a)(2)–3 (proposed as comment 107(a)(2)–2) provides guidance on how a financial institution reports application date where a covered application was not submitted directly to the financial institution or its affiliate. Lastly, final comment 107(a)(2)–4 is adopted to note the safe harbor in final § 1002.112(c)(1), which provides that a financial institution does not violate subpart B if it reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to final § 1002.107(a)(2).

107(a)(3) Application Method

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau believes that application method data will aid in fulfilling the purposes of section 1071.

The Bureau did not address the method of application as a potential data point under consideration in the SBREFA Outline. However, during the SBREFA process, one CDFI small entity representative suggested collecting information regarding the way an application was taken (in person, by phone, or online) in order to monitor for possible discouragement of applicants.[602] Relatedly, several small entity representatives that took applications for credit primarily or entirely online asserted that such channels were less likely to result in discrimination and more likely to increase access to credit to women-owned and minority-owned small businesses.

In light of the feedback during the SBREFA process and further consideration by the Bureau of additional data that would aid in fulfilling the purposes of section 1071, the Bureau proposed to require financial institutions to collect and report application method. The Bureau proposed § 1002.107(a)(3) to define this data point as the means by which the applicant submitted the covered application directly or indirectly to the financial institution. The Bureau also proposed commentary to accompany proposed § 1002.107(a)(3).

The Bureau believed that data on application method would improve the market's understanding of how applicants apply for credit which, in turn, would facilitate fair lending enforcement and the business and community development purposes of section 1071. In addition, the Bureau believed that collecting data on application method would aid in analysis of multiple data points collected and reported by financial institutions, including the ethnicity, race, and sex of applicants' principal owners.

Finally, data on application method would assist in analyzing data reported under, and assessing compliance with, proposed § 1002.107(a)(20), which would have required financial institutions to collect principal owners' ethnicity and race via visual observation or surname in certain circumstances. The Bureau explained that having application method reporting would allow the Bureau and other data users to determine, for example, which applications could be subject to data collection via visual observation or surname (because the financial institution met with the applicant in person) and, together with information reported under proposed

[600] Comments primarily directed at how to define an application under section 1071, rather than the date reported for that application, are discussed in connection with the section-by-section analysis of § 1002.103(a) above.

[601] As discussed in more detail in the section-by-section analysis of § 1002.103(b), if the covered application is requesting additional credit on an existing account, all data reported, including applicable dates, relate to the new request for credit rather than the initial origination.

[602] SBREFA Panel Report at 30–31.

§ 1002.107(a)(20), which of those applications did and did not have information collected that way.

The Bureau proposed comment 107(a)(3)–1 to clarify that a financial institution would comply with proposed § 1002.107(a)(3) by reporting the means by which the applicant submitted the application from one of the following options: in-person, telephone, online, or mail. Proposed comment 107(a)(3)–1 would have explained how financial institutions are to choose which application method to report, including via a ''waterfall approach'' when they have contact with an applicant in multiple ways. Proposed comments 107(a)(3)–1.i through .iv would have provided detailed descriptions and examples of each of the four proposed application methods.

The Bureau proposed comment 107(a)(3)–2 to provide guidance on what application method a financial institution would report for interactions with applicants both online and by mail. In short, a financial institution would have reported application method based on the method by which it, or another party acting on its behalf, requested the ethnicity, race, and sex of the applicant's principal owners pursuant to proposed § 1002.107(a)(20). Proposed comment 107(a)(3)–2 also would have provided separate examples of when the application method should be reported as ''online'' and ''mail.''

The Bureau sought comment on its proposed approach to this data point.

Comments Received

The Bureau received comments on its proposed application method data point from a number of banks, trade associations, and community groups. Several commenters supported the Bureau's proposal to require financial institutions to report data on application method; some noted that such data would facilitate fair lending enforcement and/or further the community development purpose of section 1071. A community group asserted that data on the application method would enable the comparison of application outcomes based on the application channel at specific institutions and could also help assess whether applicants are receiving comparable access to comparable credit across application channels. Another community group stated that data on application method would help shed light on the issue of whether newer, online lenders are more effective at reaching underserved populations and businesses. One commenter suggested the Bureau create more categories, particularly to distinguish email from web portal because an application received by email often reflects a more personal relationship than does an application submitted via web portal.

In contrast, several banks and trade associations opposed the proposed requirement to collect application method data and urged the Bureau to drop it from the final rule. A few commenters said that this data point was added ''late'' in the rulemaking process or without adequate public input.

Industry commenters explained that application method data are not currently collected nor recorded in the loan file. A bank stated that it would need to collect the data manually because it does not have a way to record or report the information and asserted that this data collection requirement would affect its ability to serve the credit needs of its community. Several other commenters noted that this data point is not a factor in the credit decision and argued that there is no information or insight that can be gleaned from it. Some commenters also questioned how the data point would provide value in fair lending analysis. One commenter suggested the data have limited value and that the Bureau's policy goals can be achieved by combining publicly available data with section 1071's statutory requirements; for example, collection of census tract data will indicate whether a loan was originated in a ''credit desert,'' thereby eliminating the need for the application method data point.

Some commenters asserted that the proposed waterfall approach was problematic and would introduce complexity into reporting application method data. These commenters explained that there are multiple interactions between the lender and the applicant throughout the application process and suggested that reporting application method using the proposed waterfall approach would require the financial institution to document each interaction with an applicant. They further said that could lead to a cumbersome process in trying to determine exactly how an application was received and could result in unintentional errors. One industry commenter stated that an application may start out as an email request, followed up by a phone call, and then be completed in person. This commenter suggested that there would be difficulty collecting the data accurately because the proposal did not allow for multiple methods of application, particularly because the definition of application is at the financial institution's discretion. A bank suggested that the Bureau drop the waterfall approach and allow financial institutions to designate the best way to determine application method. A group of trade associations likewise requested that the Bureau drop the waterfall approach, and instead have financial institutions report the application method where the ethnicity, race, and sex of the applicant's principal owners was requested. A few commenters suggested that the application method should be based only on the initial contact. Two of these commenters indicated that basing the application method on initial contact would provide clear requirements in the event that the applicant provides information via two methods: for example, when an applicant applies online but later provides information by telephone.

A group of trade associations noted that while the data point is about the means by which the application was submitted, the proposed commentary discusses when a financial institution meets with the applicant or communicates with the applicant by telephone. This commenter stated that the proposed commentary was confusing and did not provide clear guidance on compliance.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(3) with a number of revisions to the associated commentary. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau believes that collecting data on application method would aid in fulfilling the purposes of section 1071, as explained below.

Initially, the Bureau believes that data on application method will improve the market's understanding of how applicants apply for credit. In addition, data on application method will support 1071's statutory purposes by, *inter alia,* providing additional context for the business and community development needs of particular geographic regions. For instance, application method may help data users analyze the extent to which financial institutions may be providing access to credit online or by telephone in ''credit deserts'' where financial institutions do not have branch operations.

In addition, the Bureau believes that collecting data on application method will aid in analysis of multiple data points collected and reported by financial institutions, including the ethnicity, race, and sex of applicants' principal owners. For example, these data will assist the Bureau and other data users in identifying whether applicants are more or less likely to

provide this (and other) 1071 information in different application channels. This information may also assist in determining whether a financial institution has procedures to collect applicant-provided data at a time and in a manner that are reasonably designed to obtain a response, as required by § 1002.107(c).

The Bureau explained in the NPRM that having application method data would be useful in analyzing data reported under, and assessing compliance with, proposed § 1002.107(a)(20) related to collecting the ethnicity and race of principal owners via visual observation or surname in certain circumstances. However, as explained in the section-by-section analysis of § 1002.107(a)(19) below, the Bureau has removed the visual observation or surname requirement from this final rule. Consequently, the proposed waterfall approach is less relevant for assessing compliance with final § 1002.107(a)(19). In combination with the concerns expressed by commenters regarding compliance complexities, including the need to document multiple interactions between the financial institution and applicant, the Bureau has decided not to adopt the proposed waterfall approach for reporting application method.

The Bureau is thus adopting comments 107(a)(3)–1.i through .iv with revisions to reflect the removal of the waterfall. The Bureau believes these changes will also address a commenter's concern regarding potential confusion about the proposed commentary's treatment of meetings and other interactions with applicants. Relatedly, the Bureau is not finalizing proposed comment 107(a)(3)–2, which would have provided guidance on reporting for interactions with applicants both via mail and online under the waterfall approach.

In addition, the Bureau has added new guidance in comment 107(a)(3)–1 to clarify what a financial institution reports if it retains multiple versions of the application form. The Bureau has also made a few minor revisions in comments 107(a)(3)–1.i through .iv for clarity. Final comment 107(a)(3)–1 lists the options a financial institution reports for the means by which an applicant submitted the application. In final comment 107(a)(3)–1.i, the Bureau has clarified that the in-person application method applies, for example, to those applications submitted at a branch office, including applications hand delivered by an applicant. In final comment 107(a)(3)–1.ii, the Bureau has clarified that an application submitted via telephone call is reported as ''telephone.'' In final comment 107(a)(3)–1.iii, the Bureau has clarified that an application submitted via website, mobile application (commonly known as an app), fax transmission, or text-based electronic communication is also reported as ''online.'' The Bureau does not believe it is appropriate to distinguish between applications submitted by email and applications submitted through a web portal, on the basis that an application that is emailed reflects a more personal relationship, as suggested by a commenter. The Bureau believes that both application methods are appropriately reportable as ''online'' because they reflect an electronic communication. The Bureau notes that various electronic communication methods provided in final comment 107(a)(3)–1.iii can reflect a personal relationship. For example, an applicant may have begun communications with the financial institution through email, followed by text messages, and then submitted the application through the financial institution's website. All of these methods can potentially reflect a personal relationship.

The Bureau removed the hand delivery at a teller window example in comment 107(a)(3)–1.iv because, under the final rule, an application hand delivered by an applicant at a branch is reported as ''in-person'' pursuant to final comment 107(a)(3)–1.i. Regarding a suggestion from commenters that the Bureau use the method by which ethnicity, race, and sex of the principal owners are collected for reporting this data point, the Bureau does not believe that such an approach is necessary given that it is not finalizing its proposed requirement to collect principal owners' ethnicity and race via visual observation or surname in certain circumstances. In addition, the Bureau does not believe that application method should be based on initial contact, as suggested by a few commenters. As explained by commenters, there could be multiple interactions between the lender and applicant throughout the pre-application and application process. Thus, the initial interaction may not amount to an application submission because, for example, the initial contact was simply an inquiry.[603] In light of commenters' concerns regarding the potential difficulties in identifying application method, the Bureau believes that its approach to final § 1002.107(a)(3), which is tied to an applicant submitting an application, is preferable to the suggestions made by commenters.

Regarding commenters' concerns about the utility of this data point, the Bureau believes that application method data will facilitate the fair lending and business and community development purposes of section 1071, as explained above. This information cannot be replicated by combining data points specifically enumerated in section 1071, such as census tract, with other publicly available data. Application method is not intended solely to identify ''credit deserts,'' as the commenter appeared to suggest, and although census tract information might provide information as to where the proceeds will be applied (or the location of the applicant's headquarters/main office, or another location), that does not necessarily indicate where (or how) the financial institution interacted with the applicant. With respect to comments stating that application method is not currently collected nor is it considered as part of the credit decision, the Bureau believes that removal of the proposed waterfall approach will make collecting this data easier than contemplated in the proposed rule.

Finally, this data point was introduced with sufficient time for the public to provide feedback and offer alternatives. The data point was suggested by small entity representatives during the SBREFA process and was included in the SBREFA Panel Report. It was also included in the proposed rule and the Bureau specifically sought—and obtained—comment on it. As noted, the Bureau has made changes as a result of that feedback.

107(a)(4) Application Recipient

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau believes that information regarding how an application is received will enhance small business lending data and aid in fulfilling the purposes of section 1071.

The Bureau proposed § 1002.107(a)(4), which would have required financial institutions to collect and report the application recipient, meaning whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application

[603] Under § 1002.103(b)(2), a covered application does not include inquiries and prequalification requests.

indirectly to the financial institution via a third party. Proposed comment 107(a)(4)–1 would have clarified that if a financial institution is reporting actions taken by its agent consistent with proposed comment 109(a)(3)–3, then the agent is considered the financial institution for the purposes of proposed § 1002.107(a)(4).

The Bureau sought comment on its proposed approach to this data point.

Comments Received

The Bureau received comments on the proposed application recipient data point from industry and community groups. A community group expressed its support, noting that in combination with the application method data point under proposed § 1002.107(a)(3), it would help stakeholders determine whether traditional banking or online lending is most effective in reaching underserved small businesses or whether the effectiveness of the lending model depends on local context and conditions. A trade association also expressed its support, stating that the information can help data users understand the relationship between lender and applicant. This commenter further noted that recipient data would provide context for other collected and reported data and also improve transparency around when and whether an intermediary is considered a financial institution for the purposes of this data collection. In addition, a CDFI lender stated its general support of the Bureau's proposal to collect application recipient data.

In contrast, a number of banks and trade associations opposed the Bureau's proposal to collect application recipient data for various reasons. One trade association raised a concern that the application recipient data point was not included in the SBREFA Outline and, along with several other industry commenters, pointed out it is not one of the data points expressly enumerated in ECOA section 704B(e)(2). Several industry commenters stated that the data are not currently collected and a few of these commenters further stated that such data are not used or considered in the underwriting decision. Several industry commenters argued that the data point is burdensome and two banks stated they would need to collect the data manually because their systems are not equipped to collect the data. Other industry commenters questioned the value of the data point or how it fulfills the statutory purposes of section 1071. One industry commenter stated it is not dispositive of fair lending violations. Two banks urged the Bureau to drop the data point from the final rule or provide an exemption for certain institutions. One of these banks urged the Bureau to drop the data point from the final rule because it does not have affiliates nor does it accept applications indirectly and thus would not provide any data. The other bank commented that community banks should be exempt if they do not use actual third parties, but instead use a third-party online application system within the bank's firewall, and suggested that the only reason this data point should apply is if a bank is truly working with a third party, not a vendor who helps manage online tools. A trade association urged the Bureau to eliminate the application recipient data point from the final rule until a later determination can be made regarding its necessity.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(4) and related commentary with a small modification for clarity. Final § 1002.107(a)(4) requires the financial institution to report whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party. Final comment 107(a)(4)–1 explains that if a financial institution is reporting actions taken by its agent consistent with comment 109(a)(3)–3, then the agent is considered the financial institution for the purposes of § 1002.107(a)(4). The comment also provides an example. The Bureau believes data on application recipient will facilitate fair lending analysis and enable a better understanding of business and community development needs. Pursuant to ECOA section 704B(e)(2)(H), the Bureau believes that collecting data on application recipient will aid in fulfilling the purposes of section 1071.

Regarding commenters' concerns that application recipient data are not currently collected nor used in underwriting decisions, the Bureau anticipates that financial institutions know and track how they receive applications for small business loans. The Bureau does not believe it would be difficult to track this information, even if the financial institution does not currently collect the information.

With respect to the comments received that question how application recipient data fulfill the purposes of section 1071, the Bureau believes that collecting data on application recipient, in combination with application method, as discussed above, will improve the market's understanding of how small businesses interact with financial institutions when applying for credit which, in turn, will facilitate fair lending analysis, including the identification of risks in small business lending. Regarding the comment that application recipient data are not dispositive of fair lending violations, the Bureau agrees that such data would not be dispositive of a violation on their own, but believes data on application recipient can be used in combination with other data points or information to provide a more robust analysis. With respect to promoting the business and community development purposes of section 1071, the Bureau believes that data on application recipient will improve the public's understanding of the structure of small business lending originations across the market, the methods by which credit is originated for particular groups or underserved markets, and trends over time (for example, to the extent applicant preferences shift from in-person to online interactions). In addition, application recipient data may assist with an understanding of the business and community development needs of an area or applicant. For example, such data may help data users understand whether financial institutions making credit decisions are directly interacting with the applicant and/or generally operate in the same community as the applicant. Moreover, data on application recipient will allow the Bureau and data users to better understand the relationship between the covered financial institution and the applicant in the context of certain other data collected and reported under this final rule.

The Bureau is not removing the application recipient data point from the final rule or providing an exemption, as suggested by some commenters, for financial institutions that do not have affiliates, do not accept applications indirectly, and/or do not use third parties. Some financial institutions employ a wide variety of lending models in extending credit to small businesses. They may receive applications for credit directly from the applicant and some financial institutions may receive applications routed to them through third parties, such as brokers or vehicle or equipment dealers. Some financial institutions issue credit cards branded for particular retailers, for which applications are taken in person at the retailer's store locations. Some brokers and dealers may send applications to a single financial institution, while others may

send them to multiple financial institutions at the same time. In these types of application scenarios involving third parties, the financial institution may not directly interact with the applicant at all during the application process. Information regarding whether the applicant submitted the application directly to the financial institution is necessary to further the purposes of section 1071, including by improving the market's understanding of how small businesses interact with financial institutions when applying for credit and whether the financial institution is operating in the same community as the small business. This is true even if a particular financial institution does not accept applications indirectly or does not use third parties, and reporting of this data point should be simple for financial institutions in that situation.

Finally, this data point was introduced with sufficient time for the public to provide feedback and offer alternatives. It was also included in the proposed rule and the Bureau specifically sought—and obtained—comment on it. Given the wide variety of lending models financial institutions currently use when extending credit to small businesses, the Bureau believes it is timely and appropriate to include this data point in this final rule.

107(a)(5) Credit Type

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the type and purpose of the loan or other credit being applied for.'' [604] (The credit purpose data point is discussed in the section-by-section analysis of § 1002.107(a)(6) immediately below.) For HMDA reporting, Regulation C requires numerous data points that indicate the type of credit applied for or originated: the type of guarantees used; lien order; loan term; the presence of nontraditional contract terms including balloon, interest only, and negative amortization payments; variable rate information; open-end status; and reverse mortgage status.[605] Section 1071 provides no additional information or details regarding what aspects of credit type should be collected and reported.

The Bureau proposed in § 1002.107(a)(5) to require that financial institutions collect and report the following information regarding the type of credit applied for or originated: (i) The credit product; (ii) The type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated; and (iii) The length of the loan term, in months, if applicable. These aspects of credit type are discussed in turn below. This proposal was consistent with the approach presented in the SBREFA Outline, and would have required the financial institution to choose the credit product and guarantee(s) from a specified list. (These lists were provided in the commentary accompanying proposed § 1002.107(a)(5).) The lists included choices for ''Other'' and ''Not provided by applicant and otherwise undetermined,'' as appropriate, to facilitate compliance.

The Bureau sought comment on its proposed approach to the credit type data point, including the lists of products and guarantees proposed and the other specific requests for input below.

Credit product. The first subcategory the Bureau proposed to include in the credit type data point was the *credit product* (*i.e.,* a commonly understood category of small business lending like term loans or lines of credit) which the Bureau considered to be an integral part of the statutory requirement to collect credit type.

Proposed comment 107(a)(5)–1 would have presented the instructions for collecting and reporting credit product and the proposed list of credit products from which financial institutions would select. Proposed comment 107(a)(5)–1 would have explained that a financial institution would comply with § 1002.107(a)(5)(i) by selecting the credit product requested from the list provided in the comment. It would also have explained that if an applicant requests more than one credit product, the financial institution reports each credit product requested as a separate application. Proposed comment 107(a)(5)–1 would have also explained that if the credit product for an application does not appear on the list of products provided, the financial institution would select ''other'' as the credit product and report the specific product via free-form text.

Proposed comment 107(a)(5)–2 would have explained that, pursuant to proposed § 1002.107(c)(1), a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided data, which includes credit product. However, if a financial institution was nonetheless unable to collect or otherwise determine credit product information because the applicant did not indicate what credit product it sought and the application was denied, withdrawn, or closed for incompleteness before a credit product was identified, the proposed comment would have explained that the financial institution would report that the credit product was ''not provided by applicant and otherwise undetermined.''

Proposed comment 107(a)(5)–3 would have explained how a financial institution would report a transaction that involves a counteroffer. The comment would have stated that if a financial institution presents a counteroffer for a different credit product than the product the applicant had initially requested, and the applicant does not agree to proceed with the counteroffer, a financial institution would report the application for the original credit product as denied pursuant to proposed § 1002.107(a)(9). If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution would report the disposition of the application based on the credit product that was offered, and would not report the original credit product applied for. In addition, proposed comment 107(a)(5)–6 would have explained when ''other sales-based financing transaction'' would be used for reporting.

The Bureau noted that, under its proposal, line increases would be reportable so that the small business lending market could be tracked accurately. See the section-by-section analysis of § 1002.103(a) above for additional details. However, the Bureau did not propose that line increases be included as a separate item in the credit product list.

The Bureau sought comment on its proposed approach to this subcategory, including the appropriateness and usefulness of the products included in the list, whether there were other products that should be added, and the proposed treatment of counteroffers. The Bureau also sought comment on how financial institutions currently handle increases in lines of credit and whether a line increase should be considered a credit product, and on whether an overdraft line of credit should be considered a product separate from a line of credit and thus added to the product list.

Type of guarantee. The second data field the Bureau proposed to include in the credit type data point was *guarantee.* Proposed comment 107(a)(5)–4 would have presented the instructions for collecting and reporting type of guarantee and the proposed list of guarantees from which financial institutions would select. Proposed comment 107(a)(5)–4 would also have explained that a financial institution

[604] ECOA section 704B(e)(2)(B).

[605] Regulation C § 1003.4(a)(2), (14), (25), (27), (28), (37), and (38).

complies with § 1002.107(a)(5)(ii) by selecting the type or types of guarantee(s) obtained for an originated covered credit transaction, or that would have been obtained if the covered credit transaction were originated, from the list provided in the comment.

Proposed comment 107(a)(5)–4 would have also explained that the financial institution may select, if applicable, up to a maximum of five guarantees for a single application or transaction. Small business credit may have more than one guarantee, such as an SBA guarantee and a personal guarantee, and the Bureau believed that more complete information could be collected by requiring as many as five to be reported.

Proposed comment 107(a)(5)–4 would have also explained that if the type of guarantee for an application or originated transaction does not appear on the list of guarantees provided, the financial institution selects ''other guarantee,'' and reports the type of guarantee as free-form text. As with credit product, the Bureau believed that allowing financial institutions to choose ''other'' when a guarantee for the application does not appear on the provided list would facilitate compliance. In addition, collecting this information on ''other'' guarantee types would assist the Bureau in monitoring trends in usage of other types of guarantees and key developments in the small business lending market, which the Bureau could use to inform any future iterations of the list.

Finally, proposed comment 107(a)(5)–4 would have provided that if no guarantee is obtained or would have been obtained if the covered credit transaction were originated, the financial institution would select ''no guarantee.'' Because a small business credit transaction does not always involve use of a guarantee, the Bureau did not propose to include ''not provided by applicant and otherwise undetermined'' as an option. If no guarantee was identified for an application, the financial institution would report ''no guarantee.''

The Bureau sought comment on its proposed approach to this subcategory, including the appropriateness and usefulness of the items listed, and whether there are other guarantees that should be added. The Bureau also sought comment on whether five is the appropriate upper limit for reporting guarantees.

Loan term. The third subcategory the Bureau proposed to include in the credit type data point was the *loan term.* Proposed comment 107(a)(5)–5 would have presented the instructions for collecting and reporting loan term. Specifically, it would have explained that a financial institution complies with proposed § 1002.107(a)(5)(iii) by reporting the number of months in the loan term for the covered credit transaction, and that the loan term is the number of months after which the legal obligation will mature or terminate. The comment would have further explained how to measure the loan term and the possible use of rounding.

Proposed comment 107(a)(5)–5 would have also made clear that if a credit product, such as a credit card, does not have a loan term, the financial institution would report loan term as ''not applicable.'' The financial institution would also report ''not applicable'' if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified.

The Bureau sought comment on its proposed approach to this subcategory.

Comments Received

The Bureau received comments on its proposed approach to the credit type data point from a number of banks, community-oriented lenders, trade associations, community groups, and others.

Several commenters, including community-oriented lenders, community groups, a trade association, and a business advocacy group, supported the credit type data point as proposed, though some suggested small changes to the three individual subcategories discussed below. One commenter stated that to avoid the pitfalls that limited the use of HMDA data for spotting predatory trends in mortgages, the Bureau must collect sufficiently granular data on applicants and credit terms, including credit type. That commenter further stated that this information is critical because discrimination is not just evidenced in loan denials, but also less favorable credit terms. A community group stated that the information collected for the credit type data point would allow for more effective analysis than the current CRA small business information. A trade association stated that despite the added complexity of requiring three ''data points'' for the one listed in the statute, the Bureau has accounted for and addressed some of the concerns that community banks have raised related to credit type. That commenter went on to state its approval of the simple reporting of counteroffers and the ability to mark fields as ''not provided by applicant'' in the case of incomplete applications. Finally, a lender stated that it already collects the credit type information for the CDFI Fund.

Only one commenter opposed the credit type data point as a whole, stating that credit type and other data points would be a waste of time and efficiency.

Credit product. Two community groups and an auto finance trade association expressed support for the product list the Bureau proposed. The community groups stated that the list was nuanced and would provide useful differentiation between products. One explained that being able to determine which products were accessed could help in understanding bias in the credit market more accurately than CRA data currently allows for. An auto finance trade association specifically expressed support for the inclusion of ''other'' and ''unknown'' to facilitate compliance.[606]

One commenter stressed the importance of providing detail in distinguishing credit products, and several commenters requested changes to the credit products list. A joint letter from community groups and business advocacy groups stated that there might be value in separating out mortgages, auto loans and equipment financing as discrete secured loan types but treating all other term loan applications together, rather than treating secured term loans as one category and unsecured term loans as another. A community group asked that refinances and renewals be added to the product list, stating that this information would help demonstrate community credit needs. That commenter went on to state that listing refinances in the credit purpose data point, as proposed, would be confusing, and that the Bureau should look at the ways refinances are reported under HMDA and CRA. Several minority business advocacy groups, along with a joint letter from community groups, community oriented lenders, and business advocacy groups, responded to the Bureau's request for comment by encouraging the Bureau to include ''overdraft line of credit'' in the list of credit products. These commenters stated that overdraft can contain hidden costs, so having a way to monitor lenders who provide it could be useful.. A trade association opposed the inclusion of overdraft line of credit in the credit products list, though it did not provide a reason. Several community groups commented that the Bureau should require reporting of collateral requirements and value, instead of simply requiring ''secured'' and ''unsecured'' for items in the credit product list. One of these commenters suggested that collateral info would

[606] The proposed rule used the terms ''other'' and ''not provided by applicant and otherwise undetermined.''

shed light on underwriting changes and approaches during various economic conditions, allow stakeholders to understand why pricing might be lower on some loans and the risk that some loans might pose to borrowers.

A joint letter from community and business advocacy groups objected to the requirement to report each credit product requested as a separate application, stating that this would seem to require the lender to report each credit type requested as a separate application even when the applicant is seeking only one transaction but is open to alternative structures, and even though there would be only one action taken and one set of terms.

Type of guarantee. Several community groups expressed support for including guarantees as part of the credit type data point. These commenters stated that data on government guarantee programs would allow for better analysis of their usage, including whether minority and women owned businesses are being steered to these loans. One of these commenters stated that requiring reporting on all types of guarantees would facilitate analysis of whether minority and women owned businesses were receiving more costly or onerous credit. That commenter also stated that personal guarantees can at times be abusive, and reporting of those would allow better monitoring of this issue. Although it did not specifically express support for requiring reporting of guarantees, a trade association for auto finance lenders stated that its members will have this information for reporting.

Two industry commenters objected to the collection of guarantees as part of the credit type data point on the grounds that the statute does not require reporting of guarantees and asking that the credit type data point be limited to credit product and loan term. Those commenters, and several others who did not object to the general guarantee reporting requirement, were concerned in particular about the requirement to report what guarantees *would have been obtained* if the transaction had been originated. Some commenters stated that such a requirement extends into mere speculation, and would undermine the accuracy, reliability, and consistency of the data. Another commenter stated that it would not be possible to report what guarantees would have been obtained, and joint letter from community groups and business advocacy groups stated that the requirement could be problematic in the case of a declined application because the lender would be speculating as to potential guarantees, such as personal guarantees, from owners or non-owners. That comment went on to recommend that the Bureau either limit the reporting of this field to offers and counteroffers that are made (*i.e.,* allow financial institutions to report type of guarantee as ''not applicable'' for declined applications, as is permitted with respect to the loan term and loan pricing data fields) or, for declined applications, require reporting only if the requested guarantee were a government or programmatic guarantee (such as SBA, USDA or some other third-party guarantee program).

A community group and two CDFI lenders requested that the list of guarantees be changed in certain ways. The community group stated that the data should distinguish whether the guarantee is offered by the natural person(s) owning the business or the business itself, because it matters whether a creditor can seize assets of a person or the business. One of the CDFI lenders requested that the guarantee categories be broken down further to detail collateral coverage, which is often the deciding factor on approval or denial, and because people of color own homes (and amass wealth) at much lower rates than whites. That commenter went on to suggest that these details could shed light on the credit needs of minority small business owners and whether financial institutions are applying collateral requirements equitably. The other lender requested that State guarantee and local guarantee be separated on the list, rather than the combined ''state or local guarantee'' that was proposed. That commenter stated that differentiating between the performance of these two levels of government would be critical for understanding the focus of future reforms or capital flows through these entities. The commenter also provided statistics suggesting that conflating State and local guarantees would not be as informative as separating them.

Loan term. A community group and a community-oriented lender stated their support for the proposed loan term provision. The community group stated that loan term length influences pricing and other terms and conditions, and would help in explaining differences in these features. That commenter also suggested that loan term should be straightforward to report for lenders. In addition, a national auto finance trade association stated that its members would have this information to report.

A number of banks and a trade association objected to the proposal to have the loan term measured from the first payment period rather than the date of origination. These commenters stated that they do not measure loan term in this way, and having to do so for reporting would cause unnecessary and significant compliance difficulties. They asked to be able to measure loan term from the date of origination of the credit. Another bank objected to the reporting of loan term for applications, stating that applicants seldom make an application that specifies the desired loan term.

Although the proposed rule did not discuss how or whether merchant cash advance providers would report loan term, the Bureau did seek comment on proposed § 1002.107(a)(12)(v) and its commentary, the pricing provision for merchant cash advances, including whether to require additional pricing information for merchant cash advances, and whether merchant cash advances could be structured in ways that evade the proposed reporting requirement. Two commenters urged the Bureau to make clear that merchant cash advance providers must report loan term, and must not use the proposed rule's provision stating that ''not applicable'' could be reported for a product that has no loan term. These commenters discussed the importance of loan term in comparing different credit pricing and stated that merchant cash advances are sometimes abusive and are used disproportionately by minority businesses. These commenters also stated that loan term can be readily ascertained for merchant cash advances and they described different methods for doing so. One method suggested was that when a merchant cash advance is paid off before reporting, the provider should report the actual length of time to repayment. In addition, they suggested that for a partially paid merchant cash advance the provider could project the amount of time to repayment based on the amount already paid. One of these commenters, a cross-sector group of lenders, community groups, and small business advocates, stated that merchant cash advance providers establish an estimated loan term when they underwrite an advance, and that most merchant cash advance contracts have an estimated payment amount.

Final Rule

The Bureau is finalizing § 1002.107(a)(5) certain changes to facilitate compliance and enhance the quality and usefulness of the data reported. Final § 1002.107(a)(5) requires that financial institutions collect and report the following information regarding the type of credit applied for or originated: (i) the credit product; (ii)

the type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated; and (iii) the length of the loan term, in months, if applicable.

The Bureau believes that it is reasonable to interpret the statutory term ''credit type'' to comprise the three required subcategories, because they are critical to understanding the nature of small business credit applied for and provided, as explained below. For the reasons discussed herein, the Bureau believes that the subcategories of credit product (including collateral), guarantee type, and loan term will aid in fulfilling the purposes of section 1071. Financial institutions generally have all of the information required for this data point when they process applications (and the reporting regime is sufficiently flexible when they do not), so the Bureau does not believe there is anything in this approach that will impose particular operational difficulty. Additionally, the Bureau believes it is reasonable to interpret type of credit ''applied for'' to include the type of credit actually originated when an application results in an extension of credit.

The statutory term ''type . . . of the loan'' is ambiguous, and the Bureau reasonably interprets the term to include the credit product, any guarantee obtained, and the term of a loan because an accurate and useful record of the ''type'' of loan or credit would include those data fields. In the alternative, ECOA section 704B(e)(2)(H) authorizes the Bureau to require inclusion of ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071],'' and for the reasons discussed herein, the Bureau has also determined that the subcategories of credit product (including collateral), guarantee type, and loan term will aid in fulfilling those purposes.

Credit product. The Bureau is finalizing the credit product subcategory with certain changes to the associated commentary to facilitate compliance and enhance the quality and usefulness of the data reported. Final § 1002.107(a)(5)(i) requires financial institutions to compile and maintain data on the credit product applied for or originated. The Bureau continues to consider credit product to be an integral part of the statutory requirement to collect credit type. The Bureau believes information about the various products sought by applicants will further the purposes of section 1071 by demonstrating, for example, how small businesses of different sizes or in different sectors choose to pursue, or ultimately access, different forms of credit.

The Bureau distinguishes between secured and unsecured term loans and lines of credit in its list of credit products because it believes that whether a term loan or line of credit is collateralized can have such a significant effect on things like approval rates and pricing that secured and unsecured products fundamentally differ in kind. For this reason, the Bureau believes that including information on the use of collateral in the credit product subcategory will help data users to avoid inaccurate interpretations of data. The Bureau believes that whether a loan is secured or unsecured will be part of an application or loan file and, as a result, will not be operationally difficult to report once a financial institution's section 1071 compliance system is set up.

Final comment 107(a)(5)–1 presents the instructions for collecting and reporting credit product and the list of credit products from which financial institutions will select. Comment 107(a)(5)–1 explains that a financial institution complies with § 1002.107(a)(5)(i) by selecting the credit product applied for or originated from the list provided in the comment. The Bureau believes that the list of credit products provided in final comment 107(a)(5)–1 aligns with the most common types of credit products in small business lending. Final comment 107(a)(5)–1 also explains that if the credit product for an application does not appear on the list of products provided, the financial institution selects ''other'' as the credit product and reports the specific product via free-form text. The Bureau believes that allowing financial institutions to choose ''other'' when the credit product for the application does not appear on the provided list will facilitate compliance. In addition, collecting this information on ''other'' credit products will assist the Bureau in tracking product trends and key developments in the small business lending market, which the Bureau can use to inform any future iterations of the list.

Comment 107(a)(5)–1 also explains that if an applicant requests more than one credit product at the same time, the financial institution reports each credit product requested as a separate application. The issue of how to collect and report multiple products applied for at the same time affects several data points, but is most salient for credit type. The Bureau believes that requiring a separate application to be reported for each credit product requested will yield more complete and useful data, and that a financial institution will not experience operational difficulties in copying the relevant information, identical for most data points, to separate lines in the small business lending application register. However, the Bureau has changed the language regarding this requirement from the proposed rule, in order to clarify that when the applicant is seeking only one transaction but is open to alternative product types, the financial institution reports only one application. Comment 107(a)(5)–1 now includes instructions on how to report credit product when the applicant only requests a single covered credit transaction, but has not decided which particular product to request. The Bureau believes that this new language will facilitate compliance and lead to the collection of more accurate data. The issue of reporting requests for multiple covered credit transactions at one time is discussed more fully in the section-by-section analysis of § 1002.103(a) above.

As explained above, many commenters suggested changes to the list of products in comment 107(a)(5)–1. In regard to the requests to separate out mortgages, auto loans and equipment financing as discrete secured loan types, to include additional information about collateral, and to make ''refinancing'' a credit product rather than a credit purpose, the Bureau believes that its credit product taxonomy presents a clear, uncomplicated framework using the basic forms of credit extended to small businesses. Including types of collateral and different refinancings as part of credit products would complicate the taxonomy and introduce categorization difficulties, for example with partial refinancings. Under the final rule, these types of credit will be reported using the credit product applied for or originated, from the list in comment 107(a)(5)–1, and the extra information suggested may or may not be appropriately included in the credit purpose data point under § 1002.107(a)(6), depending on the situation. Similarly, the Bureau believes that the overdraft aspect of overdraft lines of credit will best be reported using the credit purpose ''overdraft,'' and that the credit product will then be reported as a line of credit, secured or unsecured. The Bureau believes that this arrangement will help preserve the uncomplicated framework of the credit products list. See the section-by-section analysis of § 1002.107(a)(6) below for further discussion.

As a result of further analysis and consideration, the Bureau has made one change from the proposal to the final

credit products list in comment 107(a)(5)–1. The proposed ''credit card account'' product has now been separated into ''credit card account, not private-label,'' and ''private-label credit card account.'' The Bureau believes that private-label credit cards form a distinct and important market segment that operates differently from other credit cards, and this distinction will facilitate robust data analysis and better further the purposes of section 1071. The Bureau also believes that financial institutions will have the information needed for reporting these different types of accounts readily available, and so separating the two types will not cause operational difficulty. In addition to the change in the credit product list in comment 107(a)(5)–1, the Bureau has added new comments 107(a)(5)–2 and –3 to explain the difference between these card products and facilitate compliance. Final comment 107(a)(5)–2 provides a definition of credit card accounts that are not private-label and includes instructions on reporting these products. Final comment 107(a)(5)–3 provides a definition of private-label credit card accounts and includes instructions on reporting these products.

The Bureau is also finalizing comments 107(a)(5)–4, –5 (which were numbered as comments 107(a)(5)–2 and –3 in the proposal) and comment 107(a)(5)–6 as proposed. Final comment 107(a)(5)–4 describes the situation in which a financial institution reports that the credit product was ''not provided by applicant and otherwise undetermined.'' The Bureau believes that permitting this response will facilitate compliance and enhance the quality of data collected. As discussed above, commenters supported the flexibility afforded by this kind of response.

Final comment 107(a)(5)–5 provides instructions on how a financial institution reports a transaction that involves a counteroffer. The comment states that if a financial institution presents a counteroffer for a different credit product than the product the applicant had initially requested, and the applicant does not agree to proceed with the counteroffer, a financial institution reports the application for the original credit product as denied pursuant to § 1002.107(a)(9). If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the disposition of the application based on the credit product that was offered, and does not report the original credit product applied for. The Bureau believes that, in the complex circumstances created by counteroffers, the meaning of the type of credit ''applied for'' is ambiguous, and it is reasonable to interpret the credit product ''applied for'' to mean the credit product considered via the applicant's response to the counteroffer. For a discussion of the Bureau's treatment of counteroffers more generally, see the section-by-section analysis of § 1002.107(a)(9) below.

Final comment 107(a)(5)–6 explains that for an extension of business credit incident to a factoring arrangement that is otherwise a covered credit transaction, a financial institution selects ''other sales-based financing transaction'' as the credit product, and provides a cross reference to comment 104(b)–1. The Bureau believes that this explanation will facilitate reporting of applications involving this important market segment.

Type of guarantee. The Bureau is finalizing the requirement to report guarantees as a subcategory of the credit type data point with changes to enhance the quality of the data collected and facilitate compliance. The final rule requires a financial institution to report the type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated.

The Bureau considers the guarantee obtained for an extension of credit to be part of the credit ''type'' because it is fundamental to the nature of the transaction in that it meaningfully impacts terms such as interest rates, such that guarantee information can help to explain potential disparities in outcomes and reduce inaccurate conclusions, aiding in fulfilling the fair lending purpose of section 1071. Indeed, in common parlance, small business credit transactions are often referred to using the name of the guarantee (*e.g.,* ''a 7(a) loan,'' referring to the SBA 7(a) guarantee). Because various types of guarantees are available for different credit products, the Bureau believes that guarantee type should constitute a separate subcategory within the credit type data point, so that data users can conduct separate analyses with respect to credit product and guarantees, and to avoid excessive complexity in the credit product data field. The Bureau further believes that information on the distribution of government loan guarantees (such as those provided in SBA programs) across different geographic areas and applicant groups will allow a better understanding of how those programs function on the ground, aiding in fulfilling the business and community development purpose of section 1071. As with collateral, information on guarantees is generally a part of an application or loan file and the Bureau does not believe it will be operationally difficult to report once a financial institution's 1071 compliance system is set up.

Final comment 107(a)(5)–7 (which was numbered as comment 107(a)(5)–4 in the proposal) presents the instructions for collecting and reporting type of guarantee and the list of guarantees from which financial institutions will select. The Bureau believes the list of guarantee types provided in comment 107(a)(5)–7 aligns with the most common types of guarantees used in small business lending. Final comment 107(a)(5)–7 also explains that a financial institution complies with § 1002.107(a)(5)(ii) by selecting the type or types of guarantee(s) obtained for an originated covered credit transaction, or that would have been obtained if the covered credit transaction were originated, from the list provided in the comment.

The Bureau agrees with the commenters who suggested that clarity was needed on how to report guarantee type when the covered credit transaction is not originated. Consequently, comment 107(a)(5)–7 now states that if an application is denied, withdrawn, or closed for incompleteness before any guarantee has been identified, the financial institution selects ''no guarantee.'' The Bureau believes that this reporting option will facilitate compliance and result in the collection of more reliable data. The Bureau also agrees that separating State and local guarantees, so that they can be tracked individually, will enhance the quality of the data collected. Comment 107(a)(5)–7 now includes separate items for these guarantee types, and states that the financial institution chooses State government guarantee or local government guarantee, as applicable, based on the entity directly administering the program, not the source of funding. The Bureau believes that this instruction will facilitate compliance and enhance the quality of the data collected. The Bureau also believes that differentiating between State and local guarantees will not cause operational difficulty for reporters because the financial institution will have the information in the loan file.

The Bureau understands that there may be some value in collecting the additional information suggested by commenters on whether a natural person or business makes a guarantee and the nature of the collateral backing a guarantee. However, the Bureau

believes that these items will increase the complexity and operational difficulty of compliance in reporting the type of guarantee and has not included them in the final rule.

Loan term. The Bureau is finalizing the requirement to report loan term as part of the credit type data point with certain changes to the associated commentary to facilitate compliance and enhance the quality of the data collected. Final § 1002.107(a)(5)(iii) requires a financial institution to report the length of the loan term, in months, if applicable.

As with the consumer lending market, the pricing and sustainability of closed-end credit transactions for small businesses are associated with term length, and without awareness of the term of the loan, data users will have less of an understanding of the types of credit being made available to applicants. Credit with a one-month term may differ not just in degree but in kind from credit with a 60-month term. The Bureau thus believes that the length of the loan term is a fundamental attribute of the type of credit that applicants are seeking such that it should be treated as a separate subcategory within credit type. As with other elements of the credit type data point, loan term information will allow data users to reduce inaccurate conclusions or misinterpretations of the data, aiding in fulfilling both the fair lending and business and community development purposes of section 1071. Likewise, the loan term will be part of the application or loan file and should not be operationally difficult to report once a financial institution's 1071 compliance system is set up.

Final comment 107(a)(5)–8 (which was numbered as comment 107(a)(5)–5 in the proposal) presents the instructions for collecting and reporting loan term. Specifically, it explains that a financial institution complies with § 1002.107(a)(5)(iii) by reporting the number of months in the loan term for the covered credit transaction, and that the loan term is the number of months after which the legal obligation will mature or terminate. In the proposed rule, this comment included language that would have required financial institutions to measure the loan term in the way that loan terms are generally described in real property transactions. However, the Bureau agrees with those commenters who stated that such a provision would create compliance difficulties. Although the final comment continues to allow the loan term to be measured for real property transactions in the way the Bureau proposed, it makes clear that loan term for small business credit is generally measured from the date of origination and should be reported that way.

Final comment 107(a)(5)–8 also makes clear that if a credit product, such as a credit card, does not have a loan term, the financial institution reports loan term as ''not applicable.'' The Bureau believes that permitting the use of ''not applicable'' in these situations will facilitate compliance and aid in the collection of appropriate data. However, the Bureau does not consider products that have an estimated loan term, such as certain merchant cash advances and other sales-based financing transactions, as products that do not have a loan term. The Bureau agrees with those commenters who suggested that merchant cash advance providers should report loan term so that appropriate comparisons can be made with other products. Consequently, comment 107(a)(5)–8 now provides that for merchant cash advances and other sales-based financing transactions, the financial institution complies with § 1002.107(a)(5)(iii) by reporting the loan term, if any, that the financial institution estimated, specified, or disclosed in processing or underwriting the application or transaction. The Bureau notes that loan term for a merchant cash advance or other sales-based financing transaction can also be the estimated loan term disclosed in a State or locally required disclosure, if applicable. The comment also explains that if more than one loan term is estimated, specified, or disclosed, the financial institution reports the one it considers to be the most accurate, in its discretion. The Bureau believes that these instructions will enhance the quality of the data collected and facilitate compliance by providing clear guidance on these providers' reporting responsibilities. The Bureau chose not to use the other loan term measurements that commenters suggested because they would likely have introduced significant operational difficulty. The Bureau believes that merchant cash advance and other sales-based financing providers will not have operational difficulty reporting an estimate that they already possess. If a merchant cash advance or other sales-based financing provider does not estimate, specify, or disclose a loan term as part of the processing or underwriting of the application or transaction, the provider may report that the loan term is ''not applicable.''

The proposed rule's loan term comment would have also provided that the financial institution would report ''not applicable'' if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified. However, in order to facilitate compliance, enhance the quality of information collected, and for consistency with the other data points in the final rule, final comment 107(a)(5)–8 now provides that for a credit product that generally has a loan term, the financial institution reports ''not provided by applicant and otherwise undetermined'' if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified. The Bureau believes that the availability of this response will facilitate the reporting of the loan term subcategory for applications in these situations.

107(a)(6) Credit Purpose

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the type and purpose of the loan or other credit being applied for.'' [607] (The credit type data point is discussed in the section-by-section analysis of § 1002.107(a)(5) immediately above.)

The Bureau proposed in § 1002.107(a)(6) to require that financial institutions collect and report the purpose or purposes of the credit applied for or originated. Proposed comment 107(a)(6)–1 would have presented instructions for collecting and reporting credit purpose and would have provided the proposed list of credit purposes from which financial institutions would select.

The proposed list of credit purposes was similar to the list in the SBREFA Outline, with certain adjustments. First, the items on the SBREFA list that described types of collateral, such as commercial real estate, were updated to more clearly reflect that the financial institution would be collecting and reporting the *purpose* of the loan, and not the form of collateral, though the form of collateral might be referred to in describing that purpose. In addition, the proposed listed purposes involving real property would have differentiated between dwelling and non-dwelling real property. The Bureau believed that this distinction would help in collecting more precise and useful data. To facilitate compliance the Bureau proposed to include ''not applicable'' in the purposes list for use when an application is for a credit product that generally has indeterminate or numerous potential purposes, such as a credit card. Proposed comment 107(a)(6)–5 would have also explained

[607] ECOA section 704B(e)(2)(B).

the use of ''not applicable'' as a response.

Proposed comment 107(a)(6)–2 would have explained that if the applicant indicated or the financial institution was otherwise aware of more than one purpose for the credit applied for or originated, the financial institution would have reported those purposes, up to a maximum of three, using the list provided, in any order it chose.

Proposed comment 107(a)(6)–3 would have explained that if a purpose of the covered credit transaction did not appear on the list of purposes provided, the financial institution would report ''other'' as the credit purpose and report the purpose as free-form text. For efficiency and to facilitate compliance, proposed comment 107(a)(6)–3 would have also explained that if the application had more than one ''other'' purpose, the financial institution would choose the most significant ''other'' purpose, in its discretion, and would report that ''other'' purpose. The comment would have then explained that a financial institution would report a maximum of three credit purposes, including any ''other'' purpose reported.

Proposed comment 107(a)(6)–4 would have explained that, pursuant to proposed § 1002.107(c)(1), a financial institution would maintain procedures reasonably designed to collect applicant-provided information, which would include credit purpose. However, if a financial institution was nonetheless unable to collect or determine credit purpose information, the financial institution would have reported that the credit purpose was ''not provided by applicant and otherwise undetermined.''

In order to facilitate compliance, the Bureau also proposed comments 107(a)(6)–6 and –7. Proposed comment 107(a)(6)–6 would have clarified that, as explained in proposed comment 104(b)–4, subpart B did not apply to an extension of credit that was secured by 1–4 individual dwelling units that the applicant or one or more of the applicant's principal owners did not, or would not, occupy. Proposed comment 107(a)(6)–7 would have clarified the collection and reporting obligations of financial institutions with respect to the credit purpose data point, explaining that the financial institution would be permitted, but not required, to present the list of credit purposes provided in comment 107(a)(6)–1 to the applicant. Proposed comment 107(a)(6)–7 would have further explained that the financial institution would also be permitted to ask about purposes not included on the list provided in proposed comment 107(a)(6)–1. Finally, proposed comment 107(a)(6)–7 would have clarified that if an applicant chose a purpose or purposes that were similar to purposes on the list provided, but used different language, the financial institution would report the purpose or purposes from the list provided.

The Bureau sought comment on its proposed approach to the credit purpose data point. In addition, the Bureau sought comment on whether there were any purposes that should be added to or modified on its proposed list. In particular, the Bureau sought comment on the potential usefulness of including ''agricultural credit'' and ''overdraft line of credit'' in the credit purposes list. Finally, the Bureau requested comment on whether further explanations or instructions with respect to this data point would facilitate compliance.

Comments Received

The Bureau received comments on its proposed approach to the credit purpose data point from a number of lenders, trade associations, and community groups, along with a minority business advocacy group. Several community groups expressed support for the credit purpose data point as proposed by the Bureau, and a CDFI lender explained that it already collects this information. A community group stated that the proposal accurately captured the wide variety of credit purposes and then expressed specific support for distinguishing dwellings from non-dwellings, allowing reporting of three credit purposes, and inclusion of the ''other'' category with a free-form text box. In addition, this commenter suggested that the proposed method for credit purpose collection could work well with the CRA.

A trade association representing community banks also supported the proposal for credit purpose, especially the flexibility provided by the ''not applicable'' and ''not provided by applicant and otherwise undetermined'' options, and the provision allowing a financial institution to report the credit purposes in any order it chooses, when the institution is aware of more than one purpose. That commenter said that these accommodations would facilitate compliance while still achieving the policy goals of the law. A trade association representing auto finance lenders also stated support for the flexibility provided by the ''not applicable'' and ''not provided by applicant and otherwise undetermined'' options. Two banks opposed the credit purpose proposal, explaining that it would require extensive changes and burdensome ongoing operations, and that the interplay with other regulatory requirements was unclear. One of these commenters also questioned the usefulness of the data collected. However, neither commenter suggested alternative ways to implement the statutorily required credit purpose data point.

Several commenters asked that the Bureau clarify certain aspects of the credit purpose proposal. Two industry commenters requested clarification of the circumstances when institutions should use ''not provided by applicant and otherwise undetermined'' as opposed to ''not applicable.'' Several industry commenters requested guidance on when to use ''owner-occupied'' versus ''non-owner occupied'' for non-dwelling real property. Another asked about how to report when the loan is mixed-use (business and consumer purpose). A joint letter from community groups and community oriented lenders requested that the Bureau clarify that the category ''Working capital (includes inventory or floor planning)'' also includes salaries, rents, and other daily expenses. A credit union trade association suggested that the Bureau clarify how transactions should be reported when made directly to a sole proprietor, not to the business directly, explaining that credit unions may find it confusing to report a loan purpose that implies that the business itself is the recipient.

Several commenters requested more substantial changes in the proposed credit purpose data point. Two joint comment letters, each representing multiple community groups and other entities, requested that the Bureau require more granular reporting in certain situations, especially with regard to real property loans. These comments suggested collecting real property loan data on rental purpose, whether buildings are mixed-use, the number and type of units in buildings, as well as a way to easily connect to a HMDA record for any loan that is reported under both regimes. One of these comments asked that the Bureau make it easier to determine if a capital expense loan is used to maintain a business or expand it. Another community group requested that the Bureau disaggregate the purchase-construction-repair purpose from refinancing for things like real estate, vehicles, and equipment, perhaps by adding a separate data point. Another requested that refinancings (along with renewals) should be listed as a credit product in the credit type data point, rather than as a credit purpose. That same commenter requested that financial institutions not be allowed to use their own list of purposes, as

proposed, and suggested that the Bureau consider providing a sample application form, which would include the rule's list of credit purposes, to facilitate data collection.

Several industry commenters responded to the Bureau's request for comment on including ''agricultural credit'' as a credit purpose. These commenters mostly requested that new purposes specifically geared to agricultural lending be included, though they did not offer any examples of such purposes. The commenters emphasized that agricultural lending is different from other business lending and suggested that choosing from the credit purposes listed would be difficult for this market. A community group stated that it might be confusing to list agricultural credit as a credit purpose as the credit product data point would collect that they are farm loans.[608]

Several community groups and a minority business advocacy group responded to the Bureau's request for comment on whether the final rule should include ''Overdraft line of credit'' as a credit purpose. These commenters supported inclusion of overdraft as a purpose, stating that it should be monitored for potential abuses, especially abuses in communities of color. No industry commenters discussed the possible inclusion of overdraft lines of credit as a credit purpose.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(6) and associated commentary with certain revisions for clarity, to improve the usefulness of the data collected, and to accommodate a new coverage exclusion for HMDA-reportable transactions. Final § 1002.107(a)(6) requires that financial institutions collect and report the purpose or purposes of the credit applied for or originated.

Final comment 107(a)(6)–1 provides instructions for collecting and reporting credit purpose and presents the list of credit purposes from which financial institutions will select. The final list of purposes is very similar to the proposed list but deletes two purposes that describe credit likely to be HMDA reportable, includes one additional purpose (''overdraft'') and makes minor edits to accommodate those changes and for clarity. The Bureau believes that the list of credit purposes provided in comment 107(a)(6)–1 appropriately aligns with the purposes of credit sought in the small business credit market.

Because the Bureau is adopting an exclusion for HMDA-reportable credit, the proposed purposes list's differentiation between dwelling and non-dwelling real property is no longer necessary. In addition, the purposes in the list that pertained to dwellings were very likely to be HMDA-reportable, and so have been removed in the final rule. See the section-by-section analysis of § 1002.104(b) above for further discussion of this exclusion.

The Bureau agrees with the commenter who suggested that ''Working capital (includes inventory or floor planning)'' will often also include salaries, rents, and other daily expenses. However, the final rule does not include these items in the credit purposes list description of working capital because the Bureau believes the term is already clear, and listing these items may cause confusion as to other working capital items that are not listed.

The Bureau has not added ''Agricultural credit'' or specific purposes associated with agricultural credit to the list of credit purposes in the final rule. First, although ''farm loans'' are not listed as a credit product in the credit type data point, the NAICS data point in final § 1002.107(a)(15) will make clear when the small business borrower is an agricultural business. In addition, other business types are not included in the credit purposes list and doing so with agriculture could cause confusion. As far as including specific agricultural purposes in the purposes list, the commenters who suggested this did not provide examples, and the Bureau did not propose such purposes. Going forward, the Bureau may learn of specific agricultural credit purposes from the ''Other'' free-form text box, and if appropriate, potentially add them to the rule later.

The Bureau agrees that overdraft should be separately identified as a credit purpose in the list in comment 107(a)(6)–1 in order to observe its use in the market. Rather than ''Overdraft line of credit'' as referenced in the proposal's preamble, the Bureau is using the term ''Overdraft.'' In order to facilitate compliance regarding overdraft as a credit purpose, the Bureau is adding new comment 107(a)(6)–8 to the final rule, which makes clear that when overdraft is an aspect of the covered credit transaction applied for or originated, the financial institution reports ''Overdraft'' as a purpose of the credit. The new comment also explains that the financial institution reports credit type pursuant to § 1002.107(a)(5)(i) as appropriate for the underlying covered credit transaction, such as ''Line of credit—unsecured.'' The Bureau does not believe that reporting overdraft as a credit purpose will create operational difficulties for financial institutions because the information will be readily apparent as an aspect of the credit. Finally, new comment 107(a)(6)–8 makes clear that providing occasional overdraft services as part of a deposit account offering would not be reported for the purpose of subpart B.

The Bureau is finalizing comments 107(a)(6)–2 through –5 with minor edits to accommodate the removal of purposes related to the exclusion for HMDA-reportable transactions and for clarity. Final comment 107(a)(6)–2 explains that if the applicant indicates or the financial institution is otherwise aware of more than one purpose for the credit applied for or originated, the financial institution reports those purposes, up to a maximum of three, using the list provided, in any order it chooses. Since applicants may have more than one purpose for a credit transaction, the Bureau believes it is appropriate to require collection and reporting of more than one credit purpose for this data point in that situation. The Bureau believes that having financial institutions report up to three credit purposes will provide useful data. The Bureau also believes that allowing financial institutions discretion as to the order of the credit purposes reported will facilitate compliance.

Final comment 107(a)(6)–3 explains that if a purpose of an application does not appear on the list of purposes provided, the financial institution reports ''other'' as the credit purpose and reports the credit purpose as free-form text. The Bureau believes that allowing financial institutions to choose ''other'' when a credit purpose for the application did not appear on the provided list will facilitate compliance. In addition, the Bureau believes that collecting this information on ''other'' credit purposes will assist in monitoring trends in this area and key developments in the small business lending market, which the Bureau can use to inform any future changes to the list.

Final comment 107(a)(6)–4 makes clear that, pursuant to final § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes credit purpose. However, the comment further explains that if a financial institution is nonetheless unable to collect or determine credit purpose information,

[608] The Bureau notes that the proposed rule did not expressly list agricultural loans (or similar) on either the credit products list or credit purposes list.

the financial institution reports that the credit purpose is ''not provided by applicant and otherwise undetermined.'' The Bureau agrees with the industry commenters who stated that this provision would provide flexibility and believes that permitting use of this response will facilitate compliance and enhance the quality of data reported.

In order to facilitate compliance, final comment 107(a)(6)–5 explains that if the application is for a credit product that generally has indeterminate or numerous potential purposes, such as a credit card, the financial institution may report credit purpose as ''not applicable.'' As with the ''not provided by applicant and otherwise undetermined'' purpose, the Bureau agrees with the industry commenters who felt that this provision would provide appropriate flexibility. The Bureau does not believe that there will be confusion about the situations for which ''not provided by applicant and otherwise undetermined'' (as explained in final comment 107(a)(6)–4) and ''not applicable'' (as explained in final comment 107(a)(6)–5) are appropriate to use. The commenters who suggested that such confusion might occur did not explain why the proposed language would not be sufficient.

Final comment 107(a)(6)–6 provides details on the collection of credit purposes by financial institutions. The comment states that, pursuant to § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including credit purpose. In addition, the financial institution is permitted, but not required, to present the list of credit purposes provided in comment 107(a)(6)–1 to the applicant. The financial institution is also permitted to ask about credit purposes not included on the list provided in comment 107(a)(6)–1. If the applicant chooses a purpose or purposes not included on the provided list, the financial institution follows the instructions in comment 107(a)(6)–3 regarding reporting of ''other'' as the credit purpose. If an applicant chooses a purpose or purposes that are similar to purposes on the list provided, but uses different language, the financial institution reports the purpose or purposes from the list provided. The Bureau believes that the explanations and instructions in the final commentary accompanying § 1002.107(a)(6) will reduce any confusion as to how a financial institution reports this data point when an application involves multiple credit purposes, and in other situations.

The Bureau believes that prohibiting financial institutions from using their own credit purpose lists, as one commenter suggested, would not be appropriate because the Bureau does not have sufficient information to create a definitively comprehensive credit purposes list and wishes to provide institutions the flexibility appropriate to their market segment. In regard to that commenter's suggestion that the Bureau provide a sample application form, this issue is discussed in the section-by-section analysis of appendix E below. In addition, the Bureau does not believe additional clarification regarding how to report credit purpose for business loans made to sole proprietors is necessary.

Because the Bureau is providing a complete exclusion for HMDA-reportable transactions in the final rule, the Bureau is not finalizing proposed comment 107(a)(6)–6, which would have provided a cross-reference to the partial exclusion for dwelling-secured credit in the proposed rule.

New comment 107(a)(6)–7 explains that real property is owner-occupied if any physical portion of the property is used by the owner for any activity, including storage. The Bureau adds this explanation in response to comments asking for clarity on this issue. The Bureau believes that the language provided clearly indicates the meaning of ''owner-occupied'' for reporting purposes and will facilitate compliance and help in the collection of uniform data.

In regard to the commenters that objected to the entire credit purpose data point as excessively burdensome and not providing useful information, the Bureau notes that this data point was specified by Congress in section 1071 as one that financial institutions must collect and report; these commenters did not suggest a different method of collection. The Bureau also believes, along with the national trade association representing small banks whose comment is described above, that the reporting accommodations included in the credit purpose provision will facilitate compliance while still achieving the policy goals of section 1071.

Although some additional useful information might be collected if the Bureau were to expand the credit purpose data point to include the more granular reporting requested by community groups, such changes would make the collection more difficult for financial institutions as well as potentially confusing for small business applicants; the Bureau does not believe that further granularity is necessary at this time, especially at the risk of obtaining potentially less accurate or complete data overall. In regard to making ''refinancing'' a credit product rather than a credit purpose as proposed, the Bureau believes that its credit product taxonomy presents a clear, uncomplicated framework using the basic forms of credit extended. Making refinancing a product would complicate the taxonomy and introduce categorization difficulties, for example with partial refinancings. As for including renewals, the section-by-section analysis of § 1002.103(b) above discusses this issue.

107(a)(7) Amount Applied For

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved.'' [609] The Bureau stated in the SBREFA Outline that it was considering requiring financial institutions to report the amount applied for data point using the initial amount of credit or credit limit requested by the applicant at the application stage, or later in the process but prior to the financial institution's evaluation of the credit request.[610]

The Bureau proposed § 1002.107(a)(7) to require a financial institution to collect and report ''the initial amount of credit or the initial credit limit requested by the applicant.'' Proposed comment 107(a)(7)–1 would have explained that a financial institution is not required to report credit amounts or limits discussed before an application is made, but must capture the amount initially requested at the application stage or later. In addition, proposed comment 107(a)(7)–1 would have stated that if the applicant does not request a specific amount, but the financial institution underwrites the application for a specific amount, the financial institution reports the amount considered for underwriting as the amount applied for. Finally, proposed comment 107(a)(7)–1 would have instructed that if the applicant requests an amount as a range of numbers, the financial institution reports the midpoint of that range.

To address the situation where the financial institution requests an amount applied for but the applicant nonetheless does not provide one, proposed comment 107(a)(7)–2 would have explained that, in compliance with proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect

[609] ECOA section 704B(e)(2)(C).

[610] SBREFA Outline at 28.

applicant-provided information, which includes the credit amount initially requested by the applicant. However, if a financial institution is nonetheless unable to collect or otherwise determine the amount initially requested, the financial institution would have been required to report that the amount applied for is ''not provided by applicant and otherwise undetermined.''

Proposed comment 107(a)(7)–3 would have provided instructions for reporting the amount applied for in regard to firm offers. Proposed comment 107(a)(7)–3 would have explained that when an applicant responds to a ''firm offer'' that specifies an amount or limit, which may occur in conjunction with a pre-approved credit solicitation, the financial institution reports the amount applied for as the amount of the firm offer, unless the applicant requests a different amount. If the firm offer does not specify an amount or limit and the applicant does not request a specific amount, proposed comment 107(a)(7)–3 would have explained that the amount applied for is the amount underwritten by the financial institution.

Proposed comment 107(a)(7)–4 would have explained that when reporting a covered application that seeks additional credit amounts on an existing account, the financial institution reports only the additional credit amount sought, and not any previous amounts sought or extended. The Bureau noted that a request to withdraw additional credit amounts at or below a previously approved credit limit amount on an existing open-end line of credit would not be a covered application, and so proposed comment 107(a)(7)–4 would not have applied to such a situation.

The Bureau sought comment on its proposed approach to the amount applied for data point. The Bureau also requested comment on how best to require reporting of amount applied for in situations involving multiple products or credit lines under a single credit limit. The Bureau also requested comment on potential methods for avoiding misinterpretations of disparities between the amount applied for and the amount approved or originated. Finally, the Bureau requested comment on its proposed approach to reporting when a range of numbers is requested.

Comments Received

The Bureau received comments from lenders, trade associations, community groups, and others regarding this proposed data point. Community groups and a CDFI lender supporting the Bureau's approach to the collection of the amount applied for data point. One commenter said that it works with minority farmers whose loans are approved for far less than what they originally applied for and that the data would give them information regarding lending practices involving minority farm businesses. Several commenters stated that amount applied for and amount approved or originated are key data for fair lending purposes. One said that Black-, Latino-, and Asian-owned businesses have been substantially less likely to receive the full small business loan amount requested than white-owned small businesses. Another commenter requested that the Bureau scrutinize lenders when the application and approval amounts are conspicuously close, especially if there is a disproportionate impact on women and minority-owned businesses, because some lenders may dissuade applicants from making a specific request and steer them to the considered underwriting amount that is lower than the financing need of the small business.

A community group noted that amounts should not be reported in ranges since the statute requires reporting of amounts and furthermore, that ranges are not useful for assessing whether lenders are responding adequately to credit needs. This community group also commented that with respect to line increases, it makes sense for the lender to report the additional amount instead of the additional and original amount because it is more precise in terms of being able to assess whether credit needs are being met.

Several industry commenters and a group of State banking regulators expressed concerns about collecting the data in light of the lending process where the ''amount applied for'' can fluctuate throughout the application stage. One trade association commented that financial institutions should not be required to report amounts stated before an application is made because applicants state a loan amount early on but that loan amount usually changes throughout the process for various reasons. Another stated that many business credit applications include offers, counteroffers, and negotiations. One commenter stated that even though the initial amount requested appears useful it does not reflect the true dynamic of the small business lending process. The commenter reasoned that it is not uncommon during the application process to see the actual loan amount fluctuate as the entrepreneur further refines their capital needs, and that makes tracking this type of information not particularly relevant or reflective of the process. A credit union trade association recommended that financial institutions have the discretion to report an ''amount applied for'' that is determined at a later stage, rather than at the first request of the applicant, because reporting the initial credit request could inaccurately represent the lending process. A group of state banking regulators commented that some applicants may not request an amount or may request a range, and some financial institutions will not require such information at the outset. They stated that mandating reporting of a requested loan amount would impose increased compliance burdens and has the potential to disrupt the relationship aspect of small business lending.

Two industry commenters requested the Bureau clarify how financial institutions should report the amount applied for when a firm offer of credit specifies a range of possible amounts, for example, amounts between $20,000 and $40,000. These commenters stated they believe such offers should be deemed not to specify an amount or limit and that institutions should be able to report the amount underwritten as the amount applied for. They reasoned that reporting the top of the range as the amount applied for in these circumstances could be misleading because many applicants likely will not qualify for amounts at the top of the range. A bank suggested that when an applicant indicates a range, each financial institution should be able to decide whether to report the low, midpoint, or high end of the range so long as it is consistent for the financial institution's entire small business lending application register.

Two business advocacy groups noted that uncertainty regarding key definitions could create compliance challenges and requested that the Bureau provide additional clarity as to the meaning of ''applied for.'' A bank stated that its systems do not have a way to collect and record this data point and that it would need to collect it manually, which would affect its ability to serve its customers and community.

The Bureau did not receive comments on how best to require reporting for situations involving multiple products or credit lines under a single credit limit or potential methods for avoiding disparities between amount applied for and amount originated or approved.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(7) and associated commentary with revisions and an addition in the commentary for

clarity. The Bureau notes that for HMDA, Regulation C § 1003.4(a)(7) requires reporting of ''the amount of the covered loan or the amount applied for, as applicable,'' which requires reporting of the amount applied for only when the credit is not originated. Because section 1071 uses the conjunction ''and'' rather than ''or,'' the Bureau reads section 1071 to require collection and reporting of the amount applied for regardless of whether the application is ultimately approved or originated.[611] The Bureau believes its interpretation of ''the amount of the credit or credit limit applied for'' pursuant to ECOA section 704B(e)(2)(C) is reasonable and appropriate.

With respect to the commenter that indicated that some lenders may dissuade applicants from making a specific request and steer them to the considered underwriting amount, which may be lower than their financing needs, the Bureau believes that it is necessary to capture both the amount applied for and amount approved or originated to fulfill the statutory purposes of section 1071, including facilitating fair lending enforcement. The Bureau believes the amount applied for and the amount approved data points are necessary to identify potentially discriminatory practices, such as discouragement or steering, in the lending process. For example, greater differences between amount applied for and amount originated among protected groups could indicate a fair lending concern. The Bureau notes that if a financial institution were to seek to unduly influence or alter the amount requested by the applicant in order to avoid reporting it, such conduct would violate the requirement in final § 1002.107(c) to not discourage an applicant from responding to requests for applicant-provided data and to maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response.

Regarding commenters' concerns that the amount applied for can change throughout the lending process, the Bureau acknowledges that there could be complexity in pinpointing the specific initial amount requested by an applicant in the fluid process of a small business credit application. The Bureau acknowledges that this complexity could make this data point challenging for financial institutions to collect and report. Nonetheless, the statute requires that the amount applied for be reported, and the information is important for both of section 1071's statutory purposes. The Bureau is finalizing comment 107(a)(7)–1 with minor edits for clarification. Final comment 107(a)(7)–1 provides that the financial institution reports the initial amount of credit or the credit limit initially requested by the applicant at the application stage and is not required to report credit amounts or limits discussed before an application is made. The Bureau believes that this guidance will provide a flexible compliance regime that will accommodate different business practices. A financial institution will not be required to report amounts discussed before the application is made, which will accommodate preliminary informal interactions. Regarding the recommendation that financial institutions have the discretion to report an amount determined at a later stage rather than the initial request of the applicant, the Bureau notes that the statute requires the amount applied for to be reported even though a small business credit application process can be fluid. Therefore, a financial institution should report the initial request of the applicant if the lending process has already reached the application stage. In regard to ranges of amounts requested, the Bureau does not believe that permitting financial institutions to decide whether to report the low, midpoint, or high end of the range, as requested by a commenter, would yield data that will be comparable to the other data collected for this data point because different financial institutions will be applying different rules for what to report. The Bureau believes that more uniform information will be more useful and should not create extra difficulty for financial institutions to collect. Therefore, to facilitate compliance, final comment 107(a)(7)–1 provides that for amounts that were requested as a range of numbers, the financial institution reports the midpoint of the range. In addition, for clarity, the Bureau moved guidance on what to report if an applicant does not request a specific amount to final comment 107(a)(7)–2, as explained below.

With respect to the comment that an amount may not be initially required or that some applicants may not request an amount or may request a range, the Bureau understands that a specific amount may not be provided by the applicant and that a specific amount is often not required by many financial institutions for products such as credit cards, as the financial institution assigns the credit limit as part of the credit evaluation process. Final comment 107(a)(7)–2 provides that in situations where the applicant does not request a specific amount at the application stage, but the financial institution underwrites the application for a specific amount, the financial institution reports the amount that was considered in underwriting. Final comment 107(a)(7)–2 also provides that if a particular type of credit product does not involve a specific amount requested, then the financial institution reports ''not applicable.'' The Bureau believes this method will aid compliance with section 1071 and yield appropriate data by avoiding the need to report a preliminary number when a financial institution's business practices do not result in there being such a number to report. For clarity, the Bureau moved guidance regarding amounts that are otherwise undetermined that was addressed in proposed comment 107(a)(7)–2 to final comment 107(a)(7)–5, as explained below.

Regarding the request that the Bureau clarify how institutions should report the amount applied for when a firm offer of credit specifies a range of possible amounts, the Bureau added guidance in final comment 107(a)(7)–3 that addresses this situation. ''Firm offers'' involve solicitations to small businesses when they have been pre-approved for a term loan, line of credit, or credit card.[612] The Bureau understands that financial institutions often provide an amount in such solicitations and the Bureau believes that when the applicant knows the amount of the pre-approval before responding, that figure could appropriately be considered as the amount applied for. However, if no amount appears in the pre-approved solicitation, the Bureau considers that an applicant responding to the firm offer has not requested a specific amount, and reporting of the amount underwritten would be appropriate. Final comment 107(a)(7)–3 provides that when an applicant responds to a firm offer, a financial institution reports the amount applied for as the amount of the firm offer, unless the applicant requested a different amount. If, on the other hand, the firm offer did not contain a specified amount and the applicant did not request one, then the financial institution reports the amount applied for as the amount that was underwritten. The Bureau did not propose guidance that addresses what financial institutions report when a firm

[611] The amount approved or originated data point is addressed in the section-by-section analysis of § 1002.107(a)(8).

[612] *See* 15 U.S.C. 1681a(*l*); *see also* Regulation B comment 12(b)(7)–1 (describing offers of credit).

offer specifies a range of possible amounts. The Bureau agrees with the commenters that such offers should be treated similarly to those situations where a firm offer did not specify an amount. To address this scenario, final comment 107(a)(7)–3 states that if the firm offer specifies an amount or limit as a range of numbers and the applicant does not request a specific amount, the amount applied for is the amount underwritten by the financial institution. The Bureau believes that this guidance will aid compliance and yield useful data.

The Bureau is finalizing comment 107(a)(7)–4 as proposed. The comment explains that when reporting a covered application that seeks additional credit amounts on an existing account, the financial institution reports only the additional credit amount sought, and not any previous amounts extended.

The Bureau added final comment 107(a)(7)–5 to address situations where the initial amount applied for cannot be determined. Specifically, the comment provides that under § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the credit amount initially requested by the applicant (other than for products that do not involve a specific amount requested). However, the Bureau understands that there may be situations in which amount applied for was not collected and could not be otherwise determined. Thus, final comment 107(a)(7)–5 provides that if a financial institution is unable to collect or otherwise determine the amount initially requested, the financial institution reports that the amount applied for is ''not provided by applicant and otherwise undetermined.'' The Bureau believes that providing this reporting flexibility will facilitate compliance by accommodating different business practices.

With respect to the commenter that indicated that its systems do not have a way to collect this data point, the Bureau believes that the data on the amount applied for will generally be available in the loan files and should not present particular difficulties in reporting. Regarding the request from commenters that the Bureau provide additional clarity as to the meaning of applied for, the commenters did not indicate specific issues in the amount applied for data point that require clarification. The Bureau believes it has addressed in this final rule the requests for clarity from other commenters as well as other clarifications the Bureau believes are appropriate.

107(a)(8) Amount Approved or Originated

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the amount of the credit transaction or the credit limit approved.'' [613]

Proposed § 1002.107(a)(8) would have required that the amount approved or originated data point be collected and reported as follows: (i) for an application for a closed-end credit transaction that is approved but not accepted, the financial institution collects and reports the amount approved by the financial institution; (ii) for a closed-end credit transaction that is originated, the financial institution collects and reports the amount of credit originated; and (iii) for an application for an open-end credit transaction that is originated or approved but not accepted, the financial institution collects and reports the amount of the credit limit approved.

Proposed comment 107(a)(8)–1 would have provided general instructions for the amount approved or originated data point, explaining that a financial institution reports the amount approved or originated for credit that is originated or approved but not accepted. For applications that the financial institution, pursuant to proposed § 1002.107(a)(9), would have reported as denied, withdrawn by the applicant, or incomplete, the financial institution would have reported that the amount approved or originated is ''not applicable.''

Proposed comment 107(a)(8)–2 would have explained that when a financial institution presents multiple approval amounts from which the applicant may choose, and the credit is approved but not accepted, the financial institution reports the highest amount approved. Proposed comments 107(a)(8)–3 and –4 would have provided specific instructions for identifying and reporting the amount approved or originated for closed-end transactions, including refinancings.

Proposed comment 107(a)(8)–5 would have provided instructions regarding counteroffers and the amount approved or originated data point, explaining that if an applicant agrees to proceed with consideration of a counteroffer for an amount or limit different from the amount for which the applicant applied, and the covered credit transaction is approved and originated, the financial institution reports the amount granted. Proposed comment 107(a)(8)–5 would have further explained that if an applicant does not agree to proceed with consideration of a counteroffer or fails to respond, the institution reports the action taken on the application as denied and reports ''not applicable'' for the amount approved or originated. The proposed comment would have provided a reference to proposed comment 107(a)(9)–2, which discusses the action taken data point in relation to counteroffers.[614]

The Bureau sought comment on its proposed approach to the amount approved or originated data point. The Bureau also requested comment on potential methods for avoiding misinterpretations of disparities between the credit amount or limit applied for and the credit amount or limit originated or approved and on the possible use of ranges of numbers for reporting the amount applied for and amount approved or originated data points. In addition, the Bureau requested comment on whether it would be useful and appropriate to require reporting of the amount approved as well as the amount originated for closed-end credit transactions.

Comments Received

The Bureau received comments on the amount approved or originated data point from lenders, trade associations, and community groups. Almost all of the comments received supported the Bureau's proposal. A bank and a trade association commented that the Bureau's proposal is a reasonable and appropriate means of implementing the statutory requirement. A community group and a CDFI lender highlighted the usefulness of the data for fair lending purposes, including identifying potentially discriminatory lending practices. The CDFI lender suggested that the data can help show how financial institutions compare across key metrics and reveal capital gaps in the market that lenders may be able to fill. Two commenters supported the proposal's requirement that data collection on amount approved or originated be required for transactions that are approved but not accepted, not just those that are originated. A trade association commented that different standards are appropriate for closed-end and open-end products, while a community group noted that it is appropriate to report the credit limit in cases of open-end credit. Another trade association emphasized the Bureau's proposal regarding counteroffers and

[613] ECOA section 704B(e)(2)(C).

[614] See the section-by-section analysis of § 1002.107(a)(9) for a complete discussion of how the final rule treats reporting obligations for applications involving counteroffers.

that it appropriately allows for negotiations prevalent in small business lending. A community group requested that the Bureau not permit reporting of amounts in ranges, stating that the statute requires reporting of specific amounts and that ranges are not useful for assessing whether lenders are responding to credit needs adequately.

Two banks expressed concerns about the overall proposed requirement to collect data on amount approved or originated. One suggested that the data are meaningless because the majority of loan requests at a community bank are not submitted formally and in most cases the amount approved is what was requested. That bank also noted that it would be rare for the amount to change and it does not have a way to currently track the information, thus adding burden. Another bank recommended that financial institutions should not be generally required to report information on applications where no credit was extended, such as applications that were not completed by the applicant or where the applicant did not accept the terms. This bank reasoned that the amount approved data point is irrelevant because the loan was not originated and that it does not further the purposes of section 1071 because the information would not help the Bureau materially understand credit opportunities nor help ensure fair lending laws are enforced.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(8) and associated commentary as proposed. The Bureau is also adding new comment 107(a)(8)–6. The Bureau reads the statutory language ''the amount of the credit transaction or the credit limit approved'' to require the amount of the credit limit approved to be reported for open-end applications, and the amount of the credit transaction to be reported for closed-end applications. The Bureau believes the phrase ''the amount of the credit transaction or the credit limit approved'' to be ambiguous in regard to closed-end transactions because the most common meaning of the word ''transaction'' in the context for closed-end credit transactions would be an originated loan. Thus, the Bureau reasonably interprets the statute as requiring reporting of the amount originated for closed-end credit transactions. In the alternative, section 1071 authorizes the Bureau to include any ''additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau believes that it is appropriate to use its exception authority under ECOA section 704B(g)(2) to require the amount originated, rather than the amount approved, for originated closed-end credit transactions, because excluding the amount approved for originated closed-end transactions, and requiring collection of the amount originated instead, would enhance the utility and quality of the data being reported, thus further the fair lending and business and community development purposes of section 1071.

In response to the commenters' suggestion that data on applications should not be reported in situations where the application is withdrawn or incomplete as well as the commenter's suggestion that the data are meaningless, the Bureau believes there is value in the data to be reported, even if no amount is reported for the amount approved or originated data point. Other information to be reported for the application that was, pursuant to § 1002.107(a)(9), withdrawn by the applicant or incomplete, can help further the fair lending and community development purposes of section 1071. For example, data from applications that are withdrawn or incomplete can help identify potential discriminatory practices in the application process and also indicate demand for credit by small business applicants. This would not be possible if data on applications that are withdrawn or incomplete are not reported. Accordingly, final comment 107(a)(8)–1 explains that for applications a financial institution, pursuant to § 1002.107(a)(9), reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports that the amount originated or approved is ''not applicable.'' The Bureau also believes that reporting ''not applicable'' for amount approved or originated in certain circumstances will facilitate compliance for this data point.

The Bureau does not believe, as suggested by one commenter, that data on applications where the applicant did not accept the terms would not further the statutory purposes of section 1071. The data will help facilitate fair lending enforcement by indicating the credit that had been offered to different types of applicants when the transaction does not close and there is no amount originated to report. Reporting data with respect to the amount approved will also aid in fulfilling the business and community development purpose of section 1071 by providing a more complete picture of the credit being offered to different businesses and communities.[615]

As stated above, the Bureau is finalizing the commentary to § 1002.107(a)(8) as proposed. Final comment 107(a)(8)–2 provides guidance on reporting the amount approved or originated data point when the transaction involves multiple approval amounts. The Bureau believes that reporting the highest amount approved when credit is approved but not accepted will most accurately reflect the amount of credit that was made available to the applicant in this situation. Final comments 107(a)(8)–3 and –4 provide guidance on reporting amount approved or originated for closed-end transactions and refinancings, respectively. Final comment 107(a)(8)–5 provides guidance on reporting amount approved or originated when the transaction involves counteroffers.

The Bureau is adding comment 107(a)(8)–6 to provide guidance on reporting amount approved or originated with respect to existing accounts. Comment 107(a)(8)–6 provides that the financial institution reports only the additional credit amount approved or originated for an existing account, and not any previous amounts that were extended. The Bureau believes this will help facilitate compliance for this data point.

The Bureau did not receive specific comments with respect to this data point on methods for avoiding misinterpretations of disparities between credit amount or limit applied for and credit amount or limit originated or approved and whether it would be useful and appropriate to require reporting of amount approved as well amount originated for originated closed-end credit transactions. The Bureau is therefore not requiring reporting of that additional data.

107(a)(9) Action Taken

Proposed Rule

ECOA section 704B(e)(2)(D) requires financial institutions to report the ''type of action taken'' on an application.

The Bureau proposed in § 1002.107(a)(9) to require reporting of the action taken by the financial institution on the covered application, reported as originated, approved but not

[615] The Bureau similarly believes that reporting the amount originated on closed-end credit transactions that are originated also fulfills the purposes of section 1071. For these transactions, reporting of the amount originated would aid in fulfilling the enforcement of fair lending laws by indicating the credit that had been provided to different types of applicants in actual transactions. It would also aid in fulfilling the business and community development purpose of section 1071 by providing a more complete and accurate picture of the credit actually being provided to different businesses and in different communities.

accepted, denied, withdrawn by the applicant, or incomplete. In addition, the Bureau proposed to categorize all incomplete applications as a single category of ''incomplete,'' rather than following the approach in Regulation C of separately reporting denials based on incompletes and notices of incompleteness. Although the Bureau considered expanding the action taken codes to those currently used in Regulation C (including preapprovals or purchased loans), the Bureau did not believe those additional fields would have been appropriate or necessary in the context of section 1071 given the diversity of processes and other complexities in the small business lending space and because section 1071, unlike HMDA, does not expressly reference loan purchases.

Proposed comment 107(a)(9)–1 would have provided additional clarity on when a financial institution should select each of the proposed action taken codes. The financial institution would have identified the applicable action taken code based on final action taken on the covered application.

Proposed comment 107(a)(9)–2 would have provided instructions for reporting action taken on covered applications that involve a counteroffer, along with examples. The Bureau's proposed treatment of counteroffers would have aligned with how counteroffers are treated under existing § 1002.9 notification procedures and how they are reported under Regulation C.[616] The Bureau also considered, but did not propose, adding an action taken category or flag for counteroffers. The Bureau believed the addition of a counteroffer flag or field would have provided limited useful information beyond what would have been captured under the proposal.

Proposed comment 107(a)(9)–3 would have discussed reporting action taken for rescinded transactions. Proposed comment 107(a)(9)–4 would have clarified that a financial institution reports covered applications on its small business lending application register for the year in which final action is taken. Finally, proposed comment 107(a)(9)–5 would have provided guidance for reporting action taken if a financial institution issues an approval that is subject to the applicant meeting certain conditions.

The Bureau sought comment on proposed § 1002.107(a)(9) and its associated commentary.

Comments Received

The Bureau received comment on its proposal in § 1002.107(a)(9) to require reporting of action taken from a wide range of lenders, trade associations, and community groups.

Action taken categories in general. A number of commenters, including community groups, lenders, and a trade association supported the action taken reporting categories in proposed § 1002.107(a)(9). Two industry commenters agreed that proposed § 1002.107(a)(9) was a reasonable and appropriate means of implementing section 1071. One community group stated that the action taken codes are an essential metric to enforce fair lending laws and that the proposed action taken categories are substantially similar to those used for HMDA reporting, and so will be familiar to lenders. A joint letter from community groups, community oriented lenders, and business advocacy groups similarly supported use of the action taken fields that are also used for HMDA reporting. A trade association noted that action taken information is not typically collected by motor vehicle dealers in indirect vehicle finance transactions, but may be included by the finance source as part of the credit application decision.

Some commenters focused on particular proposed action taken categories, urging the Bureau to retain a proposed action taken category and not combine categories. For example, a several lenders and community groups specifically supported collection on incomplete and withdrawn applications. They asserted that it is important to collect data on applications that do not go through the full lending process (*i.e.,* through loan decisioning) in order to identify potential discouragement. Several commenters further explained that capturing incomplete and withdrawn applications would be important for fair lending assessments, as it would identify potential disparities in treatment, discouragement, and steering. In response to the Bureau's request for comment on whether to combine the ''withdrawn by applicant'' and ''incomplete'' categories, a community group supported the Bureau's proposed approach to keep the categories separate. The commenter asserted that data analysis and fair lending assessments would be more accurate if the withdrawn and incomplete categories are kept separate, as they represent different actions by the applicant. Another community group commenter supported distinct action taken categories for approvals and denials, noting, for example, research finding disparities in credit denials for Black, Latino, and Asian small businesses.[617] A lender, however, urged the Bureau to use caution in interpreting and analyzing data collected under section 1071, noting for example that a high denial rate for different types of businesses (*e.g.,* small or minority-owned businesses) could be reflective of a financial institution's high volume of applications from such small businesses and not of a pattern of discriminatory lending.

In response to the Bureau's request for comment on whether to retain the ''approved but not accepted'' category, two community groups urged the Bureau to include this category among the available action taken options. The commenters argued that the approved but not accepted category could be used to identify instances where an applicant was offered loan terms that did not meet the needs of the small business (such as high pricing or other unfavorable terms), and could be tracked to identify potential disparities among women-owned or minority-owned small businesses, or other vulnerable populations. Another commenter argued that data may be misconstrued if approved but not accepted loans are treated as ''denials.''

In contrast, several community banks urged the Bureau to remove certain proposed action taken categories. For example, a community bank argued against use of withdrawn by applicant or denied action taken codes, stating that there was no reason to report such applications and it would violate the applicant's trust. A different community bank urged the Bureau to remove the incomplete category, noting that financial institutions treat incompleteness as a denial under existing Regulation B (because it requires an adverse action notice or a notice of incompleteness), and that such events are better captured as denials or withdrawals.

In the NPRM, the Bureau also sought comment on whether the Bureau's proposal to categorize all incomplete applications as a single category of ''incomplete'' (closed or denied) should instead be reported consistent with the approach in Regulation C, which provides separate categories for denials (including on the basis of incompleteness) and files closed for incompleteness (if the financial institution sent a written notice of

[616] Regulation C comment 4(a)(8)(i)–9.

[617] *See* Fed. Rsrv. Bank of Atlanta, *Small Business Loan Turndowns, Personal Wealth and Discrimination* (July 2002), *https://www.federalreserve.gov/pubs/feds/2002/200235/200235pap.pdf.*

incompleteness). A few industry and community group commenters specifically supported diverging from Regulation C and reporting denials based on incompleteness as ''incomplete'' applications, rather than ''denied'' applications. A CDFI lender and a community group stated that doing so would be in line with the intent of section 1071 and would lead to more accurate data by reserving the denied category exclusively for creditworthiness and underwriting factors. One trade association stated that such reporting would be easier to comply with and provide less opportunity for data errors, while another trade association noted that additional subcategories of incomplete would create confusion and add difficulty for financial institutions.

In contrast, several banks and a group of bank trade associations urged the Bureau to align reporting of incomplete applications with HMDA reporting. A bank commented that aligning with HMDA would increase efficiency for the customer, facilitate compliance, and ensure that financial institutions only need to collect data once. Similarly, several commenters argued that misalignment with HMDA would add substantial difficulty for financial institutions required to report under HMDA. However, some of those same commenters also stated that they were sympathetic to the Bureau's underlying reasons for wanting to report all incomplete applications in one category, and argued that this was further reason to exclude all HMDA transactions. A bank asked for clarification on how to report an application that results in adverse action based on incompleteness.

Treatment of counteroffers. The majority of commenters to address the issue, including several lenders, trade associations, and a community group, supported the Bureau's proposal as related to counteroffers. In response to the Bureau's request for comment on whether counteroffers that are not accepted should be reported as ''approved but not accepted,'' rather than ''denied,'' several commenters, including a community group and a CDFI lender, supported the Bureau's proposal that declined counteroffers would be recorded as denials and accepted counteroffers would be reported as originations. Several CDFI lenders further commented that this proposal would avoid lenders seeking to game the system and avoid reporting denials by giving unreasonable counteroffers likely to be denied by the applicant. In contrast, a trade association argued that counteroffers that are not accepted should be reported as ''approved but not accepted'' as it would better reflect the availability of credit. A bank asked how to report an accepted counteroffer that does not ultimately lead to an origination, and urged consistency with HMDA.

In response to the Bureau's request for comment on whether to specifically capture data on counteroffers, several industry commenters supported the Bureau's proposal to not separately track counteroffers. One of these commenters urged the Bureau to not separately track counteroffer terms (such as the amount requested and approved) as it would create burden for financial institutions, and if the offer was ultimately accepted, would not provide meaningful data. Similarly, other industry commenters argued that determining what is a counteroffer would be difficult and it would be infeasible to capture all data points for each counteroffer. A bank said that small business lending involves many discussions between the lender and the applicant, and so capturing counteroffers would be extraordinarily complex and require additional training. The industry commenters also stated that capturing counteroffers could lead to confusion and data errors. One of the commenters further urged the Bureau to align with Regulation C, which it asserted does not require reporting of counteroffers.

On the other hand, a CDFI lender and a joint letter from community and business advocacy groups urged the Bureau to require reporting of any counteroffers and their terms. These commenters suggested the Bureau modify the action taken fields to add ''counteroffer accepted'' and ''counteroffer rejected,'' and require reporting of pricing information on these options. The joint letter argued that separate reporting of counteroffers would provide visibility into pricing of credit offers made but not accepted or offers that otherwise do not result in an origination. The commenter further took issue with the aspect of the proposal that would require a lender to report it has denied an application, when it has in fact it had approved it on different terms. A CDFI lender similarly argued that the proposal provides a loophole for financial institutions, and urged the Bureau to require reporting of pricing on the initial request and any counteroffers to prevent exploitative lending. The commenter acknowledged, however, that the Bureau's proposal does not penalize entities seeking to provide assistance to businesses, which often entails multiple counteroffers to best meet the business's needs.

Finally, the joint letter from community and business advocacy groups asserted that the proposed definition of a counteroffer is problematic. Under the proposal, a counteroffer was described to occur when a financial institution offers to grant credit on terms other than those originally requested by the applicant. The commenter stated, however, that nothing requires a lender to initially solicit from applicants what terms they are seeking (other than amount applied for and credit type), and so it would not be clear when to treat an offer as a ''counteroffer'' for purposes of the rule.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(9) with a minor revision for consistency, to require reporting of the action taken by the financial institution on the covered application, reported as originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. Most commenters to address this issue generally supported the Bureau's proposed action taken categories, noting that the approach was a reasonable one and would assist in fair lending enforcement.

Although the Bureau sought comment on whether to remove or combine certain of the action taken categories, the Bureau is finalizing the list of categories as proposed in § 1002.107(a)(9). The Bureau is not eliminating the ''approved but not accepted category''; data collected under this category would reflect demand for credit, and as noted by some commenters, could potentially be used to identify offers made that do not meet the needs of small businesses. Moreover, no commenter expressly urged the Bureau to remove the ''approved but not accepted'' category. The Bureau is also retaining the ''withdrawn by the applicant'' and ''incomplete'' action taken categories. As noted by some commenters, capturing data on incomplete and withdrawn applications is important to identifying potential discrimination and discouragement during the application process, and thus consistent with the purposes of section 1071. Next, the Bureau is keeping ''withdrawn by the applicant'' and ''incomplete'' as separate action taken categories; the categories represent different actions by the applicant, and so keeping them distinct will lead to more accurate data analysis, including better fair lending analysis. Moreover, the Bureau believes a high incidence of incomplete applications could potentially indicate that there is an issue with the level of

assistance provided by a financial institution (for example, not providing reasonable support or assistance to ensure an applicant satisfies all credit conditions; or providing more support to some applicants than others). Although a couple of community banks urged the Bureau to remove the ''denied,'' ''withdrawn by applicant,'' or ''incomplete'' action taken categories as unnecessary or inconsistent with current lender practice, the Bureau believes retaining those categories further the purposes of section 1071, as described above.

The Bureau is also finalizing § 1002.107(a)(9) to require a financial institution to report all incomplete applications—whether the application is closed or denied based on incompleteness—as the ''incomplete'' action taken category. While this proposed approach is not consistent with Regulation C comments 4(a)(8)(i)–4 and –6, there could be potential errors in the data if financial institutions report incomplete denials separate from notices of incompleteness. As noted by commenters, grouping all incomplete applications together would lead to more useful data by reserving the denied category solely for creditworthiness and underwriting decisions. Moreover, as noted by several commenters, grouping all incomplete applications in one category would be easier for financial institutions to implement. Although several industry commenters urged the Bureau to align reporting of incomplete applications with Regulation C in order to increase efficiency and facilitate compliance, those concerns are mitigated by the Bureau's decision to exclude reporting of all HMDA-reportable transactions, as set forth in final § 1002.104(b)(2). Indeed, one of the commenters advocating for alignment with Regulation C also stated that they were sympathetic to the Bureau's reasons for wanting all incomplete applications reported under a single category. In response to a commenter's question regarding the reporting of applications where an adverse action notice is provided based on incompleteness, under final § 1002.107(a)(9), the financial institution would report such an application as ''incomplete,'' rather than ''denied.'' In response to another commenter's concern that data may be misconstrued if approved but not accepted loans are treated as ''denials,'' the Bureau notes that there is a separate action taken category for ''approved but not accepted'' (see final § 1002.107(a)(9) and associated commentary for reporting of that action code).

The Bureau is also finalizing as proposed its treatment of counteroffers in final comment 107(a)(9)–2. The Bureau agrees with commenters that this approach (requiring that counteroffers that are not accepted to be reported as ''denied,'' rather than ''approved but not accepted'') would prevent lenders from trying to improperly influence how their data are reported by extending unreasonable counteroffers that are likely to be denied. This approach is also consistent with existing § 1002.9 notification procedures and reporting of counteroffers under Regulation C,[618] and so will be familiar to financial institutions. In response to a commenter's concern that this approach would not capture the availability of credit (as rejected counteroffers would be reported as ''denials''), the Bureau believes the considerations noted above—preventing gamesmanship and consistency with existing Regulation B and Regulation C—outweigh the potential benefit of alternate reporting. In response to a commenter's question about how a financial institution reports an accepted counteroffer that does not ultimately lead to an origination, the Bureau directs the commenter to final comment 103(a)(9)–2, which provides that if an applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the action taken as the disposition of the application based on the terms of the counteroffer.

The Bureau is also finalizing comment 107(a)(9)–2 to not separately track counteroffers as an additional action taken category or flag. As noted by some commenters, it would be potentially infeasible to capture all data points for every back-and-forth counteroffer with an applicant, and attempting to do so would likely lead to confusion, heightened complexity, and data errors. The Bureau also believes that even without a counteroffer flag or field, the data will capture many of the terms of an accepted counteroffers (such as pricing, guarantee, etc.), as well as the amount initially requested by the applicant. Therefore, the addition of a counteroffer flag or field would provide limited useful information beyond what will already be captured under section 1071. Moreover, while a counteroffer flag or field might be useful as a screening tool for potential discrimination (for example, if women-owned businesses or minority-owned businesses are provided higher rates of counteroffers or denials compared to male- or non-Hispanic white-owned businesses), a flag alone would lack any specificity that could be leveraged for further fair lending analysis.

While several commenters urged the Bureau to require reporting of accepted and rejected counteroffers, as well as their pricing terms, the Bureau does not believe the benefits of additional reporting would outweigh the added complexity, logistical challenges, and potential data accuracy issues involved in reporting counteroffers. For example, while some commenters suggested adding counteroffer rejected and counteroffer accepted action taken categories, and to require reporting of pricing, the commenter does not explain how a financial institution would report multiple back-and-forth counteroffers connected to a single covered application, which some commenters report is typical in small business lending. Moreover, focusing solely on the pricing term of a counteroffer would leave unknown other material terms of a counteroffer, such the amount offered, duration, or a requirement to have a co-signer or guarantor. In response to commenters' concerns that not capturing counteroffers would mean a lack of visibility into counteroffers that are made but not accepted, the Bureau agrees that such information would not be captured, however, as described above, the Bureau believes that reporting of such data would add significant complexity, could undermine data quality, and would provide only limited additional benefits. Regarding some commenters' criticism that the definition of a counteroffer is flawed because it presumes a lender has solicited all requested terms from the applicant, the Bureau believes the description of a counteroffer in final comment 107(a)(9)–2 as an offer to grant credit or terms other than those originally requested by the applicant is a reasonable one: an applicant will likely specifically request the terms most important to the applicant, the definition is consistent with existing Regulation B and Regulation C and so will be familiar to financial institutions, and the commenters do not propose an alternative.

The Bureau is finalizing the commentary to § 1002.107(a)(9) with minor revisions for clarity and consistency. Final comment 107(a)(9)–1 provides additional clarity on when a financial institution should select each of the proposed action taken codes. The comment further clarifies that a financial institution identifies the applicable action taken code based on final action taken on the covered application.

[618] Regulation C comment 4(a)(8)(i)–9.

Final comment 107(a)(9)–2 provides instructions for reporting action taken on covered applications that involve a counteroffer, along with examples. As described above, final comment 107(a)(9)–2 provides that if a financial institution makes a counteroffer to grant credit on terms other than those originally requested by the applicant and the applicant declines to proceed with the counteroffer or fails to respond, the institution reports the action taken as a denial on the original terms requested by the applicant. If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the action taken as the disposition of the application based on the terms of the counteroffer.

Final comment 107(a)(9)–3 discusses reporting action taken for rescinded transactions. Final comment 107(a)(9)–4 clarifies that a financial institution reports covered applications on its small business lending application register for the year in which final action is taken. Finally, final comment 107(a)(9)–5 provides guidance for reporting action taken if a financial institution issues an approval that is subject to the applicant meeting certain conditions.

107(a)(10) Action Taken Date

Proposed Rule

In addition to requiring financial institutions to collect and report the type of action they take on an application, ECOA section 704B(e)(2)(D) requires financial institutions to collect and report the ''date of such action.''

The Bureau proposed § 1002.107(a)(10) to require action taken date to be reported as the date of the action taken by the financial institution. Proposed comments 107(a)(10)–1 through –5 would have provided additional details on how to report the action taken date for each of the action taken categories in proposed § 1002.107(a)(9). For example, proposed comment 107(a)(10)–1 would have explained that for denied applications, the financial institution reports either the date the application was denied or the date the denial notice was sent to the applicant.

Proposed comment 107(a)(10)–4 would have explained that for covered credit transactions that are originated, a financial institution generally reports the closing or account opening date. That proposed comment also stated that if the disbursement of funds takes place on a date later than the closing or account opening date, the institution may, alternatively, use the date of initial disbursement.

The Bureau sought comment on its proposed approach to the action taken date data point as well as whether it should adopt data points to capture application approval date and/or the date funds are disbursed or made available.

Comments Received

The Bureau received comments on the proposed action taken date data point from lenders, trade associations, and consumer groups. One commenter expressed its support for the data points regarding an application, including action taken date, noting that the data will provide insight regarding the quality of the capital accessed and that it will be useful in identifying potentially discriminatory lending practices, as well as highlight capital gaps in the marketplace that lenders may be able to fill. Furthermore, this commenter noted that the data will show how financial institutions compare across key metrics and help determine if the institution has equitable lending. Industry commenters expressed their support for the proposed data point as a reasonable and appropriate means of implementing the statutory requirement. A CDFI lender noted that defining ''action taken date'' as the one in which the financial institution acts is correct.

Several commenters provided feedback on whether the Bureau should adopt separate data points for application approval date and the date funds were disbursed or made available. A trade association opposed adoption of separate data points for the date the application was approved and the date the funds were disbursed or made available. This trade association reasoned that it would add degrees of complexity to the compliance process and the Bureau would be chasing de minimis data points that have diminishing value. A bank also opposed the separate data points explaining that the Bureau would already gather enough information from gathering the application date and the action taken date to find timing discrepancies and suggested the Bureau focus more on underwriting data to determine discriminatory and other fair lending issues. A CDFI lender explained that in many cases the gap between an approval and disbursal of funds can be affected by several factors outside a lender's control, such as an applicant's availability to sign closing documents.

On the other hand, three commenters urged the Bureau to adopt separate data points for application approval date and the date funds were disbursed or made available. A community group commented that separate data fields would be important for fair lending and community development purposes because if any institutions are delaying the availability of funds for unreasonable periods of time after loan approval, they would not be serving community needs, and it could also possibly indicate fair lending problems if protected classes disproportionately experience delays. Another community group suggested that discrimination in the agricultural industry occurs when loan approvals are delayed or not approved in a timely manner. This community group noted that untimely disbursement of funds could drastically impact the opportunity for a small business to succeed. They further noted that farmers lose entire seasons of income when the operating loans which they timely applied for are not approved in a timely manner. A third community group stated that lenders have a history of delaying loan approvals for farmers of color compared to white farmers.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(10) and its associated commentary with minor edits for clarity and consistency. The Bureau believes the action taken date data point is a reasonable interpretation of ECOA section 704B(e)(2)(D), which requires financial institutions to collect and report the ''date of such action'' taken on an application. The Bureau notes that its approach for this data point largely mirrors the Regulation C approach for action taken date in § 1003.4(a)(8)(ii) and related commentary, with modifications to align with the action taken categories in final § 1002.107(a)(9).

Final § 1002.107(a)(10) requires financial institutions to report the date of the action taken by the financial institution on the application. Final comments 107(a)(10)–1 through –5 provide guidance on how to report the action taken date for each of the action taken categories provided in final § 1002.107(a)(9). For applications that were denied, final comment 107(a)(10)–1 provides that a financial institution reports either the date the application was denied or the date the denial notice was sent to the applicant. For applications that were withdrawn by the applicant, final comment 107(a)(10)–2 provides that a financial institution reports either the date the express withdrawal was received or the date shown on the notification form in the case of a written withdrawal. For applications that were approved but not accepted by the applicant, final

comment 107(a)(10)–3 provides that a financial institution reports any reasonable date, such as the approval date, the deadline for accepting the offer, or the date the file was closed. The comment notes, however, that the financial institution should generally be consistent in its approach.

The Bureau is finalizing comments 107(a)(10)–4 and –5 with minor edits for clarity and consistency to facilitate compliance. Final comment 107(a)(10)–4 provides that for applications that result in an extension of credit, a financial institution generally reports the closing or account opening date. However, if the disbursement of funds takes place on a date later than the closing or account opening date, the institution may, alternatively, use the date of initial disbursement. The comment further provides that the financial institution should generally be consistent in its approach. Final comment 107(a)(10)–5 provides that for applications that are closed for incompleteness, a financial institution reports either the action taken date or the date the denial or incompleteness notice was sent to the applicant.

The Bureau is not adopting in this final rule a requirement that financial institutions report both the date the application was approved and the date the funds were disbursed. Two of the commenters who requested this change specifically focused on loan approval delays, which seems to indicate the issue is with delays in the loan approval process rather than the timing of the fund disbursements or credit availability. The application date and action taken date together will provide information about the length of time it takes for an application to reach the credit decision. In addition, the Bureau believes that the time between a loan's approval and the date of funds availability is dependent on many factors, some of which may not be within the control of the financial institution, as suggested by a commenter. Accordingly, the Bureau is not adopting a requirement that financial institutions report, in all cases, the date the funds were disbursed or made available.

107(a)(11) Denial Reasons

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau proposed § 1002.107(a)(11) to require financial institutions to collect and report the principal reason or reasons an application was denied.

Proposed § 1002.107(a)(11) would have required reporting of the principal reason or reasons the financial institution denied the covered application. Proposed comment 107(a)(11)–1 would have explained that a financial institution complies with proposed § 1002.107(a)(11) by reporting the principal reason or reasons it denied the application, indicating up to four reasons, and the financial institution would report only the principal reason or reasons it denied the application, even if there are fewer than four reasons. The proposed comment provided an example to illustrate. The proposed comment would have also stated that the reason(s) reported must accurately describe the principal reason or reasons the financial institution denied the application. Finally, the proposed comment provided a list of denial reasons from which financial institutions would select the principal reason or reasons for denying a covered application.

Proposed comment 107(a)(11)–1 would also have explained that a financial institution would have reported the denial reason as ''other'' where none of the enumerated denial reasons adequately describe the principal reason or reasons it denied the application, and the institution would report the denial reason or reasons as free-form text. Proposed comment 107(a)(11)–2 would have clarified that a financial institution complies with proposed § 1002.107(a)(11) by reporting that the requirement is not applicable if the action taken on the application, pursuant to § 1002.107(a)(9), is not a denial.

The Bureau sought comment on its proposed approach to the denial reasons data point, including whether the denial reason categories listed in proposed comment 107(a)(11)–1 sufficiently cover the common credit denial reasons in the small business lending industry. The Bureau also sought comment on the potential utility of denial reason data as well as on the potential burdens to industry in reporting denial reasons, in light of the proposed denial reason categories and the data's ability to aid in fulfilling the purposes of section 1071.

Comments Received

The Bureau received comments on the denial reasons data point from lenders, trade associations, and community groups. A number of these commenters supported the Bureau's proposal to collect data on denial reasons, stating that it would aid in fair lending analysis and further the community development purpose of section 1071. A community group said that an analysis of different types of lenders could determine whether industry-wide practices could be creating unnecessary barriers, and denial reason data could help to illuminate those practices. Some commenters noted that denial reasons can help policymakers and the public determine legitimate reasons that small businesses do not qualify for certain forms of credit and will, in turn, enable policymakers to work towards solutions. A trade association commented that the data has the potential to help identify ways to improve service in underserved communities and agreed this is an opportunity to provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps as needed. Another community group stated that this data point is one of the single most important items the Bureau can collect in its aim to carry out section 1071 and illuminate the reasons behind disparate results in small business lending. A bank commented that reporting of denial reasons would help identify roadblocks to gaining access to credit.

Commenters generally agreed with the Bureau's approach to collecting reasons for denial. Community groups supported the range of the Bureau's proposed list of reasons for denial as well as the Bureau's proposal for a financial institution to select up to four reasons. A trade association commented that the proposed list of reasons for denial adequately cover the potential reasons and noted that the list largely aligns with the HMDA/Regulation C denial reasons. This commenter also noted the importance of the option for financial institutions to select ''other'' and report additional denial reason information as free-form text.

Several community groups suggested that personal credit score must be included as an option as it is often cited as the reason for denial. They asserted that if low credit scores or other reasons for denial correlate with a business owner's race or location, but do not correlate with loan performance, then it would be important for lenders to use alternative methods for assessing creditworthiness that do not have a disparate impact on business owners of color or certain communities. Another commenter suggested that the Bureau consider clarifying the government criteria option, recommending that the option should only be used if no other principal reason applies and should come after other reasons to ensure that it does not mask those other reasons. A trade association suggested that the

Bureau allow financial institutions the discretion to choose whether to report the data; however, that commenter also indicated that if the Bureau were to require the denial reasons data point then the proposed denial reasons did represent a full picture of the typical reasons for denial. Other commenters suggested the Bureau follow the flexible approach of financial institutions providing denial reasons in ECOA adverse action notices. Two banks asked the Bureau to compare the reporting requirement against other reporting regimes, such as HMDA and CRA, to avoid duplicative and inconsistent reporting.

Some industry commenters opposed the Bureau's proposal to collect denial reasons. A few commenters stated that these data are not tracked or maintained. A bank said stated they will need to build a new and independent tracking system if the data are mandated. A joint trade association letter noted that in indirect vehicle financing transactions, dealerships are not often provided and do not have access to reasons why a third-party financing source denied a credit application. A bank questioned what the Bureau intends to do with the data and stated that it is not necessary to meet the goals and requirements of section 1071. The bank further asserted that it would eventually result in additional regulatory requirements that continue to push small and mid-size lenders from the small business lending market. Another bank raised concerns about reporting denial reason data, asserting that there are multiple factors involved in the decisions and the use of raw data without any other means to evaluate the individual decisions made could lead to allegations of discrimination against banks based solely upon data that reflect disparate impact based on ethnicity, race, or gender. Another commenter expressed a similar concern that requiring denial reasons under certain categories could lead to damaging misinterpretations. A trade association urged the Bureau to drop the denial reasons data point from the final rule, stating that the requirement is drafted in a rigid manner that is unlikely to produce accurate or reliable data. That commenter also stated that the Bureau and other regulatory agencies already have access to these data because financial institutions are already providing denial reasons under the ECOA adverse action notice requirement. In addition, commenters further noted that the proposed denial reason data point is incompatible with the Bureau's flexible approach to providing adverse action reasons in ECOA adverse action notices.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(11) and associated commentary with minor revisions. The final rule requires that financial institutions collect and report, for denied applications, the principal reason or reasons the financial institution denied the covered application. The Bureau believes data regarding denial reasons will further the fair lending and business and community development purposes of section 1071. Data on denial reasons will allow data users to better understand the rationale behind denial decisions, help identify potential fair lending concerns, and provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps as needed. Robust data on application denial reasons across applicants, financial institutions, products, and communities should help target limited resources and assistance to applicants and communities, thus furthering section 1071's business and community development purpose. Furthermore, data on denial reasons will help data users analyze potential denial disparities, and could facilitate more efficient and less burdensome fair lending examinations. Therefore, pursuant to ECOA section 704B(e)(2)(H), the Bureau determines that collecting data on denial reasons would aid in fulfilling the purposes of section 1071.

Final comment 107(a)(11)–1 explains that a financial institution reports the principal reason or reasons it denied the application, indicating up to four reasons and makes clear that the financial institution reports only the principal reason or reasons it denied the application. Final comment 107(a)(11)–1 also provides a list of denial reasons from which financial institutions select the principal reason or reasons for denying a covered application. In addition, final comment 107(a)(11)–1 explains that a financial institution reports the denial reason as ''other'' when none of the enumerated denial reasons adequately describes the principal reason or reasons it denied the application, and reports the denial reason or reasons as free-form text. The Bureau believes that including the option to select ''other'' will facilitate compliance and that collecting such information will enable the Bureau to observe trends and key developments in the small business lending market. In addition, the Bureau may use the information to inform any future iterations of the list.

The Bureau is making a revision in comment 107(a)(11)–1.iii to change ''use of loan proceeds'' to ''use of credit proceeds'' to reflect commonly understood categories of small business lending like term loans or lines of credit. The Bureau is also making a clarification in comment 107(a)(11)–1.iii to broaden the scope of the ''use of credit proceeds'' denial reason. Final comment 107(a)(11)–1.iii explains that a financial institution reports the denial reason as ''use of credit proceeds'' if it denies an application because, as a matter of policy or practice, it places limits on lending to certain kinds of businesses, products, or activities it has identified as high risk. The Bureau is removing the example provided in the proposed rule because the Bureau does not believe an example is necessary and financial institutions know what they consider to be high risk to them. Moreover, financial institutions may have different policies on credit activities or products they consider high risk such that a high risk activity or product to one financial institution may not be considered high risk to another.

The Bureau is also making a minor revision in comment 107(a)(11)–1.v to clarify that a denial reason based on collateral refers to collateral that was insufficient or otherwise unacceptable to the financial institution. The Bureau also removed the example that appeared in proposed comment 107(a)(11)–1.vi.

The Bureau is making a minor change in comment 107(a)(11)–1.vii to clarify that a denial reason based on ''government criteria'' refers to government loan program criteria. Government loan program criteria for this purpose refers to those loan programs backed by government agencies that have specific eligibility requirements. Accordingly, final comment 107(a)(11)–1.vii lists ''government loan program criteria'' as a denial reason option.

The Bureau does not share the concerns raised by commenters that denial reason data may lead to unjustified conclusions that do not necessarily meet the goals and purposes of section 1071. Rather, as explained above, the Bureau believes data on denial reasons can help identify potential lending concerns and help data users analyze potential denial disparities. In fact, the Bureau believes that including denial reasons in 1071 data should reduce the risk of inaccurate accusations of fair lending violations, as it would allow financial institutions to point to potentially legitimate reasons for disparities.

With respect to the comments that denial reasons are not currently tracked or maintained, the Bureau believes that most financial institutions already have information on denial reasons, or at least should be prepared to provide the information. The Bureau understands from commenters that there may be creditors that are not subject to the adverse action notice requirements under Regulation B and such institutions may face greater challenges in implementing the denial reason data reporting requirement than those institutions that are already subject to Regulation B requirements.[619] Nevertheless, the Bureau believes that data on denial reasons will further the fair lending and business and community development purposes of section 1071 by helping to identify potential fair lending concerns and providing financial institutions with data to evaluate their lending criteria and address potential gaps. Moreover, data on denial reasons not only help identify potential fair lending concerns, but are critical to understanding the rationale behind a financial institution's decision to deny credit, which can provide small business applicants the information they need to be able to access capital.

For transactions involving indirect vehicle financing where the dealership may not have the reasons why a third-party financing source denied a credit application, the Bureau believes that the entity that makes the final credit decision will be able to provide or obtain the reasons for denying a credit application. See section-by-section analysis of § 1002.109(a)(3) for a discussion of which institutions have a reporting obligation in transactions involving multiple financial institutions.

With respect to the suggestion from a commenter that the Bureau should allow financial institutions to report denial reason data voluntarily, the Bureau believes optional reporting is not the appropriate approach, given the need for consistent and meaningful data to further the purposes of section 1071.

Regarding the suggestion that the denial reason data point in the final rule should mirror the HMDA reporting requirements or other reporting regimes, the Bureau's approach to the final rule is to largely mirror the Regulation C reporting requirements but with modifications that better reflect the business or agricultural lending (rather than mortgage lending) context. The Bureau believes that aligning closely to a known regulatory scheme, such as Regulation C, will facilitate compliance. Regarding the suggestion that the Bureau provide more flexibility so that financial institutions can report the reasons that were provided in an adverse action notice, the Bureau believes, and as a commenter noted, the denial reasons proposed and finalized in this rule are a comprehensive list and represent a full picture of the common denial reasons for small business credit. In addition, the Bureau believes the inclusion of ''other'' as a reason for denial and the free-form text field, which will enable financial institutions to report a denial reason that is not otherwise listed, will provide flexibility, and will facilitate compliance.

[619] Existing § 1002.9(a)(3) requires creditors to provide the specific reasons for adverse action taken or to notify business credit applicants of their right to request the reasons for denying an application or taking other adverse action.

107(a)(12) Pricing Information

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau proposed, in § 1002.107(a)(12), to require financial institutions to report certain pricing information for covered credit transactions. Specifically, proposed § 1002.107(a)(12)(i)(A) would have required financial institutions to report the interest rate that is or would be applicable to the covered credit transaction; proposed § 1002.107(a)(12)(ii) would have required financial institutions to report the total origination charges for a covered credit transaction; proposed § 1002.107(a)(12)(iii) would have required financial institutions to report the broker fees for a covered credit transaction; proposed § 1002.107(a)(12)(iv) would have required financial institutions to report the total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction; proposed § 1002.107(a)(12)(v) would have required financial institutions to report, for merchant cash advances or other sales-based financing transactions, the difference between the amount advanced and the amount to be repaid; and proposed § 1002.107(a)(12)(vi) would have required financial institutions to report information about any prepayment penalties applicable to the covered credit transaction.

Proposed comment 107(a)(12)–1 would have clarified that, for applications that the financial institution reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports pricing information as ''not applicable.'' Proposed § 1002.107(a)(12) would have applied only to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

Comments Received

The Bureau sought comment on proposed § 1002.107(a)(12) and its commentary, including on additional information that could help reduce misinterpretations of disparities in pricing, such as more information about the nature of the collateral securing the credit. The Bureau also sought comment on ways to reduce burden on financial institutions with respect to overlaps or conflicts between State law disclosure requirements and the Bureau's proposal. Numerous commenters addressed the proposed pricing data point in their feedback. The Bureau addresses feedback on proposed § 1002.107(a)(12) generally in this section; feedback on specific aspects of proposed § 1002.107(a)(12)(i) through (vi) is addressed in the section-by-section analyses that follow.

Many commenters expressed views on whether the Bureau should require financial institutions to report any pricing data. Some commenters, including community groups, trade associations, a lender, and a technology service provider, supported the inclusion of pricing information. These commenters stated pricing information will help data users understand not simply whether credit is available to certain borrowers, but the terms of such credit. Several community groups said that pricing information would help with fair lending analysis, with one community group stating that academic research and mystery shopping tests suggested the presence of discrimination in the small business lending market. Other community groups said that pricing information would allow users to identify unmet business needs. A community group commented that lenders were already collecting much of the proposed pricing data for SBA and CDFI programs, while a trade association supported the proposal but noted that CDFIs would need more time to comply than larger financial institutions.

Industry commenters generally opposed including pricing information in the final rule. These commenters made several arguments in support of their position. First, they asserted that the final rule should include only data points specifically enumerated in the

statute. One commenter suggested that because pricing was not expressly enumerated in the statute, Congress therefore did not intend for the data collected and reported pursuant to section 1071 to include pricing information. Other commenters said that pricing data (along with other data points adopted pursuant to ECOA section 704B(e)(2)(H)) would increase the burden on financial institutions because, for example, pricing information can change throughout the application and underwriting process. And several industry commenters who generally objected to the inclusion of any data points pursuant to section 704B(e)(2)(H) claimed that lenders lack systems that can calculate or collect all the proposed pricing data.

Second, these commenters stated that commercial financing is less standardized than consumer financing, such that pricing is influenced by a wide variety of factors that they believed would not be adequately reflected in the 1071 data. Factors cited included the credit score of the applicant, the nature and value of collateral, the loan purpose and type, the presence of bundled services, the applicant's cash flow, the type of business, the size of any down payment, the strength of any guarantee, and debt service coverage ratio. Commenters elaborated on certain factors specific to certain financial institutions or transaction types. For example, a few commenters stated that community banks might make loans with higher interest rates than other lenders to comply with safety and soundness requirements. Some agricultural lenders and a trade association commented that farm credit borrowers periodically receive patronage dividends from lenders, which effectively lowers the cost of credit. And a group of trade associations representing the insurance premium financing industry stated that the pricing of insurance premium financing is determined almost entirely by the value of the unearned premiums, negating the benefit of pricing data for these transactions.

The absence of information about these other factors affecting the price of credit, commenters argued, would cause data users to draw inaccurate conclusions when analyzing pricing in the 1071 data. As a result, commenters claimed, financial institutions would suffer reputational harm from erroneous accusations of fair lending violations or other harmful pricing practices. However, a community group commented that advocates knew how to responsibly use pricing data and typically approach regulators or industry before publicizing pricing discrepancies. Industry commenters also argued that misleading data would reduce financial institutions' willingness to consider individualized factors in the lending process, restricting the availability of credit to small business applicants.

Many industry commenters also opposed the disclosure of any pricing information because of competition and privacy concerns. These commenters claimed that disclosure would reveal confidential information that would put financial institutions at a disadvantage. For example, competitors could attract borrowers with loans that were cheaper but inferior in other respects. These commenters also asserted that disclosure of pricing information would harm the privacy interests of applicants, especially in small communities where users could re-identify borrowers.

Instead of including pricing information in the final rule, several industry commenters suggested that analysis of pricing data was more appropriate in the supervision and examination context. One trade association asserted that requiring pricing data in the rule would be redundant of, or usurp, the supervisory activities of the prudential regulators because those agencies also collect and use pricing information in their exams. Another group of trade associations said the Bureau could use information it gathers in the course of exercising its supervision authority to determine whether pricing data could further fair lending purposes before requiring such data in the rule.

In contrast to industry commenters, who generally objected to reporting any pricing information, community groups requested additional pricing information. Specifically, numerous community groups and a minority business advocacy group, as well as some lenders and a technology service provider, asked the Bureau to require financial institutions to report the annual percentage rate (APR) for a covered credit transaction. These commenters stated that APR was the only easily understandable, uniform, and comprehensive single pricing measure for comparing diverse transactions. These commenters generally did not argue that the proposed pricing data point lacked value, but that APR would provide additional information that was superior in certain respects. For example, a cross-sector group of lenders, community groups, and small business advocates asserted that the diversity of transactions in the small business lending market increased the value of APR, because comparing loan pricing would be difficult without a single measure. This group further stated that unlike the proposed pricing data, which lacked a time period, APR standardizes the cost of a transaction over a year.

A few commenters believed that APR would make the pricing data easier for data users to understand. Some stated that although sophisticated data users might be able to estimate APR from the proposed data points, the 1071 data should allow anyone to gain information about small business loan pricing. Also, the cross-sector group's comment discussed above noted that many small business owners are familiar with APR from their consumer financing transactions.

Regarding burden, several of these commenters asserted that calculating APR was feasible in the small business lending market, with many noting that APR is a formula amenable to calculation through an automated process using generally available software. For non-traditional transactions such as merchant cash advances, commenters suggested estimating the term length from repayment data or from the term, if any, that the financial institution calculated during the underwriting process. Indeed, some of these commenters also believed that the market was evolving toward the use of APR for commercial finance transactions. They cited the New York and California commercial financing disclosure laws, as well as private disclosure initiatives that include the APR, such as the SMART Box and Small Business Borrower's Bill of Rights.[620] A CDFI lender predicted that financial institutions would eventually use a single disclosure to comply with all State disclosure laws, which would resolve any issues with differing APR methodologies among the states. A bank commented that if the Bureau required pricing information, it should adopt only APR because reporting APR was simpler than reporting multiple pieces of pricing information.

A few commenters suggested alternatives if the Bureau did not adopt APR, including requiring APR for a subset of transactions for which

[620] *See* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; N.Y. S.B. S5470B (July 23, 2020), *https://legislation.nysenate.gov/pdf/bills/2019/S5470B*; Innovative Lending Platform Ass'n, *The SMART Box Model Disclosure—In Depth, https://innovativelending.org/smart-box-model-disclosure-depth/* (last visited Mar. 20, 2023); Responsible Bus. Lending Coal., *Small Business Borrower's Bill of Rights* (2021), *http://www.borrowersbillofrights.org/bill-of-rights.html.*

calculating APR was feasible or having the Bureau calculate and publish APR data itself.

Although industry commenters largely did not address APR, a few offered arguments against its inclusion in the final rule. A group of trade associations questioned the existence of a trend toward the use of APR in commercial financing, noting that only California and Virginia had adopted commercial financing disclosure laws at the time of the NPRM. This group also speculated that Congress believed APR may be inappropriate for the small business lending market because it did not extend TILA to commercial credit in the Dodd-Frank Act. Other commenters discussed the burden of reporting APR. Several banks stated that lenders would need to change their systems to calculate APR for small business loans. A State bankers association asserted that the terms of small business loans did not allow APR to be calculated. And a CDFI lender stated that APR calculations are infeasible for loans made under the SBA's 7(a) program.[621] Such loans, the commenter explained, have fees that may vary based on the type or purpose of the loan, which makes the APR difficult to determine accurately.

Finally, some commenters directed their feedback to the scope of the proposed pricing data point. Some community groups asked the Bureau to require pricing information for all counteroffers because, they asserted, such information would illuminate situations where lenders are prepared to extend credit on less desirable terms than those requested by the applicant. An industry commenter recommended limiting the pricing information to originated transactions because it believed pricing information for approved applications held no fair lending value. But some community groups commented that including approved applications in reported pricing data would further fair lending purposes, such as allowing data users to evaluate whether financial institutions are offering high-priced loans to minority applicants that the applicants do not accept. A trade association commented that the pricing information should include only interest rate and origination charges but offered no explanation for its position.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12) and associated commentary with certain adjustments. Final § 1002.107(a)(12)(i) through (vi) require reporting of the following for covered credit transactions that are originated or approved by the financial institution but not accepted by the applicant: interest rate; total origination charges; broker fees; the total amount of all non-interest charges that are scheduled to be imposed over the first annual period; for a merchant cash advance or other sales-based financing transaction, the difference between the amount advanced and the amount to be repaid; and information about any applicable prepayment penalties. The details of final § 1002.107(a)(12)(i) through (vi) are discussed in turn in the section-by-section analyses that follow; the discussion here focuses on the Bureau's overall approach to the pricing data point.

The Bureau is finalizing comment 107(a)(12)–1 as proposed, which clarifies that, for applications that the financial institution reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports pricing information as ''not applicable.''

As discussed in the NPRM, the Bureau believes that pricing data will further both the fair lending purpose and the business and community development purpose of section 1071. The majority of small businesses are run by a single owner without extensive financial experience or expert staff to navigate the commercial credit marketplace, which lacks many of the Federal protections found in consumer lending.[622] Heightened risks to fair lending and small business development may arise from different pricing for the same products and the selective marketing of higher-priced or even predatory and unsustainable products. Because price-setting is integral to the functioning of any market, any analysis of the small business lending market—including to enforce fair lending laws or identify community and business development opportunities—would be less meaningful without this information.

Research conducted for the Department of Commerce has found that minority-owned businesses tend to pay higher interest rates on business loans than those that are not minority-owned,[623] and a report by the Federal Reserve Bank of Atlanta found that minority-owned firms more frequently applied for potentially higher-cost credit products, and were also more likely to report challenges in obtaining credit, such as being offered high interest rates.[624] In addition, research conducted for the SBA has found that Black- and Hispanic-owned businesses were less likely to have business bank loans and more likely to use more expensive credit card financing.[625] The 2020 Small Business Credit Survey by a collaboration of Federal Reserve Banks found that small business applicants to nonbank lenders, such as online lenders and finance companies, were more likely to report high interest rates or unfavorable terms than applicants to depository institutions.[626] To the extent that the recovery from the lingering economic disruptions following the COVID–19 pandemic is still ongoing when covered financial institutions begin collecting data under this final rule, and in regard to emergencies affecting small business access to credit that may occur in the future, tracking pricing in this segment of the market is particularly important.

The Bureau believes pricing data are important because they offer useful insight into underwriting disparities and are necessary for data users to examine predatory pricing or pricing disparities. For example, they might show that a particular market segment is expanding and apparently filling an important need, but the new credit offered might be predatory in nature. Pricing information will allow the Bureau and others to understand the situation more accurately. Data collection without pricing information

[621] *See* Cong. Rsch. Serv., *Small Business Administration 7(a) Loan Guaranty Program, https://fas.org/sgp/crs/misc/R41146.pdf* (updated June 30, 2022) (discussing the SBA's flagship 7(a) loan guarantee program).

[622] For example, TILA's standardized disclosure requirements for residential mortgage loans and limits on linking compensation to mortgage loan terms, including pricing, do not apply to business loans. *See, e.g.,* 15 U.S.C. 1639b, Regulation Z § 1026.36 (TILA's prohibition on basing mortgage loan originator compensation on loan terms).

[623] Minority Bus. Dev. Agency, U.S. Dep't of Com., *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs,* at 3, 5, 21, 36–37 (2010), *https://archive.mbda.gov/page/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses.html.*

[624] Fed. Rsrv. Bank of Atlanta, *Report on Minority Owned Firms: Small Business Credit Survey* (Dec. 2019), *https://www.fedsmallbusiness.org/-/media/project/smallbizcredittenant/fedsmallbusinesssite/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf.*

[625] Alicia Robb, *Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms,* at 47 (2018) (prepared for Off. of Advocacy, Small Bus. Admin.), *https://advocacy.sba.gov/2018/02/01/financing-patterns-and-credit-market-experiences-a-comparison-by-race-and-ethnicity-for-u-s-employer-firms/.*

[626] However, the survey noted that online lenders tended to receive applications with lower credit scores so applicant risk could play a role in higher interest rates for nonbank lenders. *See* 2020 Small Business Credit Survey at 15.

could have the unintended consequence of incentivizing irresponsible lending, as providers seeking to increase representation of underserved groups could be encouraged to adopt high-cost models of lending.

Without information on pricing, data users would be unable to screen for fair lending pricing risks, and regulators would be less able to focus their enforcement and supervision resources appropriately on situations of greater possibility for questionable activities. In addition, if potential discriminatory conduct is monitored effectively in regard to credit approvals, but not in regard to pricing, industry compliance systems may focus solely on approvals and denials and ignore potential pricing disparities. Having pricing data available will also increase transparency and help demonstrate to lenders where business opportunities exist to offer sustainable credit to underserved markets. In addition, it could demonstrate to small businesses the availability of more affordable credit.

Pricing information that is separately enumerated as the interest rate and general categories of fees will allow data users to more precisely analyze the components of a credit transaction's price. For example, data users will be able to identify potentially discriminatory price disparities within upfront fees charged to borrowers at origination that may not be visible in a single pricing metric. Similarly, information about which components of a transaction's price may be relatively more expensive should allow data users to better identify business and community development initiatives because they will be able to target their initiative at the particular component, such as the interest rate, that may be most responsible for the relatively high price of the transaction. The Bureau's decision not to require reporting of APR, as requested by some commenters, is discussed in more detail below.

The Bureau disagrees with commenters who suggested the pricing data point lacks congressional authorization. ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' This provision reflects Congress's understanding that certain information not explicitly identified in section 1071 may advance the statutory purposes. As described herein, the pricing data point satisfies this standard.

The Bureau understands that the small business lending market is flexible and tailored to the situations of small business applicants and borrowers. For this reason, pricing for small business credit is affected by numerous factors, some of which are not reflected in the 1071 data. For example, the final rule does not require financial institutions to report applicants' credit scores, which would provide useful information for explaining pricing differences between transactions. But the Bureau believes that commenters have understated the amount of information the final rule includes about factors relevant to pricing. For example, the final rule includes information about the existence and nature of collateral;[627] the credit purpose and type;[628] the applicant's industry,[629] size,[630] and history;[631] the type of guarantee;[632] and the type of the lender.[633] This information will provide important context for pricing data.

More broadly, the 1071 data need not reflect every determinant of credit pricing to provide value to users. The pricing data will further fair lending enforcement by allowing regulators to better understand fair lending risks and allocate their resources accordingly. As explained in the NPRM, HMDA data have long served a similar function. Some commenters questioned the analogy to HMDA data, citing greater standardization in the mortgage market. But the same basic utility—signaling fair lending risk—exists even if the nature of the signal differs. Indeed, with respect to entities it supervises, the Bureau similarly uses pricing data, when available in small business examinations, to help identify fair lending risk.

Regarding suggestions that the Bureau consult supervisory and examination data before adopting any pricing data requirements, the Bureau has relied on its experience in these areas while developing the final rule. The Bureau does not believe this rule is redundant of the supervision and examination activities of any Federal agency. Moreover, confidential supervisory information available only to Federal regulators is no substitute for a publicly available dataset.

Furthermore, comments that focus narrowly on comparisons between applicants ignore the business and community development purpose of section 1071. Data users can examine pricing data at a more general level to further this purpose. For example, government entities could develop loan programs designed to increase the availability of credit to certain small businesses whose existing financing options carry high prices.

Regarding comments about the harmful consequences of potentially misleading data, the Bureau anticipates noting when disclosing the 1071 data that the data alone generally do not offer proof of compliance with fair lending laws.[634] And the Bureau expects community groups to use the data responsibly, with knowledge of these limitations, which such groups say they have. The Bureau does not believe, as suggested by commenters, that pricing data would reduce the availability of credit to small business applicants. Instead, by helping to reduce fair lending risk and identify business and community development opportunities, the pricing data will help expand access to credit. Privacy and confidentiality concerns about the pricing data are discussed in part VIII.B.6.x below.

The Bureau understands that many financial institutions will incur costs to collect and report pricing information. The Bureau has attempted to reduce the difficulty of collecting and reporting these data in several ways. For example, final § 1002.107(a)(12) is limited to approved applications and originated transactions. These are transactions for which financial institutions generally would have to determine the price to approve (or originate) the transaction. Other transactions—*i.e.,* those that are denied, withdrawn by the applicant, or incomplete—are likely to have pricing information that is subject to change or that has not yet been determined. In addition, final § 1002.107(a)(12) generally takes a broad, functional approach to the reportability of pricing information, rather than defining reportability according to complex factors such as how a fee is

[627] *See* final § 1002.107(a)(5) (indicating whether credit is secured or unsecured); final § 1002.107(a)(6) (suggesting, along with the credit type data point, whether a loan is secured by a dwelling).

[628] *See* final § 1002.107(a)(5) (credit type); final § 1002.107(a)(6) (credit purpose). The Bureau also notes that insurance premium finance transactions are not covered by the final rule (*see* final § 1002.104(b)(3)). Thus, the unique challenges of interpreting pricing information cited by commenters for those transactions will not affect data users.

[629] *See* final § 1002.107(a)(15) (NAICS code).

[630] The gross annual revenue and number of workers data points are related to the applicant's size. *See* final § 1002.107(a)(14) and (16).

[631] *See* final § 1002.107(a)(17) (time in business).

[632] *See* final § 1002.107(a)(5)(ii) (guarantees).

[633] *See* final § 1002.109(b) (financial institution identifying information).

[634] For example, the FFIEC cautions users of HMDA data that ''HMDA data are generally not used alone to determine whether a lender is complying with fair lending laws.'' CFPB, *Summary of 2021 Data on Mortgage Lending* (2022), *https://www.consumerfinance.gov/data-research/hmda/summary-of-2021-data-on-mortgage-lending/*.

denominated or the nature of the collateral securing a transaction. The Bureau believes this will simplify the collection and reporting process. Despite any remaining burden for financial institutions, the Bureau believes that pricing data are important for achieving both of section 1071's purposes.

Further reducing the potential difficulty of reporting pricing data, the Bureau has decided against requiring financial institutions to report APR at this time. Calculating and reporting APR across the diverse types of commercial transactions covered by the final rule may require complex estimates to generate necessary variables for the APR formula. Many merchant cash advances, for example, lack a disclosed periodic payment amount. Thus, financial institutions would have to estimate this term, if they do not do so now, to calculate an APR. Although financial institutions may estimate some of the necessary information during underwriting, they may not estimate it according to the same formula, and may not maintain such information in a system designed for data reporting. The Bureau understands that many financial institutions will calculate APR to comply with State commercial financing disclosure laws.[635] But many financial institutions are not currently subject to such State laws, or are subject to State laws that do not require APR disclosure.[636] As noted in the NPRM, the Bureau will continue to monitor regulatory developments in the small business lending market. The Bureau considered requiring reporting of APR only for transactions where it is less complex to calculate, as some commenters suggested. But a limited-transaction APR reporting requirement would negate two important benefits that commenters cited for APR: using it to compare diverse types of transactions and to apply a single intuitive pricing measure for nontraditional types of financing.

The Bureau understands commenters' concerns over the accessibility and comparability of rate and fees versus APR. Final § 1002.107(a)(5)(iii) requires financial institutions to report loan term; the Bureau has added to final comment 107(a)(6)–8 a requirement that financial institutions report, for merchant cash advances and other sales-based financing, the loan term, if any, that the financial institution estimated, specified, or disclosed in processing or underwriting the application or transaction. This information will provide important context for data users comparing the pricing of different transactions and help address the criticism over the lack of a time period for pricing data. Regarding accessibility, the Bureau believes the pricing data will be generally understandable by data users. Most of the pricing data are similar to information found on existing consumer and commercial credit disclosures, including the State commercial financing disclosures cited by commenters. Additionally, the Bureau anticipates that government agencies, researchers, press organizations, community groups, and others will publish research and reports using the small business lending data, just as they do now with HMDA data. These publications may render pricing information in a form more accessible to other users.

Finally, the Bureau is not adopting modifications to the scope of the pricing data point. As discussed above, limiting the pricing data to approved and originated transactions reduces the difficulty of reporting while providing important information about the pricing decisions of financial institutions. The Bureau does not believe, as suggested by a commenter, that approved but not accepted applications lack value for fair lending analysis. Rather, these applications are similarly valuable because they also reflect transactions for which the lender has made a credit decision and set the pricing for the transaction. Lastly, limiting final § 1002.107(a)(12) to interest rate and origination charges would deprive data users of the benefits of other pricing information. The importance of each aspect of the pricing data point is discussed in the section-by-section analyses that follow.

107(a)(12)(i) Interest Rate

Proposed Rule

Proposed § 1002.107(a)(12)(i)(A) would have required financial institutions to report the interest rate that is or would be applicable to the covered credit transaction. If the interest rate is adjustable, proposed § 1002.107(a)(12)(i)(B) would have required the submission of the margin, index value, and index name that is or would be applicable to the covered credit transaction at origination.[637]

Proposed comment 107(a)(12)(i)–1 would have clarified that if a covered credit transaction includes an initial period with an introductory interest rate, after which the interest rate adjusts, a financial institution complies by reporting information about the interest rate applicable after the introductory period. Proposed comment 107(a)(12)(i)–2 would have explained that a financial institution reports the interest rate applicable to the amount of credit approved or originated reported in proposed § 1002.107(a)(8) if a covered credit transaction includes multiple interest rates applicable to different credit features. Lastly, proposed comment 107(a)(12)(i)–3 listed a number of indices to report and directed that if the index used does not appear on the list of indices provided, the financial institution reports ''other'' and provides the name of the index via free-form text field.

Proposed § 1002.107(a)(12)(i)(B) would have provided that, for adjustable interest rates based upon an index, a financial institution must report the margin, index value, and index name that is or would be applicable to the covered credit transaction at origination. Proposed comment 107(a)(12)(i)–4 would have clarified that a financial institution complies with proposed § 1002.107(a)(12)(i)(B) by reporting the index value at the time the application is approved by the financial institution. The Bureau sought comment on whether the index value should be reported based on a different time period or whether the index value should be reported at the time of approval.

The Bureau sought comment on proposed § 1002.107(a)(12)(i) and its commentary, including whether a different measure of pricing would provide more accurate data, whether additional information about pricing (for example, amortization type or adjustment frequency) would provide beneficial data to help ascertain fair lending risk and further the business and community development purpose of section 1071, and whether there are additional indices that should be included in the list from which financial institutions choose to report the applicable index on adjustable rate transactions. Lastly, the Bureau sought

[635] Cal. Dep't of Fin. Prot. & Innovation, *Commercial Financing Disclosures* (2022), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf*; N.Y. Dep't of Fin. Servs., *Proposed Disclosure Requirements for Certain Providers of Commercial Financing Transactions* (2022), *https://www.dfs.ny.gov/system/files/documents/2022/09/rp_23nycrr600_text_20220914.pdf*.

[636] Utah Dep't of Fin. Insts., *Commercial Financing Registration and Disclosure Act* (2022), *https://le.utah.gov/xcode/Title7/Chapter27/C7-27_2022050420220504.pdf*.

[637] It should be noted that not all covered credit transactions include an interest rate. Final § 1002.107(a)(12)(v) applies to certain covered credit transactions that do not include an interest rate. The discussion of final § 1002.107(a)(12)(iv) below also addresses other covered credit transactions that may not include an interest rate.

comment on whether there may be covered credit transactions where the interest rate may change after origination based on factors such as if the borrower maintains an account at the financial institution or if some other condition is met, and if so, whether additional commentary would be helpful to provide more guidance on which rate to report in that circumstance.[638]

Comments Received

The Bureau received comments specifically regarding the collection of interest rate from banks and trade associations, among others. While some commenters supported the Bureau's proposal, several industry commenters had questions regarding how the provision would work. The community group stated that interest rate information is beneficial as long as data users have access to both the initial interest rate and the interest rate after a potential initial rate reset. An industry commenter agreed that interest rate information would be helpful in conducting fair lending analyses. In contrast, a bank commenter asserted that interest rate information is of limited value.

Regarding the details of the Bureau's proposal to collect interest rate, a bank commenter noted that commercial loans may have more than one interest rate. With respect to indices for variable rate transactions and the Bureau's solicitation of comment on whether the index value should be reported based on a different time period or if at approval is the most appropriate time to measure, a group of trade associations asserted in their comment that the index value is often not related to the timing of approval or origination, and will not provide useful data, while a bank commented that it would be less burdensome to report the index value used to establish the interest rate rather than the value at the time of approval. A State bankers association asserted that the index value at approval may not have any connection to the price of the loan, providing the example of agricultural lending where the rate and terms are set after the financial institution approves the loan. Two industry commenters noted that the index value could change between approval and origination. Another bank requested that Constant Maturity Treasury (CMT) rate be included in the list of indices. Two trade associations inquired as to how to report an internal index used to set the rate on a variable rate transaction, while a bank commenter stated that use of internal indices that are unique to a financial institution would make interest rate data difficult to interpret.

A bank requested clarification of the term ''introductory period.'' Another bank asserted that for a variable interest rate transaction with a five-year introductory period, the interest rate data reported at approval will be outdated and inaccurate when the period ends. Finally, a trade association inquired as to how a financial institution would report an interest rate that is unknown at origination, such as a line of credit whose interest rate changes based on the amount advanced.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(i) with one addition, as well as with other adjustments and additions to the commentary to address comments received regarding introductory interest rate periods and adjustable interest rates. Final § 1002.107(a)(12)(i) requires financial institutions to report the interest rate that is or would be applicable to the covered credit transaction. If the interest rate is adjustable, final § 1002.107(a)(12)(i)(B) requires the submission of the margin, index value, introductory rate period expressed in months (if applicable), and the index name that is or would be applicable to the covered credit transaction. As with all aspects of pricing within § 1002.107(a)(12), this requirement applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

The Bureau believes that collection of the interest rate on the covered credit transaction furthers both the fair lending purpose and the business and community development purpose of section 1071 by allowing regulators, small business advocates, and industry to conduct fair lending reviews and monitor the market for emerging high-cost products. In addition, the availability of this pricing metric will provide pricing transparency and will encourage the development of successful lending models because policymakers, community organizations, investors, banks seeking partnerships, and others will have better visibility into which business models are successful at providing sustainable credit to minority-owned, women-owned, and other underserved small businesses.

Furthermore, research has found that minority-owned businesses tend to obtain, or be offered, higher interest rates on business credit than non-minority-owned businesses.[639] The collection of interest rate (along with fees) will allow the Bureau, other government agencies, and other data users to have insight into the existing market, monitor the market for potentially troubling trends, and conduct fair lending analyses that adequately take into account this important metric.

In general, interest rate information should be in or readily determinable from the credit file, and thus available for reporting. To the extent that it is not, the Bureau notes that certain State-level commercial lending disclosures, notably those of California and New York, require the disclosure of APR.[640] Because the interest rate must be known to calculate APR, the Bureau believes that final § 1002.107(a)(12)(i) imposes little burden on financial institutions that already include the interest rate on such disclosures required by State law, as well as on the contract between the financial institution and the applicant.

As noted above, final § 1002.107(a)(12)(i) remains largely the same as proposed § 1002.107(a)(12)(i). However, the Bureau has added to final § 1002.107(a)(12)(i)(B) a requirement that financial institutions report the initial rate period expressed in months (if applicable) (along with the margin, index value, and the index name that is or would be applicable to the covered credit transaction, as proposed). The Bureau agrees with commenters that for transactions with a variable interest rate where there is an initial rate and the interest rate resets after a certain period, at the time the financial institution approves the transaction and sets the interest rate, the financial institution will not know the future value of the index used to create the interest rate. By collecting the number of months of the initial period (if any), the rule will allow data users to determine the accurate interest rate applicable to the transaction because they will have the name of the index and the timing of the index value. For example, as written in final comment 107(a)(12)(i)–2, if a

[638] The Bureau did not receive any comments on this solicitation.

[639] U.S. Dep't of Com., *Minority Business Development Agency, Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs,* at 3, 5, 21, 36–37 (2010), *https://archive.mbda.gov/page/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses.html.*

[640] *See* N.Y. S.898, section 803(c) (signed Jan. 6, 2021) (amending S.5470–B), *https://legislation.nysenate.gov/pdf/bills/2021/s898*; Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235.*

financial institution originates a covered credit transaction with a fixed initial interest rate of 0 percent for six months following origination, after which the interest rate will adjust according to a Prime index rate plus a 3 percent margin, the financial institution reports the 3 percent margin, the number ''6'' for the length of the initial rate period, Prime as the name of the index used to adjust the interest rate, and ''not applicable'' for the index value.

New comment 107(a)(12)(i)–1 clarifies that a financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated as reported pursuant to final § 1002.107(a)(8). The Bureau is adopting this comment to address the issue raised by a commenter as to how a financial institution would report an interest rate that is unknown at origination or where the rate changes based on the amount advanced, such as with some lines of credit.

The Bureau is adopting comment 107(a)(12)(i)–2 (renumbered from 107(a)(12)(i)–1 in the proposal) with several alterations. Final comment 107(a)(12)(i)–2 clarifies that if a covered credit transaction includes an initial period with an introductory interest rate of 12 months or less, after which the interest rate adjusts upwards or shifts from a fixed to a variable rate, a financial institution complies with the provision by reporting information about the interest rate applicable after the introductory period. If a covered transaction includes an initial rate period of more than 12 months after which the interest rate resets, a financial institution complies with the provision by reporting information about the interest rate applicable prior to the reset period. Final comment 107(a)(12)(i)–2 also provides two examples to illustrate these scenarios. The Bureau's revisions to this comment address a commenter's request to clarify the term ''introductory period'' (which the Bureau has done by clarifying that an introductory period includes an initial period of 12 months or less after which the interest rate adjusts upward or shifts from a fixed to a variable rate), as well as another commenter's concern that in a transaction with a five-year introductory period, the interest rate reported at approval will be outdated and inaccurate when the period ends.

Final comment 107(a)(12)(i)–3 (renumbered from proposed comment 107(a)(12)(i)–2 with one non-substantive adjustment) clarifies that if a covered credit transaction includes multiple interest rates applicable to different credit features, a financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated reported pursuant to final § 1002.107(a)(8). The comment also provides an example.

Final comment 107(a)(12)(i)–4 (renumbered from proposed comment 107(a)(12)(i)–3) includes a list of indices for reporting the appropriate index for variable rate transactions, and also specifies that a financial institution reports ''other'' and reports the index name in free-form text if the applicable index is not listed. The Bureau has added CMT to the list of indices in the comment, as requested by a commenter. In response to requests from a number of commenters for clarification as to how a financial institution should report internal indices, the Bureau has also added ''Internal Index'' to the list of indices in the comment. The Bureau believes that allowing financial institutions to choose ''other'' when an index used does not appear on the provided list will facilitate compliance. In addition, collecting this information on ''other'' indices will assist the Bureau in monitoring trends in this area and key developments in the small business lending market, which the Bureau could use to inform any future iterations of the list.

Final comment 107(a)(12)(i)–5 (renumbered from proposed comment 107(a)(12)(i)–4) clarifies that a financial institution complies with § 1002.107(a)(12)(i) by reporting the index value used to set the rate that is or would be applicable to the covered transaction. Proposed comment 107(a)(12)(i)–4 would have required financial institutions to report, for covered transactions with an adjustable interest rate, the index value applicable at the time the application was approved by the financial institution. Some commenters stated that the index value at the time of approval may have no relationship to the index value used to set the interest rate and that it would be less burdensome to report the index value used to establish the interest rate rather than the value at the time of approval. To address these concerns, the Bureau has adjusted final comment 107(a)(12)(i)–5 to require reporting of the index value used to set the rate that is or would be applicable to the covered transaction. In most cases, this will be the index value at the time of approval, because the financial institution will set the pricing when the credit decision is made, but in cases where there might be a difference, this comment as revised will ensure that financial institutions are reporting the index value actually used to establish the interest rate, rather than the value that otherwise exists at the time of approval.

107(a)(12)(ii) Total Origination Charges

Proposed Rule

Proposed § 1002.107(a)(12)(ii) would have required financial institutions to report the total origination charges for a covered credit transaction. Total origination charges are the total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars.

Proposed comment 107(a)(12)(ii)–1 would have clarified that charges imposed uniformly in cash and credit transactions are not reportable. Proposed comment 107(a)(12)(ii)–2 would have provided guidance on reporting charges imposed by third parties. Proposed comment 107(a)(12)(ii)–3 would have clarified that broker fees are included in the total origination charges.[641] Proposed comment 107(a)(12)(ii)–4 would have provided guidance on reporting charges for other products or services paid at or before origination. And proposed comment 107(a)(12)(ii)–5 would have listed examples of reportable charges.

The Bureau sought comment on proposed § 1002.107(a)(12)(ii) and its commentary, including whether concepts and guidance adapted from Regulation Z, such as proposed comment 107(a)(12)(ii)–1 on comparable cash transactions, were applicable in the small business lending context such that they should be incorporated as drafted. The Bureau also sought comment on whether to enumerate certain types of charges separately in the 1071 data, and whether to include or exclude certain types of charges in the total origination charges.

Comments Received

The Bureau received comments specifically regarding total origination charges from several banks and trade associations, along with a community group and a joint letter from a cross-sector group of lenders, community groups, and small business advocates.

A few industry commenters questioned the utility of information about total origination charges. For example, several commenters asserted that proposed § 1002.107(a)(12)(ii) would not provide useful data because the amount of origination charges may vary based on factors not captured by

[641] For more information on broker fees, see the section-by-section analysis of § 1002.107(a)(12)(iii) below.

the 1071 data, such as geographical differences in appraisal fees. A group of trade associations stated that including broker fees while itemizing them separately in another data field would inflate the amount of origination charges. And a bank preferred to report only origination points but believed that such data would provide only limited value. This commenter did not define origination points but the Bureau understands the term to refer to one way that financial institutions denote fees paid to the lender for originating the loan. However, the cross-sector group commented that total origination charges would be especially helpful for data users examining the cost of merchant cash advances because these transactions include upfront fees not otherwise captured in the pricing data.

A few commenters asserted that reporting total origination charges would be burdensome. For example, several industry commenters stated that calculating the finance charge under Regulation Z, which defines certain charges similar to the proposed total origination charges data field, is complex and not performed for commercial credit transactions. And a trade association suggested that the proposed treatment of certain charges, such as a borrower's premium for property insurance, was unclear.

Several commenters addressed specific aspects of total origination charges. For example, a community group stated that charges imposed uniformly in cash and credit transactions should be reportable because, they asserted, such charges are rare and the existence of such an exclusion may encourage fee shifting. Conversely, a trade association stated that any charge imposed uniformly on all applicants should be excluded because such a charge could not be the source of a pricing disparity. Several industry commenters stated that third-party charges should be excluded because the imposition of such fees is often outside a financial institution's control, while a group of trade associations found the treatment of such charges confusing. Finally, another trade association stated that aligning the definition of total origination charges to Regulation C's definition of origination charges used to report data under HMDA [642] would provide helpful clarity because the Regulation C definition is understood to include only charges retained by the financial institution.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(ii) with additional clarifying commentary. Final § 1002.107(a)(12)(ii) requires financial institutions to report the total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars. As with all aspects of pricing within § 1002.107(a)(12), this requirement applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

The Bureau is finalizing comments 107(a)(12)(ii)–1 through –5 as proposed. In addition, the Bureau is adopting final comment 107(a)(12)(ii)–6, which clarifies the reporting of a net lender credit provided by a financial institution to an applicant at origination.

As discussed in the NPRM, total origination charges provide information about an important component of pricing for small business credit: the upfront cost of originating and extending credit. This relatively specific information enables insight into credit pricing that would be obscured by more general information, such as the trade-offs between the interest rate and the upfront charges. Indeed, new comment 107(a)(12)(ii)–6 enhances users' ability to examine the relationship between components of credit pricing by clarifying how to report net lender credits provided to the applicant. For example, without information about net lender credits, transactions where a borrower accepted a lender credit at origination in exchange for a higher interest rate would appear to have inflated prices. Moreover, by generally covering all upfront fees and credits regardless of how they are structured and denominated, final § 1002.107(a)(12)(ii) limits financial institutions' opportunity to shift fees to excluded charges by giving similar fees different names. Thus, final § 1002.107(a)(12)(ii) will enable users to better understand pricing disparities and identify potential business and community development opportunities.

The Bureau disagrees with commenters who claimed that information about total origination charges would not have value. Although such charges are affected by factors not included in the 1071 data, final § 1002.107(a)(12)(ii) will still provide insight into pricing in the small business lending market. General information about upfront charges will enable users to better understand fair lending disparities, even if they cannot conclusively determine the existence of unlawful disparities from the data alone. And users need not attempt to make precise comparisons among individual applicants to identify business and community development needs and opportunities. Regarding broker fees, the Bureau believes that such charges are an important component of the upfront cost of credit and notes that Regulation Z also includes them in the finance charge.[643] Also, broker fees are separately itemized in final § 1002.107(a)(12)(iii) so that users who are concerned about the impact of including broker fees can deduct them from the total origination charges.

Regarding commenters' concerns about burden, the Bureau understands that some financial institutions find calculation of the finance charge in Regulation Z § 1026.4—which is similar to final § 1002.107(a)(12)(ii)'s description of total origination charges—to be complex. But final § 1002.107(a)(12)(ii) is simpler in several important respects. First, final § 1002.107(a)(12)(ii) excludes all credit costs occurring after origination of a covered credit transaction, such as interest and time-price differential. And final § 1002.107(a)(12)(ii) adopts a more inclusive approach to upfront charges than Regulation Z's finance charge, which has numerous provisions addressing specific fees.[644] This simplified approach should make the total origination charges less burdensome to calculate than the finance charge. Regarding a commenter's question about the treatment of a borrower's premium for property insurance, this charge is handled using the general approach to charges for other products or services described in comment 107(a)(12)(ii)–4: such charges are included in the total origination charges only if the financial institution requires the purchase of such other product or service as a condition of or an incident to the extension of credit.

The Bureau is not making certain specific changes to the total origination charges data field suggested by commenters. First, final § 1002.107(a)(12)(ii) maintains the

[642] 12 CFR 1003.4(a)(18).

[643] *Compare* final comment 107(a)(12)(ii)–3, *with* Regulation Z § 1026.4(a)(3).

[644] For example, the finance charge excludes application fees charged to all applicants for credit, and numerous fees in transactions secured by real property. *See* Regulation Z § 1026.4(c)(1) (application fees) and (7) (real estate-related fees).

exclusion for charges imposed uniformly in cash and credit transactions, similar to the exclusion in Regulation Z's finance charge, because the Bureau believes that pricing data better serves section 1071's statutory purposes when it focuses on the cost of credit that the lender is imposing rather than capturing all costs that may be associated with a particular transaction (whether financed or not). Furthermore, the Bureau is not excluding charges simply because a financial institution imposes them uniformly on all applicants for credit. Even if such charges—given their uniformity—were to hold no value for fair lending analysis, they would still be part of the upfront cost of credit that data users may wish to examine in identifying business and community development needs and opportunities. Final § 1002.107(a)(12)(ii) also adopts the proposal's treatment of third-party charges, with such charges being reportable only if a financial institution either requires the use of a third party as a condition of or an incident to the extension of credit, even if the applicant can choose the third party; or retains a portion of the third-party charge, to the extent of the portion retained.[645] This approach focuses final § 1002.107(a)(12)(ii) on those upfront third-party charges that are effectively set by the lender as a cost of credit. The Bureau believes this approach is consistent with that requested by commenters who did not want third-party charges to be reportable if they were outside of a financial institution's control. Regulation Z's finance charge definition uses a similar standard for third-party charges, and the Bureau is not aware of significant confusion over its applicability. Finally, Regulation C's definition of total origination charges, which is taken directly from the amount disclosed to borrowers of closed-end consumer credit transactions secured by real property,[646] is limited in ways that the Bureau believes would reduce the value of final § 1002.107(a)(12)(ii) in the small business lending context. For example, new comment 107(a)(12)(ii)–6 clarifies that financial institutions may report a negative amount to reflect a net credit provided by the lender, but such credits could not be included in Regulation C's total origination charges data point.

[645] *See* final comment 107(a)(12)(ii)–2.

[646] Regulation Z § 1026.38(f)(1).

107(a)(12)(iii) Broker Fees

Proposed Rule

Proposed § 1002.107(a)(12)(iii) would have required financial institutions to report the broker fees for a covered credit transaction. Broker fees are the total amount of all charges included in the total reportable origination charges that are fees paid by the applicant directly to a broker or to the financial institution for delivery to a broker, expressed in dollars. Proposed comment 107(a)(12)(iii)–1 would have provided an example of reporting different types of broker fees. Proposed comment 107(a)(12)(iii)–2 would have clarified that financial institutions would use a ''best information readily available'' standard regarding fees paid directly to a broker by an applicant.

The Bureau sought comment on proposed § 1002.107(a)(12)(iii) and its commentary, including on the knowledge that financial institutions might have about direct broker fees and the challenges of reporting such information.

Comments Received

The Bureau received comments specifically regarding broker fees from several lenders, trade associations, and community groups. A community group stated that information about broker fees would help data users monitor for abusive practices. Conversely, a group of trade associations asserted that the Bureau had not established that broker fees were inflating the cost of credit in the small business lending market. This commenter also speculated that Congress was unconcerned with broker fees in this market because it had not extended certain TILA protections to commercial transactions or explicitly identified broker fees in section 1071.

Several commenters addressed the reporting of broker fees paid directly to the broker. A trade association commented that the amount of such fees may be difficult for a financial institution to obtain, while a bank said that documenting efforts to verify direct broker fees would be burdensome. A community group said that the Bureau's proposed ''best information readily available'' standard was reasonable, while a joint letter from community groups and business advocacy groups asked the Bureau to separately itemize indirect broker fees in order to provide more information about charges that are imposed by the lender.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(iii) and associated commentary as proposed. As with all aspects of pricing within § 1002.107(a)(12), this requirement to report broker fees applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

As discussed in the NPRM, loan brokers play an important role in the small business lending market. The market has shifted to include more nonbank and nontraditional lenders offering different types of financial products, which creates opportunities for intermediaries, such as brokers, who might assist applicants in navigating among potential lenders or products.[647] These intermediaries offer benefits to applicants but also create risks for those applicants arising from misaligned incentives.[648] Indeed, the small business lending market lacks certain substantive protections against misconduct that are found in the consumer credit market, such as the prohibition on basing certain loan originator compensation on the terms of a transaction.[649]

Information about broker fees will help data users better understand the small business lending market in general and the impact broker fees have on credit pricing in particular. Although broker fees are included in final § 1002.107(a)(12)(iii)'s definition of total origination charges, separately enumerating the total broker fees will allow data users to better understand the role that brokers play in the price of

[647] *See, e.g.,* 2022 Small Business Credit Survey (reporting that 40 percent of respondents applied for credit at either an online lender or a finance company in 2021).

[648] *See* Fin. Stability Oversight Council, *2016 Annual Report,* at 126 (2016), *https://home.treasury.gov/system/files/261/FSOC-2016-Annual-Report.pdf* (discussing intermediaries in alternative lending arrangements and explaining that ''[i]n other markets, business models in which intermediaries receive fees for arranging new loans but do not retain an interest in the loans they originate have, at times, led to incentives for intermediaries to evaluate and monitor loans less rigorously''). Because of the potential risks involved in multi-party business arrangements, the FFIEC's Interagency Fair Lending Examination Procedures emphasize the importance of understanding the role that brokers play in a financial institution's lending process. Fed. Fin. Insts. Examination Council, *Interagency Fair Lending Examination Procedures,* at 3 (2009), *https://www.ffiec.gov/PDF/fairlend.pdf* (instructing examiners to consider an institution's organization of its credit decision-making process, including identification of the delegation of separate lending authorities and the extent to which discretion in pricing or setting credit terms and conditions is delegated to various levels of managers, employees, or independent brokers or dealers and an institution's loan officer or broker compensation program).

[649] Regulation Z § 1026.36 (implementing TILA's prohibition on basing residential mortgage loan originator compensation on loan terms).

small business credit. For example, data users will be able to analyze whether broker fees specifically appear to be creating fair lending risk or higher-priced transactions for certain communities. Empowering data users to engage in this level of analysis will aid in fulfilling both the fair lending enforcement and business and community development purposes of the statute.

The Bureau acknowledges the lack of data regarding the extent to which broker fees may or may not be inflating the cost of credit. This insufficiency, however, is exactly what 1071 data are intended to help address. Moreover, final § 1002.107(a)(12)(iii) is valuable to data users even in the absence of any problematic pricing practices regarding brokers because it will help shed light on an important aspect of commercial financing arrangements. The final rule includes numerous data points, including much of the pricing data point, that do not capture information that about intrinsically or especially abusive conduct, but that will help data users identify fair lending concerns and identify business and community development needs and opportunities. Regarding Congress's intent, the Bureau notes that section 1071 expressly authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' [650] As discussed herein, final § 1002.107(a)(12)(iii) satisfies this requirement.

The Bureau understands that financial institutions often may not have complete access to information regarding the amount of broker fees that an applicant pays directly to a broker. Thus, final comment 107(a)(12)(iii)–2 clarifies that a financial institution may rely on the best information readily available to the financial institution at the time final action is taken. Information readily available can include, for example, information provided by an applicant or broker that the financial institution reasonably believes regarding the amount of fees paid by the applicant directly to the broker. The Bureau believes commenters may be overestimating the burden associated with this standard, which contemplates only consulting information ''readily'' available rather than performing a searching inquiry into the amount of direct broker fees. As noted in the NPRM, the same standard is used for reporting certain HMDA data under Regulation C, and it does not appear to be unduly burdensome in that context.[651] Additionally, many nonbank financial institutions will need to determine the amount of broker fees in certain circumstances to comply with State commercial financing disclosure laws.[652]

Finally, the Bureau is not requiring separate itemization of indirect broker fees at this time. Such fees could be imposed for a variety of reasons and in a variety of ways; the Bureau believes that additional information and stakeholder feedback would be beneficial before adopting such a requirement.

107(a)(12)(iv) Initial Annual Charges

Proposed Rule

Proposed § 1002.107(a)(12)(iv) would have required financial institutions to report the total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction, expressed in dollars.

Proposed comment 107(a)(12)(iv)–1 would have provided an example of how to calculate the amount to report. Proposed comment 107(a)(12)(iv)–2 would have highlighted that a financial institution should exclude interest expenses from the initial annual charges reported. Proposed comment 107(a)(12)(iv)–3 would have noted that a financial institution should not include any charges for events that are avoidable by the applicant, including for example, charges for late payment, for exceeding a credit limit, for delinquency or default, or for paying items that overdraw an account. Proposed comment 107(a)(12)(iv)–4 would have provided examples of initial annual charges that may be scheduled to be imposed during the initial annual period, including monthly fees, annual fees, and other similar charges. Finally, proposed comment 107(a)(12)(iv)–5 would have clarified that a financial institution complies with the provision by reporting as the default the highest amount for a charge scheduled to be imposed, and provides an example of how to calculate the amount reported when the scheduled fee to be imposed may be reduced based upon a specified occurrence.

The Bureau sought comment on proposed § 1002.17(a)(12)(iv) and its commentary, including whether to include or exclude certain types of charges as reportable under initial annual charges. The Bureau also sought comment on the likelihood that financial institutions would schedule charges in the second year of a covered credit transaction and beyond specifically in an effort to avoid reporting the charges for purposes of section 1071. Finally, the Bureau sought comment on how it should treat situations where the applicant has informed the financial institution that it expects to regularly incur ''avoidable charges,'' and whether such charges should be reported as a scheduled charge.

Comments Received

The Bureau received comments specifically regarding the collection of initial annual charges from lenders, trade associations, and community groups.

A community group stated that the Bureau should finalize the provision as proposed, but that the Bureau should conduct research to determine if lenders are shifting fees beyond the first year. Several community groups and a lender requested that the Bureau require financial institutions to also report charges scheduled to be imposed after the first year to avoid encouraging lenders to impose charges disproportionately in the later years of the loan's term.

With respect to avoidable fees, a community group stated that the Bureau should include all fees that could be imposed at the lender's discretion in order to avoid evasion. A bank and a joint letter from bank trade associations argued that including avoidable fees that the applicant intends to incur would unfairly inflate the prices of some loans and create documentation problems for lenders. One commenter asserted that, for loans with terms shorter than one year, financial institutions should not be made to speculate as to what constitutes the initial period on short term loans and what could occur during the initial annual period regarding charges.

A State bankers association expressed concern that the terms ''scheduled'' and ''initial period following origination'' were not defined in the NPRM. That commenter and a bank asserted that many charges that may be incurred during the first year may be uncertain,

[650] ECOA section 704B(e)(2)(H).

[651] *See* Regulation C comments 4(a)(31)–4 and 4(a)(32)–5.

[652] For example, California's commercial financing disclosure law requires lenders to determine the finance charge, which includes ''any charge that would be a finance charge under 12 CFR part 1026.4.'' Cal. Code Regs. tit. 10, section 943(a)(1), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf.* In turn, Regulation Z § 1026.4(a)(3) generally includes fees charged by a mortgage broker, whether paid directly or indirectly. California law also requires separate disclosure of broker fees that are included in the amount financed by the borrower. Cal. Code Regs. tit. 10, section 956(a)(5).

such as an inspection fee for a construction project where the timing of inspections is determined by events occurring after origination. The State bankers association also stated that some loans may have multiple transactions within a one-year period, such as a line of credit that was originated and then increased, and asserted that it is unclear whether associated charges would be reported twice or combined.

Final Rule

For the reasons set forth herein, the Bureau is adopting § 1002.107(a)(12)(iv) and associated commentary with additions and adjustments to commentary to address comments regarding speculative charges and transactions with terms of less than one year. Final § 1002.107(a)(12)(iv) provides that a financial institution reports only charges scheduled to be imposed over the first annual period of the covered credit transaction. The Bureau understands that there are a variety of ways that small business credit transactions may be structured. This includes, for example, whether there is an interest rate imposed on the transaction, whether there are finance charges, and whether there are a myriad of other fees that may be scheduled to be paid or are contingent upon some occurrence. In addition, the Bureau understands that scheduled fees may constitute a substantial part of the cost of a covered credit product, and without knowledge of those fees, the cost of the credit would be incomplete. The Bureau believes that final § 1002.107(a)(12)(iv) enables data users to have a more accurate understanding of the cost of the covered credit transaction than if the data lacked information about scheduled fees.

There may be small business credit transactions that do not include an interest rate, but do include a monthly finance charge. If the financial institution were only required to report the interest rate on these types of transactions, the true cost of credit would be obscured because the monthly finance charge would not be reported. In addition, small business credit, like consumer credit, may include a number of other fees, such as annual fees and other similar charges. The information collected and reported under final § 1002.107(a)(12)(iv) allows data users to have a more complete picture of the cost of the covered credit transaction and promotes market transparency, thus furthering the business and community development purpose of section 1071. In addition, this pricing data furthers the fair lending purpose of section 1071 as it enhances the ability to understand the cost of credit and any disparities that may exist.

The Bureau believes that by requiring only scheduled charges to be reported (rather than the submission of all potential charges, some of which could be speculative), the data reported will be more accurate than if a financial institution were to make an educated guess as to what unscheduled charges will be imposed over the first annual period. Final § 1002.107(a)(12)(iv) does not require a financial institution to itemize the charges reported thereunder. The Bureau also believes that requiring charges to be itemized would add a considerable amount of complexity for financial institutions in collecting and reporting the initial annual charges, given the range of fees that could be charged and the variations in how they might be imposed.

A financial institution complies with final § 1002.107(a)(12)(iv) by not including charges for events that are avoidable by the applicant; this restriction is explained more fully in final comment 107(a)(12)(iv)–3 (unchanged from the proposal), which provides examples of types of avoidable charges. As noted above, the Bureau believes that the accuracy of the data reported is enhanced by only including charges that are scheduled to be imposed and not including potential charges that are contingent upon an action (or inaction) by the borrower. The Bureau also believes that only requiring financial institutions to report such charges for the first year, and not the life of the loan, will reduce any burden associated with reporting the data. This information should be included in the contract and, at most, would require a simple calculation to arrive at the total charges for the initial annual period. An example of how to calculate the initial annual charges for the first annual period is found in final comment 107(a)(12)(iv)–1. Additionally, to address comments received regarding uncertain or speculative charges, the Bureau has revised final comment 107(a)(12)(iv)–1 to state explicitly that, in a transaction where there will be a charge in the initial annual period following origination but the amount of that charge is uncertain at the time of origination, a financial institution complies by not reporting that charge as scheduled to be imposed during the initial annual period following origination.

The Bureau is finalizing comments 107(a)(12)(iv)–2 (providing that a financial institution complies with the provision by excluding any interest expense from the initial annual charges reported) and –4 (providing examples of charges scheduled to be imposed during the initial annual period) as proposed. The Bureau is also finalizing comment 107(a)(12)(iv)–5 as proposed. This comment provides additional explanation about what amount to report when the financial institution provides a discount on the charge if certain conditions are met. The Bureau understands that some financial institutions may provide a discount on specific charges when certain conditions are met. For example, a financial institution may provide a discount on a monthly charge if the borrower maintains a checking account at the financial institution. In such a circumstance, final § 1002.107(a)(12)(iv)–5 requires the financial institution to report the non-discounted amount to maintain consistency across the data that are reported by all financial institutions.

The Bureau is adopting new comment 107(a)(12)(iv)–6 to clarify that, for a transaction with a term less than one year, a financial institution complies with the provision by reporting all charges scheduled to be imposed during the term of the transaction. This comment was added to address requests for clarification regarding how to report the data for transactions with terms less than one year as well as what is meant by initial annual period.

107(a)(12)(v) Additional Cost for Merchant Cash Advances or Other Sales-Based Financing

Proposed Rule

Proposed § 1002.107(a)(12)(v) would have required financial institutions to report additional cost data for merchant cash advances or other sales-based financing transactions. Specifically, this cost is the difference between the amount advanced and the amount to be repaid, expressed in dollars. Proposed comment 107(a)(12)(v)–1 would have provided an example of the difference between the amount advanced and the amount to be repaid for a merchant cash advance.

The Bureau sought comment on proposed § 1002.107(a)(12)(v) and its commentary, including whether to require additional pricing information for merchant cash advances, and whether merchant cash advances could be structured in ways that evade the proposed reporting requirement, such as by omitting or making variable the amount to be repaid.

Comments Received

The Bureau received comments specifically regarding this aspect of the

proposal from several industry and community group commenters. Several joint letters from community groups, community oriented lenders, and business advocacy groups, as well as a trade association, asked the Bureau to require reporting the loan term for merchant cash advances or other sales-based financing transactions. These commenters stated that the loan term was necessary to compare the pricing of merchant cash advances, and offered potential methodologies for estimating unknown loan terms, including those from State commercial financing disclosure laws. A lender asked the Bureau to accommodate future transaction types by allowing financial institutions to report amounts under § 1002.107(a)(12)(v) even if the transaction is not a merchant cash advance or other sales-based financing transaction. Finally, a cross-sector group of lenders, community groups, and small business advocates agreed that § 1002.107(a)(12)(v), along with the other pricing data, would capture the cost of merchant cash advances.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(v) and comment 107(a)(12)(v)–1 as proposed. Final § 1002.107(a)(12)(v) requires financial institutions to report the difference between the amount advanced and the amount to be repaid, expressed in dollars, for merchant cash advances or other sales-based financing transactions. As with all aspects of pricing within final § 1002.107(a)(12), this requirement applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

As discussed in the NPRM, some types of commercial financing contain pricing terms that are difficult to reflect in data about interest rate and fees. For example, under a typical merchant cash advance, a merchant receives a cash advance and promises to repay it (plus some additional amount) to the merchant cash advance provider. Merchant cash advance providers generally do not provide an interest rate, and while they may charge fees at origination or during the first year, the majority of a merchant cash advance's cost to the merchant comes from the additional amount repaid by the merchant on top of the amount advanced. This additional amount may be expressed as a multiple of the amount advanced in the form of a factor rate or percentage, or it may be derived by comparing the total payback amount to the amount actually advanced. This additional amount is typically not characterized as interest, so it would not be reported under final § 1002.107(a)(12)(i). Nor is this additional amount characterized as a fee charged at origination or scheduled to be imposed during the first year after the transaction, so it would not be reported under final § 1002.107(a)(12)(ii) or (iv). Without an additional pricing data field to capture this additional amount along with any other fees the merchant cash advance provider charges, data users attempting to analyze merchant cash advance pricing would miss most of the cost of credit associated with these transactions. Therefore, the inclusion of this data field aids in fulfilling both the fair lending enforcement and business and community development purposes of the statute.

The Bureau believes that collecting and reporting this data will impose relatively little burden on financial institutions, because they can determine the additional amount repaid by computing the difference between the amount of revenue purchased and the purchase price typically found in the merchant cash advance contract. Commenters generally did not make assertions to the contrary.

As discussed in the section-by-section analysis of § 1002.107(a)(5) above, the Bureau is requiring, for merchant cash advances and other sales-based financing transactions, that financial institutions report the loan term, if any, that the financial institution estimated, specified, or disclosed in processing or underwriting the application or transaction. This information will allow data users to better understand and use the information reported pursuant to final § 1002.107(a)(12)(v). However, the Bureau is not adopting one commenter's suggestion regarding future transaction types that may resemble merchant cash advances or other sales-based financing, as the Bureau believes such transactions should be adequately covered by the ''other sales-based financing'' label and thus this information would be reportable for such transactions.

107(a)(12)(vi) Prepayment Penalties

Proposed Rule

Proposed § 1002.107(a)(12)(vi)(A) would have required financial institutions to report whether the financial institution could have included a prepayment penalty under the policies and procedures applicable to the covered credit transaction. Proposed § 1002.107(a)(12)(vi)(B) would have required financial institutions to report whether the terms of the covered credit transaction include a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due. Proposed comment 107(a)(12)(vi)–1 would have provided additional information on how to determine whether the applicable policies and procedures allow a financial institution to include prepayment penalties in the loan agreement.

The Bureau sought comment on proposed § 1002.107(a)(12)(vi) and its commentary, including whether to enumerate other types of contingent charges separately in the 1071 data to more accurately reflect the cost of covered credit transactions. The Bureau also sought comment on whether there are alternative data that would provide similar insight into whether certain borrowers are being steered into covered credit transactions containing prepayment penalty terms or other similar contingent terms.

Comments Received

The Bureau received comments regarding the reporting of prepayment penalty information from lenders, trade associations, and community groups. A number of community groups supported the proposal to collect prepayment penalty information. One asserted that information on prepayment penalties is important for data users to determine whether such charges are targeting underserved borrowers. Another noted that research by the Federal Reserve Board shows that many small business borrowers do not expect the balloon finance charge that many merchant cash advances and other transactions impose for prepayment.[653] A joint letter from community and business advocacy groups requested that the Bureau ensure that financial institutions cannot evade the reporting requirement by changing how prepayment penalties are described.

A number of trade associations and banks questioned the necessity of prepayment penalty data and claimed that it would be misleading. A group of trade associations stated that the Bureau offered no evidence that these penalties impact community development or are used in a discriminatory fashion. The same commenter also asserted that nearly all merchant cash advance providers collect a charge for prepaying the amount advanced, but this charge would not be reflected in the proposed

[653] Barbara Lipman & Ann Marie Wiersch, Bd. of Governors of the Fed. Rsrv. Sys., *Browsing to Borrow: ''Mom & Pop'' Small Business Owners' Perspectives on Online Lenders and Products* (June 2018), *https://www.federalreserve.gov/publications/files/2018-small-business-lending.pdf*.

prepayment penalty data point, leading to the data appearing to inflate the apparent cost of non-merchant cash advance credit. A State bankers association asserted that nondiscriminatory reasons exist for certain loans to have prepayment penalties even if a lender's general policies and procedures do not provide for them, so the reported data could not be used to detect steering. A bank stated that the proposal would not detect steering because it does not clarify whether the prepayment penalty applies to the transaction requested or the transaction approved.

Two trade association comments asserted that lending policies are written in general terms and do not address prepayment penalties. Another trade association commented that it is possible that every loan ''could'' have a prepayment penalty.

A number of commenters requested that the Bureau change the scope of the data collection. A lender stated that the data collection should be limited to a binary flag and not require details on the potential penalties themselves. Two banks and a State bankers association stated that the data collection should be limited to whether a prepayment penalty was actually charged because a lender's policies might change during the reporting year and are dependent on external factors, such as the requirements of a third-party guarantor. A joint letter from community and business advocacy groups asserted that the Bureau should require reporting of the amount of any prepayment penalty and the term over which the penalty could be imposed. Finally, a cross-sector group of lenders, community groups, and small business advocates stated that the data collection should be modified to capture the balloon finance charge that nearly all merchant cash advances, and many other small business loans, charge on prepayment. This commenter stated that, because this charge is the finance charge that would be paid over the original term of the loan, it would not be considered a ''penalty.''

Final Rule

For the reasons set forth herein, the Bureau is adopting final § 1002.107(a)(12)(vi) with one technical correction, adopting comment 107(a)(12)(vi)–1 as proposed, and adding new comment 107(a)(12)(vi)–2 regarding charges that become due immediately on prepayment. Final § 1002.107(a)(12)(vi)(A) requires a financial institution to report whether it could have included a charge to be imposed for paying all or part of the transaction's principal before the date on which the principal is due under the policies and procedures applicable to the covered credit transaction (notwithstanding whether such a provision was in fact included in this specific credit transaction). Final § 1002.107(a)(12)(vi)(B) requires financial institutions to report whether the terms of the covered credit transaction do in fact include such a charge. These provisions allow data users to determine what percentage of covered credit transactions could contain a prepayment penalty term, what percentage of such transactions actually contain such a term, and, together with other data points, the demographic profile of borrowers whose contracts do and do not include the term. The two provisions work together to allow data users to better determine whether certain borrowers are being steered towards covered credit transactions containing prepayment penalty terms.

Final comment 107(a)(12)(vi)–1 elaborates on the requirement to report whether financial institutions could have included a prepayment penalty in the covered credit transaction to clarify that the applicable policies and procedures are those that the financial institution follows when evaluating applications for the specific credit type and credit purpose requested. The Bureau believes this provision will ensure that similar credit products are being analyzed together and reduces the possibility that potential fair lending risk is incorrectly identified. In response to commenters who said that financial institutions' policies may change during the reporting year, the Bureau notes that comment 107(a)(12)(vi)–1 explains that the relevant policies and procedures are those in effect at the time of the covered credit transaction. A financial institution would not report based on different policies and procedures that might be adopted later in the reporting period.

New comment 107(a)(12)(vi)–2 explains that a financial institution complies with final § 1002.107(a)(12)(vi) by reporting as a prepayment penalty any balloon finance charge that may be imposed for paying all or part of the transaction's principal before the date on which the principal is due and provides an example which illustrates a balloon finance charge that should be reported. As explained above, one commenter stated that most merchant cash advances and many other transactions have finance charges that would be paid over the entire term of the loan but that immediately become due on prepayment. The Bureau agrees that it was not sufficiently clear that these balloon finance charges would have been covered under the proposed description of a prepayment penalty. In addition, another commenter asked the Bureau to make clear that financial institutions cannot evade the reporting requirement by changing how prepayment penalties are described. New comment 107(a)(12)(vi)–2 was added to address both of these concerns.

In response to commenters asserting that prepayment penalty data are unnecessary or misleading, the Bureau notes that small business loan contracts may include prepayment penalties and the penalties can be sizable and structured as a percent of the remaining outstanding balance. The Bureau also understands that there may be concern among stakeholders, including community groups, that certain small business applicants may be steered toward loans containing prepayment penalty terms. The collection of data regarding which contracts contain a prepayment penalty and whether a prepayment penalty could have been imposed on specific contract types allows the data to be analyzed for fair lending purposes to see if certain groups are more frequently entering into contracts containing prepayment penalties. From a market competition standpoint, financial institutions may want to know how frequently their competitors are using prepayment penalties, and collection of these data could improve market transparency and new product development opportunities. The Bureau is not convinced by commenters' assertions that the data will not be valuable nor that it should require reporting of additional data related to prepayment penalties. The Bureau believes the type of data required to be reported pursuant to final § 1002.107(a)(12)(vi) strikes the right balance between collecting information helpful to analyze for the purposes mentioned above and not requiring financial institutions to provide information regarding prepayment penalties.

107(a)(13) Census Tract

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the census tract in which is located the principal place of business of the . . . applicant.'' [654] This provision is similar to Regulation C, which requires reporting of the census tract in certain circumstances if the property securing the loan (or proposed to secure the loan,

[654] ECOA section 704B(e)(2)(E).

if the transaction was not originated) is in a county with a population of more than 30,000.[655] Under Regulation C, the financial institution generally finds the census tract by geocoding using the address of the property. Geocoding is the process of using a particular property address to locate its geographical coordinates, and from those coordinates one can identify the corresponding census tract.

CRA reporting of business loans by depository institutions also requires reporting of census tract. The Bureau understands that CRA allows reporting of a census tract based on the address or location where the proceeds of the credit will be principally applied.[656]

The Bureau proposed § 1002.107(a)(13) to require financial institutions to collect and report the census tract data point using a ''waterfall'' approach. The proposed rule would have required a financial institution to collect and report the census tract in which is located: (i) The address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or (ii) If the information in (i) is unknown, the address or location of the main office or headquarters of the applicant; or (iii) If the information in both (i) and (ii) is unknown, another address or location associated with the applicant. In addition, the proposed rule would have required that the financial institution also indicate which one of the three types of addresses or locations listed in (i), (ii), or (iii) the census tract is based on. Although the proposed rule did not specifically require it, the Bureau assumed that financial institutions or their vendors would generally use a geocoding tool to analyze the appropriate address to identify a census tract number.

The proposed approach would have required a financial institution to report the census tract of the proceeds address if it was available but would not have required a financial institution to ask about it specifically. Financial institutions would have been able to apply the waterfall approach to the addresses they were currently collecting; they would not have been required to specifically ask for the proceeds or headquarters addresses. In addition, the proposed method would have allowed a financial institution to report that it was unsure about the nature of the address if it had no information as to the nature or function of the business address it possessed.

Proposed comment 107(a)(13)–1 would have provided general instructions on using the waterfall reporting method, with examples for guidance. The Bureau believed that this comment would facilitate compliance and sought comment on whether any additional instructions or examples would be useful.

Proposed comment 107(a)(13)–2 would have explained that a financial institution would comply with proposed § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. The comment would also have made clear that a financial institution would not be required to investigate beyond its standard procedures as to the nature of the addresses or locations it collects.

Proposed comment 107(a)(13)–3 would have explained that pursuant to proposed § 1002.107(c)(1) a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided information, which would include at least one address or location for an applicant for census tract reporting. However, the comment would have further explained that if a financial institution was nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution would report that the census tract information was ''not provided by applicant and otherwise undetermined.''

The Bureau proposed a safe harbor in § 1002.112(c)(1) (renumbered as § 1002.112(c)(2) in the final rule), which would have stated that an incorrect entry for census tract would not be a violation of ECOA or subpart B if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. Proposed comment 107(a)(13)–4 would have cross-referenced that provision. See the section-by-section analysis of § 1002.112(c)(2) below for additional discussion of this safe harbor.

During the SBREFA process, some small entity representatives explained that they generally collect the main office address of the small business, which for sole proprietorships will often be a home address, and were generally not aware of the proceeds address. The Bureau's proposed waterfall approach would accommodate this situation by allowing financial institutions to report census tract using the address that they currently collect. While several small entity representatives were already geocoding applicants' addresses, others were concerned about the burden associated with geocoding for HMDA and one expressed a preference for the CRA method of geocoding, as did several other stakeholders. Accordingly, the Bureau sought comment on the difference between geocoding for HMDA and for CRA, and any specific advantages or disadvantages associated with geocoding under either method. In regard to a small entity representative's request for a Federal government tool capable of batch processing for geocoding of addresses, the Bureau noted that it was considering the utility of such a tool. As the SBREFA Panel recommended, the Bureau sought comment on the feasibility and ease of using existing Federal services to geocode addresses in order to determine census tract for section 1071 reporting purposes (such as what is offered by the FFIEC for use in reporting HMDA and CRA data).

The Bureau sought comment on its proposed approach to the census tract data point. In addition to the specific requests for input above, the Bureau noted that the waterfall method was intended to allow CRA reporters to provide the same data for both reporting regimes, but requested comment on whether the proposed method would achieve this goal and, if not, whether and how this data point should be further coordinated with CRA.

Comments Received

The Bureau received comments on this aspect of the proposal from numerous lenders, trade associations, community groups, and others. Several commenters supported the inclusion of the census tract data point, and many specifically discussed and supported the proposed waterfall approach to reporting. One CDFI lender stated that it currently collects this information for the CDFI Fund. Several community groups discussed the importance of knowing where loans were made to combat redlining and ensure that socially disadvantaged farmers and other small businesses can have appropriate access to credit. A community group and a trade association agreed with the Bureau's proposal that the waterfall method would allow section 1071 reporting to match CRA requirements. Another trade association said that financial institutions would be able to use an address provided by the applicant and agreed that reporting of the proceeds address would allow coordination with CRA, though it did not comment on the

[655] Regulation C § 1003.4(a)(9)(ii)(C). Regulation C also requires reporting of the property address for all applications.

[656] *See* 2015 FFIEC CRA Guide at 16.

proposed waterfall. Although they supported the waterfall approach, two community groups requested that financial institutions be required to ask for the location where the proceeds of the credit would be used, stating that this method would allow for better coordination with CRA and better fulfillment of the purposes of section 1071.

Several industry commenters stated that the census tract data point would be confusing and difficult to report. One commenter pointed out that multiple applicant addresses and address changes for applicants would complicate reporting. A national auto finance trade association stated that its members do not work with census tracts and that technical and process changes would be necessary to deliver this data.

A trade association stated that geocoding will be a significant burden for many credit unions, the vast majority of which do not collect census tract information for small business loans. That commenter further stated that although some CDFI credit unions collect census tract information, many are completely unfamiliar with census tracts—particularly credit unions that are not HMDA reporters. The commenter also said that the FFIEC geocoder does not permit batch inputs, which it said further slows application processes. Finally, the commenter requested that the Bureau develop a free tool that permits batch inputs and better enables efficient and cost-effective compliance.

Two banks and a trade association commented that many banks that are not HMDA reporters are unfamiliar with census tracts. Commenters also stated that the FFIEC geocoder works efficiently for addresses in and close to metro areas, but not as easily for more rural addresses, and in relation to new subdivisions and developments. They further pointed out that when an address is not ''matched'' in the FFIEC system, it requires manual plotting, which is time-consuming and difficult, and stated that a bank that makes strictly agricultural loans might find many non-matching addresses. Finally, two of these commenters suggested that reporting the State and county codes should be sufficient when there is no match in the FFIEC geocoder.

Several industry commenters specifically objected to the waterfall reporting method, which they stated was confusing and difficult, and many suggested it should not be mandatory. Some of these commenters requested clarification on how to report if there are multiple proceeds addresses, or if the bank learns of a different proceeds address after the loan closes. In addition, two commenters asked that the Bureau clarify whether the census tract should match the mailing address of the applicant or the physical address.

Numerous banks and trade associations stated that section 1071 reporting requirements, especially the census tract data point, overlapped or conflicted with HMDA and CRA reporting requirements, creating unnecessary difficulties. Most of these commenters asked that the Bureau coordinate these requirements and provide a complete exemption from section 1071, HMDA, or CRA for loans that overlap. Commenters requesting exemptions did not explain why the use of the proceeds address would not allow coordination between section 1071 and CRA census tract reporting.

Some industry commenters expressed concern that census tract information, especially when combined with the NAICS business type and other reported data, could facilitate reidentification of small business applicants. These commenters stated that this risk would be greater in rural areas.

Comments addressing the Bureau's proposed safe harbor for use of certain geocoders are addressed in the section-by-section analysis of § 1002.114(c)(1) below.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(13) and associated commentary with a minor edit for clarity. Final § 1002.107(a)(13) requires that financial institutions collect and report the census tract data point using the ''waterfall'' approach described above.

In regard to the comments expressing concern about the burden associated with collecting and reporting census tract information using a geocoder and by other means, the Bureau notes that census tract is specifically enumerated as a data point in the statute. In addition, the Bureau believes that its reporting method for the census tract data point leverages existing industry information collection practices and will result in useful information to further section 1071's purposes while avoiding imposing much additional burden on financial institutions. The waterfall method allows a financial institution to report census tract using an address it already has, with no further investigation; allows a financial institution to avoid further investigation when it is unsure about the nature of the address reported; and allows current CRA reporters to report the same address for this rule as they do for CRA.[657] In addition, the waterfall method prioritizes the proceeds address, which the Bureau considers to be particularly useful for both the fair lending and business and community development purposes of section 1071.

The waterfall approach adopted in the final rule requires a financial institution to report the census tract of the proceeds address if it is available, but does not require a financial institution to ask about it specifically. This provision is meant to address potential concerns about reporters spending time on complex, fact-specific questions and unintentionally misreporting this data point, which could occur if financial institution staff have to determine what kind of address they are reporting based on insufficient information. The Bureau believes that this option will be particularly helpful if the application is denied or withdrawn early in the application process before the nature of any address provided by the applicant is clear.

Requiring financial institutions to inquire as to the address where the proceeds will be applied, as some commenters requested, might result in slightly more proceeds addresses being reported. However, the Bureau does not believe that the extra information reported in certain instances would be worth the extra difficulty across all small business applications. In addition, the Bureau believes that the waterfall approach in collecting census tract data provides sufficient flexibility; making use of the waterfall voluntary, as some commenters suggested, would result in less useful information being collected while only reducing difficulty by a small amount. In regard to the comment asking whether the physical or mailing address or location should be used, the Bureau notes that the credit proceeds will be applied at a physical location, and the main office or headquarters of a business will also occupy a physical location. The third option in the waterfall, ''another address or location,'' does not suggest the nature of such an address, but the financial institution will need to have enough information to determine a census tract for that location.

As explained above, the Bureau understands that CRA currently requests reporting of a census tract based on the

[657] As explained below, the current CRA rulemaking envisions replacing small business and small farm CRA data collection with the 1071 data collection, but in the event CRA data is still reported under the current regime for some period of time after compliance with this rule is required, the Bureau believes that the ability to report the same data in the interim should reduce any operational difficulties related to census tract. *See* 87 FR 33884, 33997, 34005 (June 3, 2022).

address or location where the proceeds of the credit will be principally applied.[658] The Bureau also believes that CRA reporting on this data point is reasonably flexible, and a financial institution will be able to coordinate the two compliance regimes to report the same census tract. The commenters who stated that this data point would conflict with CRA reporting did not explain why they believed this to be so, and other industry commenters agreed that the census tract data point for section 1071 would allow coordinated reporting with CRA. The Bureau also notes that the recent CRA interagency proposed rule, if finalized, would eventually replace CRA small business and small farm data with data collected pursuant to section 1071, in which case this issue would likely be moot.[659]

Although the Bureau sought comment on the differences between HMDA and CRA census tract reporting, no commenters provided information on this issue. In regard to commenter concerns about overlaps or conflicts with HMDA reporting, the Bureau notes that the final rule excludes HMDA-reportable transactions from coverage, as discussed in the section-by-section analysis of § 1002.104(b)(2) above, so that concern is now moot as well.

The Bureau notes that section 1071's description of the census tract data point refers to the census tract for the applicant's ''principal place of business.'' [660] The Bureau considers the waterfall approach in final § 1002.107(a)(13) to be a reasonable interpretation of the undefined statutory term ''principal place of business,'' which the Bureau understands not to have a standard definition, and thus believes to be ambiguous. First, the Bureau believes that the address or location of the main office or headquarters of the applicant fits easily into one of the common meanings of ''principal place of business.'' In addition, the Bureau anticipates that, generally, the address where the loan proceeds will be applied will also be the main office or headquarters address.[661] The primary exception to this principle will be in the case of credit intended for purchase, construction/improvement, or refinancing of real property; under these circumstances, the Bureau reasonably interprets the term ''principal place of business'' to mean the principal location for business activities relating to the extension of credit at issue. Although ''another address or location associated with the applicant'' might not always be the principal place of business of the applicant, the Bureau considers this information to be the financial institution's best option for reporting data on the principal place of business when the nature of a location is unknown.

In the alternative, section 1071 authorizes the Bureau to include any ''additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau has determined that requiring reporting of the proceeds address will aid in fulfilling both the fair lending and business and community development purposes of section 1071 by providing more useful information on the location of the activity financed for fair lending analysis and understanding where the business and community development is occurring. Requiring reporting of another address or location associated with the applicant when both the proceeds address and the main office or headquarters address are not available will provide location data when otherwise none would be present, thus also aiding in fulfilling both the fair lending and business and community development purposes of section 1071 by providing more useful information on location for fair lending analysis and understanding where the business and community development will likely be occurring. In addition, requiring data on the nature of the address reported will aid in fulfilling both the fair lending and business and community development purposes of section 1071 by facilitating accurate analyses of the data reported. Also, in the alternative, to the extent that ''the principal place of business of the . . . applicant'' is understood to mean only ''main office or headquarters address'' (which, as explained above, the Bureau does not adopt as its interpretation of the statutory term) the Bureau believes it is appropriate to use its exception authority under ECOA section 704B(g)(2) to provide that financial institutions in certain situations may report the proceeds address or ''another address or location associated with the applicant,'' because the Bureau believes those addresses will carry out the purposes of section 1071 more appropriately than requiring the main office or headquarters address in every situation.

The Bureau is finalizing comment 107(a)(13)–1 through –4 with a minor edit for consistency. Comment 107(a)(13)–1 provides general instructions on using the waterfall reporting method, with examples for guidance, which will facilitate compliance.

Final comment 107(a)(13)–2 explains that a financial institution complies with § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. The comment also makes clear that a financial institution is not required to investigate beyond its standard procedures as to the nature of the addresses or locations it collects. The Bureau believes that this guidance strikes the right balance by allowing flexibility in reporting, and also requiring appropriate good faith compliance in exercising that flexibility, thereby yielding quality data. In regard to commenters' concerns about reporting census tract when there are multiple proceeds addresses, the Bureau notes that the rule requires reporting using the address where the proceeds will be or would have been *principally* applied, and allows for other addresses to be used if that address is unknown. As final comment 107(a)(13)–2 makes clear, as long as a financial institution determines which address to use in good faith, it will be in compliance with the rule. The Bureau believes that including detailed instructions on how to determine which proceeds address to report would increase the difficulty of reporting while only marginally enhancing the quality of the data reported. In regard to the comment about what to report when the proceeds or other address changes, because comment 107(a)(13)–2 requires that the address/location be identified in good faith, an address that the financial institution knows is no longer accurate

[658] *See, e.g.,* Off. of the Comptroller of Currency, Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., *Community Reinvestment Act; Interagency Questions and Answers Regarding Community Reinvestment; Guidance,* 81 FR 48506, 48551–52 (July 25, 2016).

[659] *See* 87 FR 33884, 33997, 34005 (June 3, 2022).

[660] ECOA section 704B(e)(2)(E).

[661] According to U.S. Census 2019 SUSB data, there are 6,081,544 firms with fewer than 500 employees (which will be used, for this purpose, as a rough proxy for a ''small business''); those firms collectively have 6,588,335 establishments (*i.e.,* locations). This means that, at most, approximately 8 percent of firms with fewer than 500 employees could have more than one location. *See* U.S. Census Bureau, *2019 SUSB Annual Datasets by Establishment Industry* (Feb. 2022), *https://www.census.gov/programs-surveys/susb/data/tables.html.* According to the U.S. Census Bureau's Non-employer Statistics, there are 27,104,006 non-employer establishments (regardless of revenue size). Non-employer firms account for fewer than 4 percent of all sales, though, and the vast majority are sole proprietorships. While not impossible, the Bureau believes it is very unlikely that non-employer firms would have more than one location. *See* U.S. Census Bureau, *All Sectors: Nonemployer Statistics by Legal Form of Organization and Receipts Size Class for the U.S., States, and Selected Geographies: 2019* (2019), *https://data.census.gov/cedsci/table?q=NONEMP2019.NS1900NONEMP&tid=NONEMP2019.NS1900NONEMP&hidePreview=true.*

would not be appropriate to use in determining the census tract when a more accurate address is available.

Final comment 107(a)(13)–3 explains that pursuant to final § 1002.107(c)(1) a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes at least one address or location for an applicant for census tract reporting. However, the comment further explains that if a financial institution is nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution reports that the census tract information was ''not provided by applicant and otherwise undetermined.'' Based on the Bureau's understanding of financial institutions' application procedures, the Bureau believes it is highly unlikely that a financial institution will not obtain some type of address for the applicant. Nonetheless, the Bureau permits financial institutions to report this data point using the ''not provided by applicant and otherwise undetermined'' response in order to facilitate compliance in those rare instances when the financial institution does not have the data requested. The reference in the comment to final § 1002.107(c)(1) makes clear, however, that a financial institution must maintain procedures reasonably designed to collect at least one address. As with the previous comment, the Bureau believes that this comment strikes the right balance by facilitating compliance and also emphasizing the requirement to collect appropriate data.

Final comment 107(a)(13)–4 cross-references a safe harbor the Bureau is finalizing in § 1002.112(c)(2), which states that an incorrect entry for census tract will not be a violation of ECOA or subpart B if the financial institution obtains the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. See the section-by-section analysis of § 1002.112(c)(2) below for additional discussion of this safe harbor. In regard to commenters' requests for a new Federal geocoding tool that allows for batch processing, the Bureau continues to explore this option.

Finally, as discussed above, some commenters were concerned about reidentification risk in regard to census tract reporting, especially when combined with NAICS industry codes and other data, and especially in rural areas. The Bureau appreciates concerns regarding the potential re-identification risk posed by the publication of unmodified census tract data. Accordingly, the Bureau believes that, if it decides to publish census tract, modification may be appropriate to mitigate potential re-identification risk to small business applicants and related natural persons. The Bureau notes that it will consider carefully what data will be publicly released, and will carefully protect applicant privacy, while preserving the utility of the dataset. See part VIII.B.6.xi below for discussion of this issue.

107(a)(14) Gross Annual Revenue

Proposed Rule

Section 1071 requires financial institutions to collect and report ''the gross annual revenue of the business in the last fiscal year of the . . . applicant preceding the date of the application.'' [662]

Proposed § 1002.107(a)(14) would have required reporting of the gross annual revenue of the applicant for its preceding full fiscal year prior to when the information is collected. The Bureau proposed to require reporting of a specific value for gross annual revenue—rather than a range—to simplify the reporting of gross annual revenue information for financial institutions and because it believed that a precise value would be more useful for data users, including the Bureau.

Proposed comment 107(a)(14)–1 would have clarified that a financial institution need not verify gross annual revenue information provided by the applicant to comply with proposed § 1002.107(a)(14), as some small entity representatives and other stakeholders suggested. The proposed comment would have explained that the financial institution may rely on statements of or information provided by the applicant in collecting and reporting gross annual revenue. The proposed comment would have also stated, however, that if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. The Bureau believed that a requirement to verify gross annual revenue could be operationally difficult for many financial institutions, particularly in situations in which the financial institution does not collect gross annual revenue currently. The Bureau also did not believe that such a requirement was necessary in fulfilling either of section 1071's statutory purposes. However, the Bureau believed that reporting verified gross annual revenue when the financial institution already possesses that information would not be operationally difficult and would enhance the accuracy of the information reported.

[662] ECOA section 704B(e)(2)(F).

Proposed comment 107(a)(14)–1 would have also provided specific language that a financial institution could use to ask about an applicant's gross annual revenue and would have explained that a financial institution could rely on the applicant's answer. The Bureau believed this language would facilitate compliance for financial institutions that currently do not collect gross annual revenue, collect it only in limited circumstances, or would otherwise find its collection challenging, as some small entity representatives and other stakeholders suggested.

Overall, the Bureau believed that this approach in proposed comment 107(a)(14)–1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information and providing language that a financial institution may use to ask for such information—should reduce the complexity and difficulty of collecting gross annual revenue information.

The Bureau believed that situations could arise in which the financial institution has identified that an applicant is a small business for the purposes of proposed § 1002.106(b) through, for example, an initial screening question asking whether the applicant's gross annual revenue is below $5 million, but then the specific gross annual revenue amount could not be collected. Therefore, the Bureau proposed comment 107(a)(14)–2, which would have first clarified that pursuant to proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, including the gross annual revenue of the applicant. The proposed comment would have then stated that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is ''not provided by applicant and otherwise undetermined.'' The Bureau believed that permitting this reporting flexibility would reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and the gross annual revenue could not be collected.

Proposed comment 107(a)(14)–3 would have clarified that a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. The proposed comment would have stated that, for example, if the financial

institution does not normally collect information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates when it has not collected that information. The Bureau believed that permitting, but not requiring, a financial institution to include the revenue of affiliates will carry out the purposes of section 1071 while reducing undue burden on financial institutions in collecting gross annual revenue information. Proposed comment 107(a)(14)–3 would have concluded by explaining that in determining whether the applicant is a small business under proposed § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue. This approach regarding affiliate revenue in proposed comment 107(a)(14)–3 was consistent with the approach regarding affiliate revenue for purposes of determining whether an applicant is a small business under proposed § 1002.106(b). The Bureau believed that this operational equivalence between proposed § 1002.107(a)(14) and proposed § 1002.106(b) would facilitate compliance and enhance the consistency of the data.

In the NPRM, the Bureau expressed skepticism regarding some small entity representatives' suggestions to allow estimation or extrapolation of gross annual revenue based on partially reported revenue, noting, for example, that a seasonal business's bank statements for its busy season would likely yield an inflated gross annual revenue when extrapolated to a full year. The Bureau sought comment on whether financial institutions should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and how such estimation or extrapolation would be carried out. The Bureau also noted that estimation or extrapolation of gross annual revenue would be sufficient for the purposes of determining small business status under proposed § 1002.106(b), subject to the requirement under proposed comment 107(a)(14)–1 that a financial institution must report verified gross annual revenue information if available.

The Bureau sought comment on its proposed approach to the gross annual revenue data point, as well as the specific requests for comment above. As the SBREFA Panel recommended, the Bureau also sought comment on how the timing of tax and revenue reporting can best be coordinated with the collection and reporting of gross annual revenue. In addition, the Bureau sought comment on the effect of cash flow versus accrual accounting on reporting of gross annual revenue.

Comments Received

The Bureau received comments on its proposed approach to the gross annual revenue data point from a range of lenders, trade associations, and community groups. With the exception of several agricultural lenders, industry commenters generally did not object to the Bureau's proposal to require the collection and reporting of gross annual revenue as required by ECOA section 704B(e)(2)(F) and three commenters (two community groups and a lender) expressed support for the proposed gross annual revenue data point. One of the community groups asserted that the gross annual revenue of the small business is a critical data element since research shows that smaller businesses are less likely to receive loans and that this data point is needed to assess whether banks are meeting credit needs of small businesses. The other community group remarked that it was critically important to allow for analysis looking at smaller buckets of small businesses based on gross revenue.

Several agricultural lenders, echoing comments from a major agricultural credit trade association, argued that the Bureau should not require the collection or reporting of gross annual revenue information for agricultural credit and urged the Bureau to use its exception authority to eliminate this data point for agricultural credit. The commenters argued that collecting gross annual revenue information would pose substantial challenges for them given the prevalence of the ''non-standard'' agricultural borrower, including the majority of farmers who only farm on a part-time basis, and because many agricultural loans are currently decisioned with principal reliance on credit scoring systems, without considering revenue from farming or off-farm income. One agricultural lender explained that its underwriting standards include personal W–2 and other off-farm income, arguing that inclusion of that information in reporting this data point would be misleading as to the size of the business applying for a loan because off-farm income is not truly business income. The same commenter asserted that if, on the other hand, the off-farm income is not reported, the data would be misleading as they would show many loans approved to farmers with low business revenue (where they have sufficient personal income) and other loans denied to farmers with higher business revenue (because of insufficient personal income). Another commenter noted it was unclear how to calculate gross annual revenue for many agricultural credit transactions because for both estate planning and asset preservation purposes, many family farms are set up using complex business entities consisting of multiple trusts, corporations, partnerships, and limited liability entities, and that this means that the applicant signing the note may differ from the denoted mortgagors and guarantors, but all of whom are family members or business entities they own. Many of these agricultural lenders suggested that instead of gross annual revenue information, the appropriate metric for agricultural credit should be ''gross sales of agricultural or aquatic products'' as defined by the Farm Credit Administration in the prior year.

Some bank commenters suggested the Bureau align with other reporting regimes (such as HMDA and CRA) by adopting a definition of gross annual revenue based on annual revenue relied upon to make the credit decision. Several explained inconsistencies among regulatory approaches to gross annual revenue, pointing out the Bureau's proposal would require collecting gross annual revenue from the preceding fiscal year, whereas HMDA reporting requires use of the income considered in making the credit decision and the CRA utilizes gross annual revenue used to make the credit decision. Several commenters asserted that using a prior year's gross annual revenue would be problematic for many small businesses that cannot produce usable financial statements, including tax returns, immediately upon the close of a fiscal year. One such commenter elaborated that tax returns, which are often the only available income statements, may not be ready until September, resulting in many lenders relying on a tax return from two years ago or using a pro forma revenue outline. Another bank commenter asserted that using similar, but differently defined, data points between section 1071 and CRA would complicate the reporting process and could be avoided by aligning the definitions. One commenter recommended aligning with CRA for originated loans by using gross annual revenue used to make the credit decision, but for non-originated loans (which are not reported under the CRA) using gross annual revenue information that has been provided by applicants absent credit decisions (such as in cases of some withdrawn or incomplete applications).

Some commenters provided market intelligence related to the collection of gross annual revenue data. A trade association stated that collecting gross annual revenue information can be complicated because many small businesses have loan guarantors and co-borrowers. Another trade association explained that in the vehicle financing context, the borrower employee who is responsible for acquiring the vehicle may not be familiar with the total revenue of the company and the owner(s) of the company may not want to share this information with all employees. A few industry commenters stated that there are many instances where gross annual revenue information is not collected in the normal course of business because underwriting may be based on other factors such as a cash flow analysis, net income, or debt-to-service ratio. For this reason, one of these commenters stated that it should be clear that applicants have no obligation to provide gross annual revenue information. Another asserted that where an applicant declines to provide gross annual revenue information, the Bureau is creating a significant regulatory challenge for the financial institution by requiring it to submit application-level information when it will not know for certain whether the business is a small business nor have any reliable way of obtaining gross annual revenue information absent a third-party provider, which do not exist for many industries. Conversely, a community group stated that gross annual revenue was likely to be collected as part of the underwriting process.

A number of industry commenters requested clarification regarding how to report gross annual revenue information. A few commenters requested guidance regarding appropriate sources for gross annual revenue information. One bank commenter requested consistency in what defines gross annual revenue and asked whether gross sales listed on a tax return constitute an acceptable source for this information. Another commenter asked the Bureau to delineate whether tax returns, accountant prepared financial statements, or internal profit and loss statements constitute acceptable source documentation.

Several industry commenters asked for guidance or made suggestions regarding how to calculate gross annual revenue. One asked whether the Bureau intends for gross annual revenue to be defined as the total of all income (account credits) for the year before subtracting any expenses (account debits). Another asked whether, in the case of a business that uses a calendar year for its fiscal year and applies for a loan early in the next fiscal year with many unknown numbers related to the prior fiscal year, the applicant should provide an estimate or whether the applicant should provide the information from the next preceding fiscal year. Two commenters suggested that the Bureau clarify that different business units within the financial institution may use different methods to determine gross annual revenue, as long as the methods are used consistently within each business unit. Another asked if, in the case of an applicant that owns two or more businesses, the financial institution should only collect and report the gross annual revenue of the business being financed and not combined revenues of all owned businesses.

A number of industry commenters asked for clarification and made suggestions regarding how to report gross annual revenue for a startup business, a new line of business, or a business with a change in structure or ownership. A few commenters asked whether ''zero'' and/or ''not available'' is an acceptable response for a startup business. One commenter urged the Bureau to define gross annual revenue in a straightforward manner that does not impact credit opportunities (nor compliance) for newly formed businesses that do not have historical gross annual revenue. Another commenter suggested the Bureau address or exempt new businesses from section 1071 reporting. Two commenters asked whether ''zero'' or ''not provided by applicant and otherwise undetermined'' should be reported when a borrower is establishing a new line of business but already has revenue in other businesses; one also asked if treatment should differ based on whether or not the new business line was in the same industry as the existing businesses. A bank commenter opined that for a start-up business, the financial institution should use the actual gross annual revenue to date (including the reporting of $0 if a new business has had no revenue to date) and that pro-forma projected revenue figures should not be reported since these figures do not reflect actual gross revenue. Another bank commenter suggested the Bureau develop FAQs and other documents that applicants can consult to help them determine what number to supply for gross annual revenue, particularly when a business is starting up or establishing a new business line. Another industry commenter asked how to handle situations where there is a change in structure or ownership of the business and it is unclear how the gross annual revenue should apply to the applicant.

Two industry commenters specifically suggested changes related to how to report the gross annual revenue of single purpose entities and other real estate financing vehicles. Both suggested allowing a financial institution to rely on the gross annual revenue generated by the property or the applicant's projected gross annual revenue for purposes of determining the small business status of the applicant. One also suggested specific revisions to the commentary to incorporate its suggestions.

The Bureau also received some general comments regarding the treatment of gross annual revenue information from an applicant's affiliate. A trade association expressed support for the Bureau's proposal to clarify that a financial institution need not verify gross annual revenue information provided by the applicant and is permitted—but not required—to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. Two community group comments urged the Bureau to require reporting on the gross annual revenue of parent companies and beneficial owners of limited liability companies in order to avoid obfuscating extensive property ownership.

Some industry commenters provided suggestions regarding how to handle gross annual revenue information from the parent companies or affiliates of applicants. A bank inquired whether revenue or income relied upon from co-signers or guarantors that are not affiliates of the borrower should be factored into the gross annual revenue determination. A group of trade associations suggested specific technical revisions to the commentary for clarity. Two bank commenters noted there may be inconsistencies in the data where one institution looks like it is lending more to small(er) businesses because it opts not to include gross annual revenue of affiliates. Two other commenters asked that reportable gross annual revenue be the gross annual revenue of both the applicant and all of its affiliates. A bank recommended the Bureau further explain how to handle situations where the applicant is using multiple owned businesses/affiliates to support sufficient cashflow, and whether there are repercussions for excluding/including multiple revenues used in the credit decision. A group of trade associations representing the commercial real estate industry asked

the Bureau to provide additional guidance on what types of entities may be affiliates of an applicant, *e.g.,* as a result of common ownership or common control. Another trade association suggested that the Bureau make minor revisions to commentary to clarify that a lender that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions.

A few commenters specifically asked for clarity regarding the treatment of real estate affiliate revenue. These commenters explained that many of their loans are to real estate investors who often form and apply through a single-purpose limited liability company that has no gross annual revenue (and therefore would meet the proposed definition of a small business) but that may be affiliates of many other single-purpose limited liability companies and individual owners. These commenters noted that they typically underwrite these loans based on a schedule of other real estate in which the single purpose entity (or its sponsor) has an ownership interest and by using a global debt coverage calculation that considers the combined income of the applicant and all affiliated businesses, which can often exceed $5 million annually. A group of trade associations representing the commercial real estate industry stated that under the SBA's general principles of affiliation, the single purpose entities that own that other real estate would be affiliates of the applicant single purpose entity, because of the overlapping ownership interest. They also stated that the single purpose entities on the schedule of real estate could additionally be affiliates of the applicant single purpose entity where one or more officers, directors, managing members, or partners controls the board of directors or management of both the applicant single purpose entity and the single purpose entities on the schedule of real estate. A bank asked the Bureau to clarify that such businesses should be determined to be ''small businesses'' for which data collection and reporting is required only if the combined income of the business and its related affiliates does not exceed the threshold set. The group of trade associations suggested revisions to the commentary that, in the case of single purpose entities, would allow a financial institution to consider the owners of any real property listed on a schedule of real estate as affiliates of the applicant and would also, under certain circumstances, allow a financial institution to estimate the gross annual revenue of any income-producing real property for purposes of determining an applicant's small business status. They also suggested that for an applicant that is a newly created single purpose entity, a financial institution should be permitted to apply the $5 million gross annual revenue threshold to either the gross annual revenue of the property for its most recent fiscal year under its prior owner or the single purpose entity's projected gross annual revenue.

Some commenters asked for guidance or argued in favor of using estimates and extrapolations when exact gross annual revenue information is unavailable. A bank asked if using an estimate was permitted when the applicant does not have prior fiscal year information completed. Another commenter suggested that when an applicant does not provide information regarding its gross annual revenue but that applicant's revenue is tracked through a technology company's online platform (*e.g.,* its sales on the company's online marketplace), a covered financial institution should be able to report gross annual revenue based on revenue information obtained from the platform data. The commenter argued that permitting use of this alternative data point would serve the purposes of section 1071 by enabling technology companies to collect and report information on a greater number of applications, while also reducing the compliance burden for financial institutions. Two commenters argued that for consistency, the Bureau should allow financial institutions to extrapolate or estimate an applicant's gross annual revenue, claiming that the Bureau proposed to allow *institutions* (not just applicants) to rely on extrapolated or estimated revenue data for determining whether or not a business is a small business.

Many industry commenters supported the Bureau's proposal to permit financial institutions to rely upon gross annual revenue information provided by the applicant without any requirement to verify. Many of these commenters noted that they do not currently collect gross annual revenue information with every application and even if it is collected, they do not always verify the amount provided, as underwriting is often based on other factors such as a cash flow analysis or debt-to-service ratio. One commenter noted that the flexibility to use the gross annual revenue provided by the applicant and without verification allows financial institutions to continue using current, proven underwriting practices and does not add to the compliance burden by requiring additional revenue verification steps.

The Bureau received some general comments regarding its proposal to not require verification of gross annual information but to require reporting of verified information when available. Two banks requested further clarification regarding the meaning of ''verification,'' one of whom argued that neither the identification and assessment of income figures (not the same as gross annual revenue) by a financial institution during the underwriting and credit decision process nor the post-origination independent testing and validation of the small business data file should be considered ''verification.'' The other bank stated that exact gross annual revenue information is not always known until a tax return is completed and asked if the self-reported gross annual revenue information should be reported or the information found later on the tax return.

Two community groups urged the Bureau to require the verification of gross annual revenue information. One noted that tax returns are generally available and can be used to confirm the applicant's gross annual revenue information. The other asserted that because the accuracy of determining whether credit needs of small businesses are being met hinges on the accuracy of collecting and reporting the revenue size of the business and because using tax documents or cash flow information makes it feasible for the lender to verify annual revenue, the Bureau should require the verification of gross annual revenue information. This community group argued that if affiliates are not accounted for in data collection, the data could include businesses that exceed the revenue limits established by the Bureau, thereby reducing the efficacy of the data in reporting on the experiences of small businesses in the lending marketplace. The commenter suggested that the Bureau thus investigate this issue and determine whether there are feasible methods a lender can use to identify the presence of affiliates.

Some industry commenters suggested the Bureau provide a safe harbor and/or remove its proposed requirement to report verified gross annual revenue information. Commenters requested the Bureau specify that the financial institution has no responsibility to verify the number supplied by the applicant. A few commenters also suggested the Bureau institute a safe harbor to ensure that whatever gross annual revenue number is supplied by the applicant can be reported. Commenters urged the Bureau to clarify that a financial institution is not liable

for misinterpretation in answering questions or providing information to the applicant beyond the proposed gross annual revenue question. One commenter suggested that if it is the lender's practice to revise the application information in its system to reflect what it believes to be a verified number, the Bureau should permit the lender to report the verified number retained in its system, rather than requiring the lender to maintain both numbers in its system. This commenter also argued that a lender's verification of revenue should not result in the lender being required to change the applicant's self-classification as being a small business or not being a small business because the determination of whether or not an applicant is a ''small business'' needs to be made by the applicant at the time of application.

Several community groups and a CDFI lender expressed support for reporting gross annual revenue as a specific dollar amount rather than in ranges. These commenters emphasized the importance of having precise and accurate data on gross annual revenue because this information is a fundamental determinant of whether a business is deemed to be small and all of its attendant information is captured and collected as part of the 1071 dataset. One commenter argued gross annual revenue in discrete units rather than bands was needed to assess the availability of credit to the smallest businesses, especially those owned by women and people of color. Another commenter asserted that revenue categories should be more detailed than those in the CRA small business loan data because research revealed the inadequacies with the CRA classifications since businesses with revenues below $500,000 had markedly less access to loans than businesses with revenues above this amount. This commenter argued in the alternative that should the Bureau adopt a range for gross annual revenue, it should select the mid-point with $10,000 increments as a continuous variable as the most accurate for capturing experiences of the range of small businesses in the lending marketplace.

With regard to the time frame for usability of gross annual revenue information, a bank stated that gross annual revenue information should only be usable for one fiscal year. A trade association suggested that financial institutions not be required to re-request gross annual revenue for new credit applications when they can rely on their records from previous transactions.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(14) and associated commentary with revisions for clarity and consistency. Final § 1002.107(a)(14) requires reporting of the applicant's gross annual revenue for its preceding fiscal year. The Bureau is requiring that financial institutions report a specific value for gross annual revenue—rather than a range—to simplify the reporting of gross annual revenue information for financial institutions and because it believes a precise value is more useful for data users, including the Bureau. However, the Bureau has not yet determined how it will publish gross annual revenue data in the dataset. The Bureau will consider whether modification techniques, such as ranges, may be appropriate after it conducts its full privacy analysis. See part VIII below for further discussion about the privacy analysis and public disclosure of data.

The Bureau is not categorically exempting agricultural credit from the requirement to collect and report gross annual revenue, as requested by some commenters. The Bureau understands, as noted by commenters, that most farmers in this country farm on a part-time basis and that the gross annual revenue data point may pose challenges given the prevalence of ''non-standard'' agricultural borrowers such as customers applying jointly despite having separate farming operations. The Bureau also understands from commenters that many Farm Credit System lenders decision applications without either considering off-farm income or revenue from farming; instead, lenders rely principally on credit scoring systems. Nevertheless, the Bureau believes that omitting the gross annual revenue data point for agricultural credit transactions would introduce inconsistency in data collected across different industries and would not support section 1071's statutory purposes. The Bureau notes that data users will be able to identify agricultural credit transactions using the reported 3-digit NAICS code and make any necessary adjustments in their analyses to account for particularities unique to agricultural industries. The Bureau also believes, as discussed below, that the suggested gross annual revenue question in final comment 107(a)(14)–1 will facilitate compliance for agricultural lenders that currently do not collect gross annual revenue, particularly because the financial institution may rely on the applicant's answer. As discussed above in the section-by-section analysis of § 1002.106(b), the Bureau does not believe that ''gross sales of agricultural or aquatic products'' in the prior year would be an appropriate metric for agricultural credit in this final rule, nor that this should form the basis for a separate small business definition for agricultural businesses.

The Bureau has considered the comments regarding the collection and reporting of gross annual revenue and it believes its approach in final comment 107(a)(14)–1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information, and providing language that a financial institution may use to ask for such information—will reduce commenters' concerns regarding complexity and difficulty of collecting gross annual revenue information.

Final comment 107(a)(14)–1 clarifies that a financial institution reports the applicant's gross annual revenue for the fiscal year preceding when the information was collected. The Bureau believes this will clarify the timing requirements for collection of the gross annual revenue data point. The final comment provides specific language that a financial institution may use to ask about an applicant's gross annual revenue and explains that a financial institution may rely on the applicant's answer (unless subsequently verified or updated), even if the applicant's statements or information is based on estimation or extrapolation. The Bureau believes this language will facilitate compliance for financial institutions that currently do not collect gross annual revenue, collect it only in limited circumstances, or would otherwise find its collection challenging, as some commenters suggested.

Final comment 107(a)(14)–1 also clarifies that a financial institution need not verify gross annual revenue information provided by the applicant to comply with final § 1002.107(a)(14). The comment explains that the financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue. The comment also states, however, that if the financial institution verifies the gross annual revenue provided by the applicant it must report the verified information. The Bureau understands, as noted by industry commenters, that a requirement to verify gross annual revenue would be operationally difficult for many financial institutions, particularly in situations in which the financial institution does not currently collect gross annual revenue. The Bureau does not believe that such a

requirement is necessary to fulfill either of section 1071's statutory purposes. However, the Bureau believes that reporting verified revenue when the financial institution already possesses that information will not be operationally difficult and will enhance the accuracy of the information collected. For the same reasons and for the reasons outlined in its discussion of final comment 107(c)–5, the Bureau is clarifying in final comment 107(a)(14)–1 that a financial institution reports updated gross annual revenue data if it obtains more current data from the applicant during the application process. The comment states that if this updated information is on data the financial institution has already verified, the financial institution reports the information it believes to be more accurate, in its discretion.

With respect to the suggestions that the Bureau further clarify the meaning of ''verify,'' the Bureau believes that additional specificity in the rule itself could unnecessarily constrain financial institutions. The Bureau interprets the word ''verification'' to mean the intentional act of determining the accuracy of information provided, in this case for the purpose of processing and underwriting the credit application, and potentially changing that information to reflect the determination. Gross annual revenue information that may or may not be more accurate than applicant-provided data and is not part of a financial institution's verification of the file's applicant-provided data or used by the institution in processing or underwriting the application need not be reported. The Bureau agrees with the commenter who stated that post-origination independent testing and validation of the small business data file does not constitute ''verification.'' In situations where a financial institution verifies only a portion of the small business's provided gross annual revenue figure (perhaps because the institution is relying on that portion for its credit decision), the financial institution has not verified the entire gross annual revenue amount provided by the applicant, and it may continue to rely on the applicant's statement or information, and it need not report the partially verified information.

The Bureau does not believe it would be appropriate to use a definition of gross annual revenue for this rule based on the annual revenue relied upon to make the credit decision. Given both the statutory language requiring the collection and reporting of ''the gross annual revenue of the business in the last fiscal year'' and section 1071's statutory purposes, the Bureau believes that using the small business's entire gross annual revenue, which may differ from revenue relied upon in making the credit decision, is the better approach to implement this data point in final § 1002.107(a)(14). Moreover, the Bureau notes that—unlike for this final rule—a business's gross annual revenue is not determinative of either HMDA or CRA coverage. Here, the Bureau believes it is important to obtain the applicant's entire gross annual revenue for more accurate identification of business and community development needs and opportunities. The Bureau thus agrees with commenters that gross annual revenue data are important to assess the availability of credit to the smallest firms, especially those owned by women, minorities, and LGBTQI+ individuals. Moreover, for credit transactions that are underwritten without consideration or collection of a small business's gross annual revenue, no information would be reported for this data point under a relied-upon standard. Lastly, the Bureau believes it important to ensure that the gross annual revenue figure used to determine small business status is the same total figure as the gross annual revenue reported for the data point. Using different figures could create data discrepancies and disconnects and would ultimately result in greater compliance risk for financial institutions.

In addition, the Bureau does not believe that financial institutions need a safe harbor to ensure that whatever gross annual revenue number is supplied by the applicant can be reported or that it would be appropriate to remove the requirement to report verified gross annual revenue information when the financial institution in fact verifies it. Final comment 107(a)(14)–1 already clarifies that a financial institution need not verify gross annual revenue information provided by the applicant to comply with final § 1002.107(a)(14) and thus a safe harbor is not necessary to allow reporting of the gross annual revenue number supplied by the applicant. As one commenter explained, some financial institutions already revise application information in their systems with a verified gross annual revenue number and thus the Bureau does not believe that reporting verified revenue when the financial institution already possesses that information will be operationally difficult. In such situations, the financial institution may report the verified number retained in its system and is not required to maintain both numbers in its system. Moreover, the Bureau agrees with the commenter who stated that the accuracy of determining whether the credit needs of small businesses are being met hinges on collecting and reporting the revenue size of the business and thus the Bureau believes that reporting verified revenue when available will enhance the accuracy of the information collected.

With respect to requests for guidance from commenters regarding acceptable sources of gross annual revenue information, the Bureau does not believe it would be appropriate to require the use of any specific documentation. However, the Bureau notes that gross annual revenue information can be reasonably derived from a variety of sources including tax returns, accountant-prepared financial statements, internal profit and loss statements, cash flow analyses, or any type of business income documentation that the financial institution reasonably relies on in the normal course of business.

With respect to comments regarding how to calculate gross annual revenue, the Bureau notes that the suggested applicant question in final comment 107(a)(14)–1 states that gross annual revenue is the amount of money the business earned before subtracting taxes and other expenses. The comment further states that an applicant may provide gross annual revenue calculated using any reasonable method. Different business units within the financial institution may use different methods to ascertain gross annual revenue, as long as the methods are used consistently within each business unit.

The Bureau believes that situations could arise in which the financial institution has identified that an applicant is a small business for the purposes of final § 1002.106(b) through, for example, a screening question asking whether the applicant's gross annual revenue is $5 million or less, but then the financial institution is unable to collect or determine a specific gross annual revenue amount. Therefore, the Bureau is finalizing comment 107(a)(14)–2 substantively as proposed. The comment first clarifies that pursuant to final § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including the gross annual revenue of the applicant. The final comment then states that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is ''not provided by applicant and otherwise undetermined.'' The

Bureau believes that permitting this reporting flexibility will reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and gross annual revenue could not be collected.

The Bureau is finalizing comment 107(a)(14)–3 with minor revisions for clarity and consistency. The Bureau is adopting commenters' suggestions to add a cross reference to comment 106(b)(1)–3 and to remove an example provided in the proposed commentary for additional clarity. This example would have provided that if the financial institution does not normally collect information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates when it has not collected that information. The Bureau shares the commenter's concern that this comment may be interpreted to preclude a financial institution that does not collect affiliate revenue in all transactions from collecting affiliate revenue in some transactions and believes the comment is sufficiently clear without this example.

Final comment 107(a)(14)–3 also clarifies that a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. For example, if the financial institution has not collected information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates. The Bureau is adopting suggested revisions to comment 107(a)(14)–3 and additionally notes that a financial institution that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions. The Bureau believes this comment is responsive to one commenter's question about how to report gross annual revenue for an applicant with two businesses because it permits, but does not require, reporting of gross annual revenue for an applicant that includes the revenue of affiliates, which may include a business with common ownership. Final comment 107(a)(14)–3 concludes by explaining that in determining whether the applicant is a small business under proposed § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue. The Bureau noted that final comment 106(b)–3 follows the same approach to affiliate revenue for purposes of determining whether an applicant is a small business under final § 1002.106(b). The Bureau believes that this operational equivalence between final § 1002.107(a)(14) and final § 1002.106(b) will facilitate compliance and enhance data consistency.

The Bureau recognizes, as noted by commenters, that there may be inconsistencies in the data where one financial institution looks like it is lending more to small(er) businesses as it opts not to include gross annual revenue of affiliates versus another financial institution that opts to include such revenue when it reports the gross annual revenue of an applicant. However, the Bureau is not requiring reporting of the gross annual revenue of both the applicant and all of its affiliates, nor is it requiring reporting of revenue for parent companies and beneficial owners of limited liability companies. The Bureau believes that permitting, but not requiring, a financial institution to include the revenue of affiliates will carry out the purposes of section 1071 while reducing undue burden on financial institutions in collecting gross annual revenue information. The Bureau considered whether there are feasible methods to identify the presence of affiliate revenue, as a commenter suggested, but ultimately has determined that such an identifier could interfere with allowing a financial institution to rely on an applicant's self-reported gross annual revenue information and, in any case, would introduce additional complexity into reporting. In response to a question about whether revenue or income relied upon from co-signers or guarantors that are not affiliates of the applicant should be factored into the gross annual revenue determination, the Bureau notes that the final rule only *requires* the collection and reporting of gross annual revenue of the *applicant.*

The Bureau understands there may also be instances, as indicated by one commenter, where the applicant may use multiple owned businesses/affiliates to support sufficient cashflow, and in those instances, a financial institution may rely on an applicant's representations regarding gross annual revenue that include affiliates' revenue. For additional guidance on what types of entities may be affiliates of an applicant, *e.g.,* as a result of common ownership or common control, see the section-by-section analyses of §§ 1002.102(a) and 1002.106(b).

The Bureau has considered the comments regarding the treatment of real estate affiliate revenue, but is not adopting revisions to, in the case of single purpose entities, allow a financial institution to categorize all owners of any real property listed on an applicant's Schedule Of Real Estate Owned as affiliates of the applicant. The Bureau is likewise not adopting revisions to allow a financial institution to estimate or project the gross annual revenue of any income-producing real property for purposes of determining the applicant's small business status. The Bureau agrees that under the SBA's general principles of affiliation, ''common investments'' affiliation can be based on shared investments in or joint ownership of real estate.[663] Thus, the owners of real estate that is also owned by the applicant may be affiliates of the applicant. However, the Bureau is not adopting the suggested revisions to commentary because affiliate determinations are inherently fact-specific and rebuttable,[664] and the Bureau does not believe it would be appropriate to categorize all entities as affiliates based on a form listing.

The Bureau has considered the comments regarding whether financial institutions should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and is making a minor revision in final comment 107(a)(14)–1 to emphasize a manageable method for collecting full gross annual revenue when a financial institution does not already do so. Specifically, final comment 107(a)(14)–1 clarifies that a financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue, even if the applicant's statement or information is based on estimation or extrapolation, and that an applicant may provide gross annual revenue calculated using any reasonable method. As such, when an applicant does not yet have fiscal year information completed (a hypothetical provided by a commenter), the applicant may choose to provide its gross annual revenue using any reasonable method, including

[663] *See* 13 CFR 121.103(f) (''Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or *firms with common investments,* or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.'') (emphasis added); Small Bus. Admin., *Small Business Compliance Guide: A Guide to the SBA's Size Program and Affiliation Rules* (July 2020), *https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf.*

[664] *See, e.g.,* 13 CFR 121.103(f) (''Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.'').

estimating or extrapolating based on a prior fiscal year's tax return. The Bureau believes that this flexibility will help address concerns from commenters that tax returns may not be immediately available upon the close of a fiscal year. As noted by another commenter, an applicant may alternatively wish to provide revenue figures generated by a technology company's online platform (*e.g.,* through sales on the company's online marketplace). The Bureau notes that under final § 1002.107(b), however, a financial institution must report verified gross annual revenue information if available. Moreover, as provided by new comment 107(c)–5, a financial institution reports updated applicant-provided data if it obtains more current data during the application process; if this updated information is on data the financial institution has already verified, the financial institution reports the information it believes to be more accurate, in its discretion.

The Bureau also wishes to clarify some apparent confusion among some commenters who claimed that the proposal would have allowed *financial institutions* to extrapolate or estimate an applicant's revenue to determine whether or not a business is a small business. The proposal indicated that financial institutions could rely on extrapolated or estimated revenue information provided by *applicants.* The Bureau is making this position clear with final comment 107(a)(14)–1. The Bureau sought comment on whether *financial institutions* should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and how such estimation or extrapolation would be carried out. On this issue, the Bureau does not believe that it would be appropriate to permit such estimation or extrapolation for the identification of small businesses about whom data collection and reporting is required, and thus financial institutions' own extrapolation or estimation should likewise not be used in reporting gross annual revenue in order to maintain consistency.

With respect to comments asking how to report gross annual revenue for a startup business, a new line of business, and/or a business with a change in structure or ownership, the Bureau is adding new comment 107(a)(14)–4, which notes that in a typical startup business situation, the applicant will have no gross annual revenue for its fiscal year preceding when the information is collected because either the startup existed but had no gross annual revenue or it simply did not exist in the preceding fiscal year. In these situations, the financial institution reports that the applicant's gross annual revenue in the prior fiscal year is ''zero.'' The Bureau agrees with the commenter that suggested, for a start-up business, the financial institution should use the actual gross annual revenue for its preceding fiscal year (including the reporting of $0 if a new business has had no revenue to date) and that pro forma projected revenue figures should not be reported since these figures do not reflect actual gross revenue.

In situations where an applicant is establishing a new line of business but already has revenue in other businesses, such as in the case of a sole proprietor with an established in-home child-care center who now seeks financing to start a new line of business offering house-cleaning services, the Bureau notes that final comment 107(a)(14)–3 clarifies that a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. This comment may also apply to situations where there is a change in structure or ownership of the business. In response to a question from a commenter, the Bureau does not believe that treatment of affiliate gross annual revenue information should differ based on whether or not the new business line was in the same industry as the existing businesses. The Bureau notes that according to the definition of affiliate provided in final § 1002.102(a), which refers to the SBA's rules for determining affiliation (13 CFR 121.103), affiliation is not limited to businesses in the same industry. The Bureau also notes that final § 1002.106(a) defines a business as having the same meaning as the term ''business concern or concern'' in 13 CFR 121.105, which expressly provides that a firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity and that the annual receipts and employees of the predecessor will be taken into account in determining size. This successor-in-interest rule would apply to situations where a business reorganized, and a new entity emerges with essentially the same assets and liabilities as the old concern.[665]

The Bureau is not exempting new businesses from having application data reported, as suggested by one commenter, because the Bureau believes that doing so would contravene section 1071's statutory purposes. The Bureau does not believe that the final rule will disproportionately impact credit opportunities (or compliance) for newly formed businesses that do not have the historical gross annual revenue. However, as suggested by a commenter, the Bureau will track questions related to collecting and reporting gross annual revenue information and may develop FAQs or other materials as necessary to help financial institutions help applicants determine what number to supply for gross annual revenue, particularly when a business is starting up or establishing a new business line.

The final rule does not permit financial institutions the option to use the gross annual revenue figures provided by an applicant for up to three years from the date of an application for which the information was gathered, as requested by one commenter. However, under final § 1002.107(d), discussed below, the Bureau is permitting financial institutions to reuse previously collected gross annual revenue information when the data were collected within the same calendar year as the current covered application. The statutory requirement is for the applicant's gross annual revenue in the last fiscal year preceding the date of the application; the Bureau does not believe that revenue information from years *prior to* the last fiscal year would satisfy this requirement.

107(a)(15) NAICS Code

Proposed Rule

The SBA customizes its size standards on an industry-by-industry basis using 1,012 6-digit NAICS codes.[666] The first two digits of a NAICS code broadly capture the industry sector of a business. The third digit captures the industry's subsector, the fourth captures the industry group, the fifth captures the industry code, and the sixth captures the national industry. The NAICS code thus becomes more specific as digits increase and the 6-digit code is the most specific.

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau proposed in § 1002.107(a)(15) to require that

[665] *See Size Appeal of Willowheart, LLC,* SBA No. SIZ–5484, at *4 (July 10, 2013).

[666] *See* U.S. Census Bureau, *North American Industry Classification System,* at 41 (2022) *https://www.census.gov/naics/reference_files_tools/2022_NAICS_Manual.pdf.* At the time of the NPRM, there were 1,057 6-digit NAICS codes. *See* U.S. Census Bureau, *North American Industry Classification System,* at 26 (2017) *https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf.*

financial institutions collect and report an applicant's 6-digit NAICS code. Proposed comment 107(a)(15)–1 would have provided general background on NAICS codes and would have stated that a financial institution complies with proposed § 1002.107(a)(15) if it uses the NAICS codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting. Proposed comment 107(a)(15)–2 would have clarified that, when a financial institution is unable to collect or determine the applicant's NAICS code, it reports that the NAICS code is ''not provided by applicant and otherwise undetermined.''

The Bureau also proposed that financial institutions be permitted to rely on NAICS codes obtained from the applicant or certain other sources, without having to verify that information itself. Specifically, proposed comment 107(a)(15)–3 would have clarified that, consistent with proposed § 1002.107(b), a financial institution may rely on applicable applicant information or statements when collecting and reporting the NAICS code and would have provided an example of an applicant providing a financial institution with the applicant's tax return that includes the applicant's reported NAICS code. Proposed comment 107(a)(15)–4 would have provided that a financial institution may rely on a NAICS code obtained through the financial institution's use of business information products, such as company profiles or business credit reports, which provide the applicant's NAICS code.

The Bureau believed that collecting the full 6-digit NAICS code (as opposed to the 2-digit sector code) would better enable the Bureau and other stakeholders to drill down and identify whether disparities arise at a more granular level and would also enable the collection of better information on the specific types of businesses that are accessing, or struggling to access, credit. For example, a wide variety of businesses, including those providing car washes, footwear and leather goods repair, and nail salons, all fall under the 2-digit sector code 81: Other Services (except Public Administration). With a 2-digit NAICS code, all of these business types would be combined into one analysis, potentially masking different characteristics and different outcomes across these business types.

To address concerns related to the complexity of determining a correct NAICS code, the Bureau proposed a safe harbor to indicate that an incorrect NAICS code entry is not a violation of subpart B if the first two digits of the NAICS code are correct and the financial institution maintains procedures reasonably adapted to correctly identify the subsequent four digits (see proposed § 1002.112(c)(2)). The proposed NAICS-specific safe harbor would have been available to financial institutions in addition to the general bona fide error exemption under proposed § 1002.112(b).

The Bureau sought comment on its proposal to collect 6-digit NAICS codes together with the safe harbor described in proposed § 1002.112(c)(2). The Bureau also sought comment on whether requiring a 3-digit NAICS code with no safe harbor would be a better alternative.

Comments Received

The Bureau received comments from a wide range of lenders, trade associations, community groups, and others regarding the reporting of a 6-digit NAICS code as proposed in § 1002.107(a)(15). Numerous community groups as well as a few lenders supported the Bureau's proposal and urged collection of a 6-digit NAICS code. Several commenters emphasized that 1071 data would adequately achieve a fair lending purpose only if they contain key variables that are used in underwriting and enable meaningful fair lending analysis. Commenters stated that NAICS codes provide critical context to understanding credit underwriting decisions and help ensure that fair lending analysis is focused on similarly situated businesses. A few commenters stated that these data must be reported so that lenders cannot hide behind data not collected as the justification for their lending disparities.

A bank and a bank trade association stated that NAICS code could potentially be helpful in demonstrating a non-discriminatory basis for credit decisions with respect to applicants in different industries. The trade association stated that, at most, the Bureau should only add limited data points pursuant to ECOA section 704B(e)(2)(H) that are considered by the financial institution in the credit underwriting process, citing NAICS code and time in business as examples.

Another trade association said that NAICS codes have the advantage of being independently defined and available for reference. The commenter stated that if a NAICS code is supplied by the applicant and published by the Bureau only in the aggregate, the NAICS code can contribute useful information without unduly burdening lenders.

Some commenters stated that a 2- or 3-digit NAICS code would be too high a level of aggregation to facilitate fair lending analysis. A CDFI lender stated that a 6-digit code will offer the most precise insight into the industries that lenders serve, whereas a 3-digit NAICS code will leave unnecessary ambiguity in the data. The commenter provided the example of a dry cleaner sharing the same 3-digit NAICS code as a mortuary and a parking lot.

Furthermore, a number of community groups and several lenders stated that 6-digit NAICS codes are useful for identifying certain industries' ability to access small business credit and to identify areas of unmet need. For example, one community group asserted that the ability to identify needs and opportunities for small businesses requires the ability to compare lending by sector to the total number of businesses in that sector based on other public data sources.

Moreover, some lenders and community groups said that it is already standard practice for many small business lenders to collect NAICS codes. For example, these commenters noted that lenders already collect NAICS codes for SBA loans, Equal Employment Opportunity Commission certifications, and CDFI loans.

In contrast, many industry commenters, along with several business advocacy groups and other commenters, generally opposed the data points proposed pursuant to ECOA section 704B(e)(2)(H), including NAICS code, as discussed in the section-by-section analysis of § 1002.107(a) above. In addition, the majority of industry commenters to address this issue specifically opposed collection of 6-digit NAICS codes. These commenters expressed concerns about the burden on both lenders and applicants and the complexity of determining the appropriate NAICS code. Concerns raised by commenters included, for example, that collecting NAICS codes would slow the loan application process; most lenders are unfamiliar with NAICS codes or do not currently collect them; lenders would have to change their operating procedures significantly which would create strain on staff and resources; and it would add more costs to the lending process which may be passed on to small business borrowers.

Many industry commenters also voiced concern regarding accuracy and data integrity, explaining that small businesses often do not know their NAICS code or may operate in multiple NAICS sectors. Other challenges cited by commenters included the business changing over time; codes having overlapping definitions; and

classifications being prone to human error. For example, two trade associations noted that their members who made Paycheck Protection Program loans reported that many applicants were unfamiliar with NAICS codes. Additionally, some industry commenters expressed concern about verifying applicant-provided data and potential liability if the NAICS code is incorrect. One commenter noted that NAICS code classifications could be subject to change based on SBA rulemaking and thus financial institutions would need to monitor such developments. A credit union trade association stated that the identification of business and credit needs can be accomplished without explicit reference to NAICS codes, such as by leveraging already existing data sources and voluntary surveys of business owners. In addition, the trade association asserted that sector-specific analysis of business credit supply and demand is best left to the SBA, which already collects NAICS information through its lending programs.

Several commenters raised concerns that requiring NAICS codes would add confusion to the lending process. A trade association argued that requiring NAICS codes will create frustration for the small business borrower, including delayed application processing, and additional time and operational burden by banks to ensure the information is gathered and entered. They asserted that while NAICS codes are generally provided with some tax documents, lenders found borrower confusion when making Paycheck Protection Program loans, particularly when certain NAICS codes allowed for a more generous loan amount and certain small businesses were unable to benefit from higher loan amounts for certain sectors due to mismatched NAICS codes. Another commenter stated that applicants may struggle to determine which code to report, especially if the nature of the business changes over time or falls under multiple categories.

A number of industry commenters also expressed concern regarding privacy risks in collecting the 6-digit NAICS code. These commenters highlighted the risk of borrower re-identification, particularly in rural areas and smaller communities. Some commenters stated that NAICS code combined with census tract would make it easy to re-identify a small business. In addition, while a community group supported collection of a 6-digit code, it stated that the public database should provide only 4-digit NAICS codes to address privacy concerns.

In addition, a few commenters asserted that collecting NAICS codes would not advance the purposes of section 1071, arguing that collecting NAICS codes does not provide information that would inform fair lending analysis. For example, one bank stated that NAICS code would be of minimal value to fair lending analytics given the complexity of small business lending, such as the scope and size of the business. Moreover, several banks stated that they do not currently collect NAICS codes and that NAICS codes are not used in underwriting or financial analysis purposes.

A few industry commenters supported collection of a 2-digit NAICS code, stating that this would achieve the intended policy goal without creating unnecessary burdens and heightened costs, as well as protect the privacy of market participants. A trade association for online lenders supported collection of a 4-digit NAICS code, stating it would provide sufficient information while mitigating risk of re-identification and avoiding potential impacts and delays to the borrower during the application process. A joint letter from community and business advocacy groups urged the Bureau to permit the submission of a 3-digit code where the applicant does not provide a 6-digit code. Finally, one commenter suggested that the Bureau coordinate with the U.S. Census Bureau to create a suffix to a business's NAICS code that would identify its minority-owned or women-owned status. The commenter stated that this would create efficiencies across organizations and provide an easier and more neutral method of collecting demographic information on applications. The commenter further noted that this suffix could be easily masked when loans are sent to underwriters to ensure it does not impact their decisions.

Final Rule

For the reasons set forth herein, the Bureau is revising § 1002.107(a)(15) to require that financial institutions collect a 3-digit NAICS code for the applicant. The Bureau is also finalizing proposed comments 107(a)(15)–1, –2, and –5, with minor adjustments for consistency. Final comment 107(a)(15)–1 explains what a NAICS code is, and final comment 107(a)(15)–2 addresses what to report if a financial institution is unable to collect or otherwise determine the applicant's NAICS code. Proposed comments 107(a)(15)–3 and –4, which addressed a financial institution's reliance on information from the applicant and from other sources, have been removed as those issues are now addressed in final comment 107(b)–1. Final comment 107(a)(15)–3 (proposed as comment 107(a)(15)–5) cross-references the safe harbor in final § 1002.111(c)(3) for incorrect 3-digit NAICS code entries. The Bureau has considered commenters' concerns regarding the difficulties in obtaining an accurate NAICS code as well as the importance of NAICS codes for fair lending and community development analysis. The Bureau believes that collecting the 3-digit NAICS code will achieve the right balance between minimizing burden on financial institutions and small business applicants, while also providing valuable data to analyze fair lending patterns and identify industry subsectors with unmet credit needs.

The Bureau believes that NAICS code data will considerably aid in fulfilling both section 1071's fair lending purpose and its business and community development purpose, even if the NAICS code is not necessary for determining whether an applicant is a small business. While it will not provide the same level of detail as a 6-digit code, the 3-digit code will still help ensure that fair lending analysts are comparing applicants with similar profiles, thereby controlling for factors that might provide non-discriminatory explanations for disparities in underwriting and pricing decisions. Moreover, NAICS subsector codes are useful for identifying business and community development needs and opportunities of small businesses, which may differ widely based on industry, even controlling for other factors. For example, 3-digit NAICS codes will help data users identify subsectors where small businesses face challenges accessing credit and understand how small businesses in different industries use credit. Furthermore, the Bureau believes that publication of NAICS codes (subject to potential modification and deletion decisions by the Bureau, as discussed in part VIII below) will help provide for some consistency and compatibility with other public datasets related to small business lending activity, which generally use NAICS codes. This ability to synthesize 1071 data with other datasets may help the public use the data in ways that advance both the business and community development and fair lending purposes of section 1071. The Bureau agrees with commenters' concerns that the 2-digit NAICS code would not provide sufficiently detailed information to aid regulators and the public in monitoring particular industries' access to small business credit.

The Bureau recognizes that covered financial institutions not currently using NAICS codes will need to gain familiarity with the NAICS code system and refer to NAICS subsector classifications for all relevant applications before reporting 3-digit NAICS codes to the Bureau. To address concerns related to the complexity of determining a correct NAICS code, particularly for covered financial institutions that do not currently use NAICS codes, the Bureau is permitting a financial institution to rely on applicable applicant information or statements when compiling and reporting the NAICS code, as well as permitting a financial institution to rely on a NAICS code obtained through the financial institution's use of business information products, such as company profiles or business credit reports (see final comment 107(b)–1). In other words, a financial institution may rely on oral or written statements from an applicant, other information provided by an applicant such as a tax return, or third-party sources such as business information products. The Bureau believes that being able to rely on NAICS codes obtained from the applicant or third-party sources significantly eases potential difficulties for financial institutions in collecting and reporting a 3-digit NAICS code and mitigates concerns about inadvertently reporting an inaccurate code.

In response to industry concerns regarding the accuracy of the NAICS code and the burden of verifying applicant-provided data, the Bureau emphasizes that financial institutions are permitted to rely on NAICS codes obtained from the applicant or third-party sources, without having to verify that information. Furthermore, the Bureau has expanded the NAICS code safe harbor in final § 1002.112(c)(3), which makes clear that the safe harbor extends to financial institutions that rely on an applicant's representations or on other information regarding the NAICS code. Final § 1002.112(c)(3) also provides a safe harbor for incorrect 3-digit NAICS code entries, where the financial institution identifies the NAICS code itself, provided that it maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code. The Bureau has also removed the term ''appropriate'' from the regulatory text of § 1002.107(a)(15). The Bureau believes the term is unnecessary, particularly in light of the revisions to the NAICS code safe harbor in final § 1002.112(c)(3), and removing it may help avoid potential confusion regarding NAICS codes the financial institution obtains from the applicant or other sources.

Additionally, the Bureau understands that multiple NAICS codes may apply to a single business. While this may be more of a concern with 6-digit codes, if more than one 3-digit code applies to a single business, only one 3-digit NAICS code should be reported.

The Bureau acknowledges community groups' concern that collecting anything less than 6-digit NAICS codes will result in less precise data about industry classification. The Bureau nonetheless believes that its final rule requiring collection and reporting of 3-digit NAICS codes (along with the expanded safe harbor) strikes an appropriate balance in addressing the concerns raised by industry and the importance of NAICS code information in fair lending and community development analysis. The Bureau will monitor the utility of the NAICS code data point and, if warranted, may revisit the required number of digits in the future.

Although the Bureau will address re-identification concerns generally by modifying or deleting data upon publication, the Bureau notes that its shift to 3-digit NAICS codes will decrease the risk of re-identification of small business borrowers and related natural persons in rural areas and smaller communities. See part VIII below for further discussion about the privacy analysis and public disclosure of data.

107(a)(16) Number of Workers

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' In the proposed rule, the Bureau stated that it believed that data providing the number of persons working for a small business applicant would aid in fulfilling the business and community development purpose of section 1071. These data would allow users to better understand the job maintenance and creation that small business credit is associated with and help track that aspect of business and community development.

Proposed § 1002.107(a)(16) would have required financial institutions to report the number of non-owners working for the applicant.

Proposed comment 107(a)(16)–1 would have discussed the collection of the number of workers. The proposed comment would have stated that in collecting the number of workers from an applicant, the financial institution would explain that full-time, part-time, and seasonal workers, as well as contractors who work primarily for the applicant, would be counted as workers, but principal owners of the business would not. The proposed comment would have further stated that if the financial institution was asked, it would explain that volunteers would not be counted as workers. This treatment of part-time, seasonal, contract, and volunteer workers would follow the SBA's method for counting employees,[667] with minor simplifications. The Bureau sought comment on whether further modifications to the number of workers data point were needed to facilitate this operational simplification.

Proposed comment 107(a)(16)–1 would have also explained that workers for affiliates of the applicant would only be counted if the financial institution were also collecting the affiliates' gross annual revenue.

The proposed comment would have further explained that the financial institution could rely on statements of or information provided by the applicant in collecting and reporting number of workers, but if the financial institution verifies the number of workers provided by the applicant, it must report the verified information.

Proposed comment 107(a)(16)–1 would have also provided sample language that a financial institution could use to ask about the number of workers, if it does not collect the number of workers by another method. The Bureau provided the sample language in the proposed comment, which implements the simplified version of the SBA definition referenced above. The Bureau sought comment on this method of collection, and on the specific language proposed.

Proposed comment 107(a)(16)–2 would have first clarified that a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, including the number of workers of the applicant. The proposed comment would have then stated that if a financial institution is nonetheless unable to collect or determine the number of workers of the applicant, the financial institution reports that the number of workers is ''not provided by applicant and otherwise undetermined.''

The Bureau sought comment on its proposed approach to the number of workers data point, as well as on the specific requests for comment above.

[667] *See* 13 CFR 121.106(a).

The Bureau also sought comment on whether financial institutions collect information about the number of workers from applicants using definitions other than the SBA's, and how the collection of this data point could best be integrated with those collections of information.

Comments Received

The Bureau received comments on its proposed number of workers data point from lenders, trade associations, and community groups. A number of commenters supported the Bureau's proposal. A few commenters urged the Bureau to adopt the number of workers data point, suggesting that it is important for business and community development purposes. A CDFI lender and community group commenter said that the number of workers data point will help provide a greater understanding of owner-operated and microbusiness needs and accessibility to affordable credit. Another community group commented that the data point provides insight into the number of jobs created, retained and/or supported by access to credit. This community group further noted that the data point would also assist in analysis of whether businesses of various sizes fare differently in the lending marketplace. Many community groups expressed support for collecting data on the number of workers because they believe it will help indicate whether smaller businesses of various sizes will require more support and technical assistance when it comes to credit access. A minority business advocacy group commented that the data will help determine various levels of economic development and impact across the country. A few commenters agreed with the Bureau's proposed method of collecting the number of non-owner workers and including part-time staff, seasonal staff, and contractors that work primarily for the business.

A trade association commented that the important considerations are that the Bureau provide language for lenders to provide to applicants to help applicants correctly answer the question and that the Bureau emphasize that financial institutions may rely on statements made by the applicant without incurring risk. Another industry commenter suggested that the final rule enable principal owners to count themselves as workers because this method is more common in industry and would avoid confusion. A bank recommended that the final rule expressly permit covered financial institutions to collect required data from applicants through a variety of means, including on the application form, supplemental documents or forms, or the sample data collection form. A CDFI lender suggested that the Bureau require financial institutions to report the breakdown of full-time and part-time workers.

The Bureau received many comments from industry opposing the proposal to collect data on the number of workers. Some commenters stated that data on the number of workers is not currently collected and that some customers do not readily have this information available, though several noted they had collected it for Paycheck Protection Program loans. A trade association stated that the data are unfamiliar to the applicant or difficult to obtain and will result in additional complexity, confusion, and significant operational and regulatory costs. Several commenters indicated that it is not a factor in the credit decision. A bank stated that it is not in the banker's role to determine this information and there is no reason to collect and monitor this data point if the small business is a creditworthy borrower.

A few industry commenters questioned the value of this data point, arguing that it would not aid in fulfilling the fair lending purpose of section 1071. Two asserted that without context (for example, separating full-time versus part-time and contract workers) there seems to be little value in collecting the information. One suggested that collection is further complicated when the gross annual revenue of an affiliate is considered, because then the number of workers for the affiliate must be included. Several industry commenters also stated that the proposed general exclusion of affiliate employees is problematic because some of these employees may perform substantial services for the applicant.

A bank commented that the CRA already considers the impact of adding jobs through small business and community development loans. Another bank commented that SBA uses either the gross annual revenue or number of workers, depending on the type of business, to qualify businesses as small and because the Bureau's proposal already contains a gross annual revenue size test, it would be unnecessary to collect the number of workers because it is irrelevant to the credit decision and determining the size of the business.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(16) with an addition and a minor revision to the associated commentary. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau believes that data on the number of workers will aid in fulfilling the business and community development purpose of section 1071. Data on the number of persons working for a small business applicant will provide data users and relevant stakeholders with a better understanding of the job maintenance and creation that small business credit provides.

In response to comments regarding the complexity and difficulty in collecting information about the number of workers, the Bureau is adding a new comment to require that financial institutions report the number of workers using ranges rather than reporting the specific number of workers. Final comment 107(a)(16)–1 provides that a financial institution complies with § 1002.107(a)(16) by reporting the number of people who work for the applicant using the ranges prescribed in the Filing Instructions Guide. The Bureau believes that reporting the number of workers in ranges rather than a specific numerical value will eliminate some of the collection difficulties expressed by commenters, such as determining the exact number of employees when that number varies throughout the year.

The Bureau is finalizing comment 107(a)(16)–2 (renumbered from comment 107(a)(16)–1 in the proposed rule) with some revisions as well as additional guidance on how a financial institution may collect information about the number of workers in light of final comment 107(a)(16)–1. Specifically, a financial institution may collect the number of workers from an applicant using the ranges specified by the Bureau in the Filing Instructions Guide (as indicated in final comment 107(a)(16)–1) or as a numerical value. Final comment 107(a)(16)–2 retains from proposed comment 107(a)(16)–1 the discussion on collecting the number of workers, including the sample language to provide to applicants to ask about the number of workers and the statement that a financial institution may rely on the applicant's response, but the Bureau is making minor edits for clarity. The Bureau agrees with commenters that these provisions are helpful, and is including them to facilitate compliance.

The Bureau agrees with commenters' recommendations that financial institutions should be able to rely on statements made by the applicant and should be permitted to collect required data from applicants through a variety of means. First, the rule does not limit the means by which the number of workers data can be collected, and

though it provides optional language to use, it does not require the use of that language. The Bureau believes that allowing financial institutions to rely on applicant-provided data will sufficiently safeguard accuracy such that the resulting data will aid in fulfilling the purposes of section 1071. The Bureau also believes that reporting the verified number of workers when the financial institution already possesses that information will not be operationally difficult, and will enhance the accuracy of the information collected. To facilitate compliance with the regulation, the Bureau provides guidance related to reliance on all applicant-provided data, including number of workers, in final comment 107(b)–1. Generally, that comment permits reliance on statements of the applicant or information provided by an applicant; however, if a financial institution verifies information, it reports the verified data. For more information on relying on statements made by or provided by an applicant, see the section-by-section analysis of § 1002.107(b).

The Bureau is finalizing comment 107(a)(16)–3 (renumbered from proposed comment 107(a)(16)–2) with a minor edit for clarity. Final comment 107(a)(16)–3 cites to § 1002.107(c), which provides that a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of workers of the applicant. Comment 107(a)(16)–3 further explains that a financial institution reports that the number of workers is ''not provided by applicant and otherwise undetermined'' if, despite such procedures, the financial institution is unable to collect or determine the information. The Bureau believes that allowing this response will facilitate compliance when an applicant does not provide the requested data.

The final rule does not require financial institutions to report the distinction between various worker categories such as full time versus part time, as recommended by some commenters. The Bureau believes that requiring distinctions between various worker categories could introduce unnecessary complexity and compliance challenges. The final rule also does not include principal owners in the number of workers, as recommended by a commenter. The final rule requires the separate collection of the number of principal owners in final § 1002.107(a)(20), and the Bureau believes that this differentiation will improve the granularity and usefulness of the data collected.

The Bureau acknowledges comments noting that some financial institutions do not collect or maintain data on number of workers nor is the information used in their credit decisions. However, the Bureau believes that number of workers is critical to further the business and community development purpose of section 1071 and the Bureau does not believe it will be particularly difficult for financial institutions to obtain this information if they do not do so already. The Bureau has also provided sample language in final comment 107(a)(16)–2 that a financial institution may use to ask an applicant about the number of workers.

With respect to questions from commenters about how the number of workers data point meets section 1071's purposes, as discussed above the Bureau believes the data will provide insight into small business credit that contributes to job creation and maintenance, as well as other trends in the small business market's ability to grow and maintain workers, and the full set of data required to be collected and reported under this final rule should provide sufficient context for meaningful understanding of this data point. Regarding the comment that the CRA already considers the impact of adding jobs through small business and community development loans, the Bureau notes that data collected under section 1071 vary from data collected under CRA and the institutions subject to section 1071 are not necessarily subject to CRA. Regarding the concerns raised by commenters that the number of workers for an applicant's affiliates must be counted if the affiliates' gross annual revenues are considered, the Bureau notes that the applicant is already providing information on affiliate(s) in this situation, and the financial institution can simply ask a question regarding number of workers, perhaps using the language provided in final comment 107(a)(16)–2, and tell the applicant to include affiliate information.

107(a)(17) Time in Business

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' In the proposed rule, the Bureau stated that it believed that data providing the time in business of a small business applicant would aid in fulfilling both the business and community development and fair lending purposes of section 1071.

The Bureau proposed § 1002.107(a)(17) to require a financial institution to collect and report the time the applicant has been in business, described in whole years, as relied on or collected by the financial institution. Proposed § 1002.107(a)(17) would have required the data be reported in whole years, rather than ranges of time, because a financial institution would have a definite number of years if it collects this information presently, and the Bureau believed that time in business reported in whole years would make the data more granular and useful.

Proposed comment 107(a)(17)–1 would have provided guidance on how to report one of the two methods (relied on or collected) for reporting the time-in-business data point. The proposed comment would have explained that, regardless of which method is used, the financial institution must report the time in business in whole years, or indicate if a business has not begun operating yet, or has been in operation for less than a year. Proposed comment 107(a)(17)–1 would have explained that when the financial institution relies on an applicant's time in business as part of a credit decision, it reports the time in business relied on in making the credit decision. However, the comment would have further explained that proposed § 1002.107(a)(17) would not require the financial institution to rely on an applicant's time in business in making a credit decision.

Proposed comment 107(a)(17)–1 would have also explained that the financial institution may rely on statements or information provided by the applicant in collecting and reporting time in business; however, pursuant to proposed § 1002.107(b), if the financial institution verifies the time in business provided by the applicant, it must report the verified information. This guidance would have applied whether the financial institution relies on the time in business in making its credit decision or not, although the Bureau believed that verification would be very uncommon when the financial institution is not relying on the information.

Proposed comment 107(a)(17)–2 would have provided instructions on how to report the time in business relied on in making the credit decision. The proposed comment would have stated that when a financial institution evaluates an applicant's time in business as part of a credit decision, it reports the time in business relied on in making the credit decision. For

example, the proposed comment would have further explained, if the financial institution relies on the number of years of experience the applicant's owners have in the current line of business, the financial institution reports that number of years as the time in business. Similarly, if the financial institution relies on the number of years that the applicant has existed, the financial institution reports the number of years that the applicant has existed as the time in business. Proposed comment 107(a)(17)–2 would have then concluded by stating that a financial institution reports the length of business existence or experience duration that it relies on in making its credit decision, and is not required to adopt any particular definition of time in business.

Proposed comment 107(a)(17)–3 would have stated that a financial institution relies on an applicant's time in business in making a credit decision if the time in business was a factor in the credit decision, even if it was not a dispositive factor. The proposed comment would have provided the example that if the time in business is one of multiple factors in the financial institution's credit decision, the financial institution has relied on the time in business even if the financial institution denies the application because one or more underwriting requirements other than the time in business are not satisfied.

Proposed comment 107(a)(17)–4 would have clarified that if the financial institution does not rely on time in business in considering an application, pursuant to proposed § 1002.107(c)(1) it shall still maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's time in business. The proposed comment would have explained that in collecting time in business from an applicant, the financial institution complies with proposed § 1002.107(a)(17) by asking for the number of years that the applicant has been operating the business it operates now. The proposed comment would have further explained that when the applicant has multiple owners with different numbers of years operating that business, the financial institution collects and reports the greatest number of years of any owner. Proposed comment 107(a)(17)–4 would have then concluded by making clear that the financial institution does not need to comply with the instruction if it collects and relies on the time in business by another method in making the credit decision.

Proposed comment 107(a)(17)–5 would have explained that pursuant to proposed § 1002.107(c)(1) a financial institution shall maintain reasonable procedures to collect information provided by the applicant, which includes the time in business of the applicant, but if the financial institution is unable to collect or determine the time in business of the applicant, the financial institution reports that the time in business is ''not provided by applicant and otherwise undetermined.''

The Bureau sought comment on its proposed approach to this data point. The Bureau also sought comment on whether time-in-business information may be less relevant or collectable for certain products or situations (such as retailer-branded credit cards acquired at point of sale) and whether reporting ''not applicable'' should be allowed in those instances. In addition, the Bureau sought comment on whether there should be an upper limit on time in business—for example, to allow reporting of ''over 20 years'' for any applicant of that duration, rather than requiring reporting of a specific number of years.

Comments Received

The Bureau received comments on its proposed time in business data point from a number of lenders, trade associations, and community groups. A number of commenters supported the Bureau's proposal to collect time in business data with some pointing out the importance of time in business for the fair lending and community development purposes of section 1071. A trade association noted that time in business data are potentially useful for lenders, policymakers, regulators, and communities and that this is a common credit consideration for the type of small business lending undertaken by certain financial institutions. This trade association asserted that the data can help explain differences in underwriting risk among small business applicants and avoid misinterpretation of the dataset by distinguishing potentially riskier new businesses from established businesses. A community group stated that this data point is needed to assess if access to credit is reasonably available and whether there are geographical barriers that do not seem present in other areas based on analysis of the data. This commenter further stated that such analysis can help stakeholders identify and ameliorate any access to credit barriers for younger firms.

A bank and a trade association commented that this data point could be helpful in demonstrating a non-discriminatory basis for different credit decisions and may provide helpful context for evaluating the basis for credit decisions and conducting an accurate, fact-based fair lending analysis. A community group stated that lenders already collect or consider the number of years a small business has been in operation as it is an element of loan risk and underwriting. This commenter further stated that time-in-business data would allow the assessment of whether businesses of similar duration are likely to receive credit at comparable terms, such as by comparing Black-owned, Latino-owned, and Asian-owned start-ups with white-owned start-ups. A number of commenters noted in discussing data points, including time in business, that fair lending analysis requires a robust set of key variables that are used in underwriting. Relatedly, other commenters stated that data collected under the Bureau's rule must be sufficient to allow data users to understand the characteristics of applicants that are denied credit so as to identify areas of unmet need and also to be able to compare declined applicants with those who are approved for credit to look for evidence of discrimination.

Commenters specifically pointed out the importance of collecting information regarding whether a business is a start-up. A community group noted start-ups and younger businesses generally have more difficulties qualifying for credit, and other commenters pointed out that it is well known that start-ups often struggle to access financing.

In contrast, the Bureau received many comments from lenders and trade associations generally opposing the Bureau's proposal to collect time in business. One trade association questioned how asking how long a company has been in operation furthers fair lending purposes. A few banks stated that the information is not considered for underwriting purposes or relevant to the creditworthiness of the applicant. An agricultural lender asserted that time in business data can be unknown, misleading, or not relevant. A few industry commenters asserted that time in business data are not currently collected or maintained by lenders. Some commenters said collecting time in business data would impose compliance burden and one also said that it would add friction to the application process. A bank stated that customers do not have this type of information readily available when applying for a commercial loan. Another bank noted that the data point adds a layer of complexity, will not provide useful information that advances section 1071, and goes beyond what other laws,

such as HMDA, require financial institutions to collect. A trade association commented that time in business is unfamiliar to the applicant or difficult to obtain and will result in additional complexity, confusion, and significant operational and regulatory costs. Another trade association said this data point involves complexities because many small businesses cannot provide an exact amount of time in business due to name changes, mergers and acquisitions, and other routine events that complicate this calculation. A bank stated that its borrowers rarely keep good enough records to properly state the date they began doing business. An agricultural lender stated that time in business can be difficult to determine for a farming operation that may have begun as a lifestyle venture or arose from multiple generations of farming.

Some commenters expressed concerns with the data to be collected as well as the method of reporting. A bank stated that it makes loans for startup companies and relies on the applicant's experience in the given industry rather than the length of time they have operated their current business; however, underwriting for an established business uses the length of time that specific business has been in operation. Although the Bureau's proposal allows for the consideration of business experience or business longevity, this commenter and several others asserted that the resulting data gathered will not be comparable and analysis of that data will be meaningless. Another bank stated that in most cases, the credit decision is a combination of the number of years the applicant has been in business and the number of years the principals have been in the industry, but if one institution reports the number of years the applicant has been in business and another reports the number of years of experience of the principals, they would not appear to be as similarly situated as they are; therefore, it will be impossible to make comparisons or draw accurate conclusions with respect to the information submitted. Another bank pointed out this same issue and stated that the mixture of responses would lead to unreliable information, unjustifiable conclusions, and unjustified burden on applicants and financial institutions. Other banks and a trade association also indicated that the credit decision can be based on a combination of the number of years the applicant has been in business and the number of years the principals have been in the industry. Two of these commenters also said that the Bureau did not provide guidance on how to report the data in these circumstances.

A bank trade association commented that many small business borrowers create new entities for various reasons and expressed concern that the data collected could suggest lenders are giving more favorable treatment to new small businesses as opposed to existing ones. Another trade association stated that collecting time in business using management or owner experience rather than the age of the business itself undercuts the Bureau's rationale that time in business could explain the difference in underwriting risk among small business applicants and avoid misinterpretation of data. This commenter recommended that time in business be collected at the financial institution's option. A bank was concerned that time in business data may make it appear to discriminate against start-up businesses, explaining that its practice has been to avoid providing financing for start-up businesses unless it can secure government guaranties because in distressed areas where the bank generally lends, start-up businesses have historically been unable to sustain a repayment history for the loan term due to business closure and liquidation. Therefore, the bank explained, if comparing this information for fair lending, it will appear that they are discriminating against start-up businesses when there are studies showing that minority-owned businesses are under-financed as start-ups.

Several commenters requested the Bureau provide clarification on certain aspects of reporting the data point or made recommendations for reporting the data. A bank suggested that the Bureau collect the time the business has been active regardless of ownership experience or time the current owners have owned this business. A community group recommended that financial institutions be required to report the time in business used when underwriting the loan because time in business could refer to either the time period since the business was formally incorporated or the time period of operation. A bank requested clarification on temporary lapses in business and how to report seasonal businesses. Several agricultural lenders and a trade association suggested that if this data point is not dropped then the Bureau should tie it to the established Farm Credit data point, ''Year began Farming,'' because Farm Credit associations already collect ''Year began farming.'' These commenters reasoned that there would be needless confusion in the context of agricultural credit if there were separate and competing definitions of ''Time in business'' and ''Year began farming.'' A bank recommended that the easiest way to report time in business information is with a number in the column; however, it suggested that for newer businesses, particularly for those with less than one year in business, the number should be reported in ranges, *e.g.,* 0–6 months or 7–12 months. A community group said that credit card lenders should not be able to routinely report ''not applicable'' for this data point because the information should not be too hard to ask for on an application form. A bank and a trade association requested that the Bureau allow all financial institutions to report the applicant's time in business, whether used in credit underwriting or collected from the applicant, and to rely on the information provided by the applicant. These commenters also requested that the Bureau include in the final rule a safe harbor from liability for reporting the applicant-provided time in business. Another trade association also recommended that the Bureau clarify that financial institutions may rely on statements made by the applicant without incurring risk.

A bank commented that putting an upper limit on years to report is not a good idea and said that time in business should always be reported as a specific number of years. The bank reasoned that there are businesses that struggle at the 5 year mark, the 10 year mark, or the 50 year mark. According to this bank, one should not assume that applicants are ''fine'' because those years are above an arbitrary number the Bureau has chosen.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(17) with revisions to the regulatory text and commentary. As explained below, financial institutions will be required to report the time the applicant has been in business, but the Bureau has revised the requirements to provide financial institutions more flexibility in collecting the information. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau determines that collecting data on time in business will further the purposes of section 1071, as further explained below.

The Bureau believes that time in business will advance both statutory purposes of section 1071. Research illustrates the role that start-ups and new businesses play in the business ecosystem and in promoting important community development aims, such as

creating new jobs.[668] Financial institutions often have special credit policies regarding start-ups and other young businesses, including whether the institution will extend credit to start-ups at all, the type(s) of credit products start-ups and new businesses can apply for, and the amount of credit for which they can be approved. Studies generally show that start-ups experience greater difficulty in accessing credit.[669]

Time in business data will benefit data users, including financial institutions, policymakers, economic analysts, and communities by allowing them to better identify the proportion of small businesses seeking credit that are start-ups or relatively new businesses, the type(s) of credit offered to these groups, the geographic setting of these businesses, the types of financial institutions that are reaching such businesses, and where communities might focus business development efforts. The data may also aid policymakers in addressing issues impacting the growth of small start-ups. The data, particularly as to unmet demand, could help interested financial institutions identify lending opportunities to reach more start-ups and new businesses, promoting both business and community development. This data point will also facilitate fair lending analyses by providing a useful control to identify similarly situated applicants and eliminate some false positives, while also allowing monitoring of potential disparate treatment of relatively new minority- and women-owned small businesses.

The Bureau understands from commenters that there are complexities associated with collecting time in business information from an applicant for various reasons, including applicant difficulty providing an exact time because of prior name changes, events that affected the applicant's structure, multi-generational ownership, and others discussed by commenters above. In light of the feedback received, the Bureau has revised the requirements for reporting time in business information, based on the financial institution's procedures. The Bureau is also not finalizing this data point to include data as relied on by the financial institution to make a decision. Rather, the final rule requires financial institutions to report time in business as collected or otherwise obtained. Although this requirement is similar to reporting the time in business relied on, the new language makes clear that the financial institution reports the time in business collected or obtained regardless of whether it relied on that information in underwriting the application. Commenters indicated that they may base their credit decision on a combination of factors, such as the time the applicant has been in existence and the time the owners have been in the industry, while other commenters indicated that they do not collect or use time in business for underwriting purposes. The Bureau believes that standardizing the time in business data point to be based on what the financial institution collects or obtains streamlines the requirement and provides flexibility for the financial institution to report time in business information based on its credit policies or programs rather than having to select a time in business method specifically for reporting pursuant to this rule. Accordingly, the Bureau is not finalizing "as relied on or collected by the financial institution" in the regulatory text. Final regulatory text for § 1002.107(a)(17) requires reporting of the time the applicant has been in business; however, the Bureau is providing further details guidance in commentary regarding time in business collection and reporting, as explained below. As some commenters suggested, allowing different methods for measuring time in business will have an effect on the comparability of the data, but information about the time in business actually collected by the financial institution for its own purposes will be useful for fair lending analysis and will impose less operational difficulty than requiring reporting based on a single definition. For example, this method will allow a financial institution to use the "year began farming" date, as suggested by some commenters, to report time in business without further inquiry.

Final comment 107(a)(17)–1.i provides that a financial institution reports time in business in whole years if, as part of its procedures, it collects or obtains the number of years an applicant has been in business. Final comment 107(a)(17)–1.i also provides guidance to make clear that if the financial institution reports the number of whole years, the financial institution rounds down to the nearest whole year. Final comment 107(a)(17)–1.ii provides that if a financial institution does not collect or obtain the number of years an applicant has been in business, but as part of its procedures it determines whether or not the applicant has been in business less than two years, then the financial institution reports the applicant's time in business as either less than two years or two or more years. Final comment 107(a)(17)–1.iii provides that if a financial institution does not collect or obtain time in business, either as number of years or a determination as to whether the applicant has been in business less than two years, then the financial institution complies with the rule by asking the applicant whether it has been in business less than two years or two or more years. The Bureau is not finalizing the provision in proposed comment 107(a)(17)–1.ii to require financial institutions to indicate whether an applicant has not begun operating yet or has been in operation less than a year. In addition, the Bureau is not requiring that newer business applicants' time in business be reported in ranges, as one commenter suggested. The Bureau believes that time in business information reported in whole years or an indication of over or under two years can provide data users with robust information regarding start-ups and newer businesses as well as the maturity of other businesses, thus furthering the purposes of section 1071 while also simplifying collection and reporting. Issues such as whether to report the time in business based on the time of incorporation or time of business opening, lapses in business operation such as for a seasonal business, and new business entities that do not actually constitute a new enterprise should all be considered within the financial institution's discretion in collecting time in business. The Bureau does not believe that these scenarios will have a significant effect on the quality of the data reported, but crafting a rule that takes them into account could considerably increase the operational difficulty of compliance.

Final comment 107(a)(17)–2 provides that a financial institution that collects time in business as part of its procedures is not required to collect or obtain time in business information pursuant to a specific definition for the purposes of this rule. The comment

[668] *See, e.g.,* Small Bus. Admin., *2018 Small Business Profiles,* at 1–2 (2018), *https://www.sba.gov/advocacy/2018-small-business-profiles-states-and-territories?utm_medium=email&utm_source=govdelivery*; John Haltiwanger *et al., Who Creates Jobs? Small versus Large versus Young,* 95(2) Review of Econ. & Stat., at 347–61 (2013), *https://direct.mit.edu/rest/article/95/2/347/58100/Who-Creates-Jobs-Small-versus-Large-versus-Young.*

[669] For example, a Federal Reserve Bank of New York report, based on data from the 2016 Small Business Credit Surveys that included information from 12 Federal Reserve Banks, provides statistics on how start-ups are less likely to receive credit as compared to mature businesses, even with comparable credit scores. *See* Fed. Rsrv. Bank of N.Y., *Small Business Credit Survey: Report on Start-up Firms,* at iv (2017), *https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-StartupFirms-2016.pdf.*

provides examples of how a financial institution may define time in business, including by asking the applicant when the business started or based on the owner's experience in the industry. As discussed above, the Bureau understands from commenters that a financial institution may collect and/or consider for underwriting both the number of years the applicant has been in business and the number of years of experience an owner has in the industry. In response to a comment requesting clarification and to mitigate other commenter concerns, final comment 107(a)(17)–2 provides that if a financial institution collects the number of years the applicant has existed as well as another measure of time in business, such as the number of years of experience an owner has in the industry, the financial institution reports the number of years the applicant has existed as the time in business. The Bureau believes that this method will result in more uniform and comparable data on time in business and should not cause operational difficulty because the financial institution will be reporting information that it already collects.

Comment 107(a)(17)–3 (renumbered from proposed comment 107(a)(17)–6) is finalized with minor clarifications. Final comment 107(a)(17)–3 provides that a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes time in business; however, if the financial institution is nonetheless unable to collect this information, then the financial institution reports ''not provided by applicant and otherwise undetermined'' for the time in business data point. The Bureau believes that providing this reporting option will facilitate compliance.

The Bureau acknowledges commenters' arguments that time in business is not collected by some financial institutions now nor used by such institutions for underwriting purposes. However, other industry commenters indicated that they do collect and use time in business for underwriting (for example, commenters stated the credit decision is based on a combination of the number of years the applicant has been in business and the number of years the principals or owners have in the industry).

Commenters also expressed concern with the burden associated with collecting time in business information. The Bureau does not believe it would be too difficult for financial institutions to collect this information if they do not already do so, and the ability to merely ask whether a business has existed for less than two years or two years or more should reduce any complexity for applicants in providing the information. The Bureau also believes that collection of time in business will further the dual purposes of section 1071, as discussed above. The final rule does not permit time in business information be reported at the financial institution's option, as the Bureau believes that if it made this data point optional, very little data would be reported.

With respect to the concern raised by a commenter that reporting time in business information may cause a financial institution to appear to discriminate against start-up businesses because of its policy to avoid providing financing to start-ups, the Bureau believes that time in business information will help mitigate concerns of data misrepresentation and help explain the credit decision made by a financial institution. For example, data indicating that an applicant is relatively new with little experience or financial history could explain why the financial institution denied the application or approved it for less than what was applied for.

With respect to the recommendation that the Bureau allow all financial institutions to report the applicant's time in business whether used in credit underwriting or collected from the applicant, the final rule provides this flexibility for financial institutions. The final rule also allows the financial institution to collect applicant-provided data, including time in business information, from appropriate third-party sources. See final § 1002.107(b).

The Bureau is not adopting a safe harbor from liability for reporting the applicant-provided time in business for the reasons provided in the section-by-section analysis of § 1002.112(c). Guidance related to relying on information provided by an applicant and appropriate third-party sources, including time in business information, is provided in final comment 107(b)–1. (Similar content was included in proposed comment 107(a)(17)–1.) That comment explains that a financial institution needs report verified information only if it verifies information from the applicant for its own business purposes. Because the rule makes clear that a financial institution may rely on statements made by or information from the applicant regarding time in business and need not verify its accuracy, the Bureau does not believe that a safe harbor is necessary. For more information on relying on information provided by an applicant, see the section-by-section analysis of § 1002.107(b).

107(a)(18) Minority-Owned, Women-Owned, and LGBTQI+-Owned Business Statuses Background

ECOA section 704B(b) requires financial institutions to inquire whether applicants for credit are minority-owned and/or women-owned businesses and to maintain a record of the responses to that inquiry separate from the applications and accompanying information. Section 704B(c) provides that applicants for credit may refuse to provide information requested pursuant to 704B(b). ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' The Bureau is finalizing § 1002.107(a)(18) to address how a financial institution would collect and report an applicant's minority-owned and women-owned business statuses, along with LGBTQI+-owned business status which the Bureau believes would aid in fulfilling the purposes of section 1071.

The Bureau proposed appendix F to provide instructions to aid financial institutions when collecting minority-owned business status pursuant to proposed § 1002.107(a)(18) and women-owned business status pursuant to proposed § 1002.107(a)(19). However, there was some duplication between what was contained in proposed appendix F and in proposed § 1002.107(a)(18) and (19) and associated commentary.

As discussed further herein, final § 1002.107(a)(18) differs from proposed § 1002.107(a)(18) in a number of ways, largely to streamline the rule and facilitate compliance. First, the final rule combines proposed § 1002.107(a)(18) and (19) into final § 1002.107(a)(18). Next, final § 1002.107(a)(18) also requires collection of LGBTQI+-owned business status. Finally, the commentary to final § 1002.107(a)(18) incorporates the information contained in proposed appendix F.

Proposed Rule—Proposed § 1002.107(a)(18) and (19)

In order to implement the section 1071 requirement that financial institutions inquire whether applicants for credit are minority-owned and/or women-owned businesses, the Bureau proposed § 1002.107(a)(18) to address minority-owned business status, and § 1002.107(a)(19) to address women-owned business status. The text of these

proposed provisions was otherwise identical in their language. Proposed § 1002.107(a)(18) and (19) would have required financial institutions to collect and report whether an applicant is a minority-owned or women-owned business, respectively. Proposed § 1002.107(a)(18) and (19) would also have required financial institutions to collect and report whether minority-owned business status or women-owned business status, respectively, was being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). When the financial institution requests minority-owned and women-owned business statuses from an applicant, the financial institution would have been required to inform the applicant that the financial institution cannot discriminate on the basis of the applicant's minority-owned or women-owned business status, or on whether the applicant provides this information. Finally, proposed § 1002.107(a)(18) and (19) would have referred to proposed appendix F for additional details regarding how financial institutions are required to collect and report minority-owned or women-owned business statuses, respectively. Proposed appendix F would have included a requirement that a financial institution inform an applicant that the applicant is not required to respond to the financial institution's questions regarding the applicant's minority-owned business status and women-owned business status and inform the applicant of a prohibition on financial institutions requiring applicants to provide this information.[670]

Proposed comments 107(a)(18)–1 and 107(a)(19)–1 would have clarified that a financial institution would be required to ask an applicant if it is a minority-owned business or women-owned business, respectively, for each covered application unless the financial institution is permitted to report minority-owned business status or women-owned business status, respectively, based on previously collected data. Additionally, the financial institution would have been required to permit an applicant to refuse to answer the financial institution's inquiry and to inform the applicant that it is not required to provide the information. The financial institution would have reported the applicant's response, its refusal to answer the inquiry (such as when the applicant indicates that it does not wish to provide the requested information), or its failure to respond (such as when the applicant fails to submit a data collection form) to the inquiry.

Proposed comments 107(a)(18)–2 and 107(a)(19)–2 would have explained that a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of an applicant's minority-owned business status or women-owned business status, respectively, or on whether the applicant provides the information. These proposed comments would also have clarified that a financial institution may combine this non-discrimination notice regarding minority-owned business status or women-owned business status, respectively, with the similar non-discrimination notices that a financial institution is required to provide when requesting women-owned business status or minority-owned business status, respectively, and a principal owner's ethnicity, race, and sex if a financial institution requests such information in the same data collection form or at the same time.

Proposed comments 107(a)(18)–3 and 107(a)(19)–3 would have explained how, pursuant to proposed § 1002.111(b), financial institutions must record an applicant's response regarding minority-owned business status and women-owned business status pursuant to proposed § 1002.107(a)(18) or (19), respectively, separate from the application and accompanying information. These proposed comments would have also provided examples of how responses could be recorded separately from the application and accompanying information.

Proposed comments 107(a)(18)–4 and 107(a)(19)–4 would have stated that pursuant to proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's minority-owned business status or women-owned business status, respectively. However, if a financial institution did not receive a response to its inquiry, the financial institution would have reported that the applicant's minority-owned business status or women-owned business status, respectively, is ''not provided by applicant.''

Proposed comments 107(a)(18)–5 and 107(a)(19)–5 would have stated that notwithstanding proposed § 1002.107(b) (regarding verification of applicant-provided information), a financial institution would have reported the applicant's response, its refusal to answer the inquiry, or its failure to respond to the inquiry pursuant to proposed § 1002.107(a)(18) or (19), respectively, even if the financial institution verifies or otherwise obtains an applicant's minority-owned business status or women-owned business status for other purposes. Moreover, a financial institution would not have been required or permitted to verify the applicant's responses to the financial institution's inquiries pursuant to proposed § 1002.107(a)(18) or (19) regarding minority-owned business status or women-owned business status, respectively.

Proposed comments 107(a)(18)–6 and 107(a)(19)–6 would have clarified that a financial institution does not report minority-owned business status or women-owned business status, respectively, based on visual observation, surname, or any basis other than the applicant's response to the inquiry that the financial institution makes to satisfy proposed § 1002.107(a)(18) or (19), respectively, or, if the financial institution was permitted to report based on previously collected data, on the basis of the applicant's response to the inquiry that the financial institution previously made to satisfy § 1002.107(a)(18) or (19), respectively.

Proposed comments 107(a)(18)–7 and 107(a)(19)–7 would have clarified that a financial institution may report minority-owned business status or women-owned business status, respectively, based on previously collected data if the financial institution is permitted to do so pursuant to proposed § 1002.107(c)(2) and its commentary.

The Bureau sought comment on its proposed approach to these data points, including the proposed methods of collecting and reporting the data. The Bureau also requested comment on whether additional clarification regarding any aspect of these data points is needed. In particular, the Bureau sought comment on whether applicants are likely to have difficulty understanding and determining the information they are being asked to provide and, if so, how the Bureau may mitigate such difficulties.

Proposed Rule—Proposed Appendix F

Proposed appendix F would have provided instructions to aid financial institutions when collecting minority-owned business status pursuant to proposed § 1002.107(a)(18) and women-owned business status pursuant to proposed § 1002.107(a)(19).

The Bureau proposed appendix F pursuant to its authority under ECOA

[670] Proposed appendix G would have included a similar requirement to notify applicants that they are not required to provide information regarding principal owners' ethnicity, race, and sex and of a similar prohibition on financial institutions requiring that applicants provide such information.

section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, in order to facilitate compliance with the statutory requirements to collect minority-owned and women-owned business statuses pursuant to 704B(b)(1). Further, the Bureau proposed appendix F pursuant to its obligation in 704B(g)(3) to issue guidance to facilitate compliance with the requirements of section 1071, including assisting financial institutions in working with applicants to determine whether the applicants are women-owned or minority-owned businesses.

The Bureau sought comment on the proposed instructions, and generally sought comment on whether additional clarification regarding any aspect of the proposed instructions was needed. The Bureau further requested comment on whether additional or different instructions were needed for financial institutions that choose not to use a paper data collection form to collect minority-owned business status or women-owned business status, such as collecting such information using a web-based or other electronic data collection form, or over the telephone. The Bureau also sought comment regarding the challenges faced by both applicants and financial institutions by the data collection instructions prescribed in appendix F and specifically requested comment on ways to improve the data collection of minority-owned business status and women-owned business status.

Comments Received—Women-Owned and Minority-Owned Business Statuses

The Bureau received comments on proposed § 1002.107(a)(18) and (19) and appendix F from some industry and community group commenters. Commenters uniformly supported the Bureau's proposal that the financial institution would rely solely on the applicant to determine minority-owned and women-owned business statuses, and that institutions should not be required or permitted to verify an applicant's response. One commenter requested that a financial institution not be required to conduct any follow-up if an applicant fails to provide the information. Another noted that owners and ownership status may change from day to day. One said that the back-office functions of financial institutions will need to ensure the data are being reported correctly and identify any issues in the data, which will require an increase in staff.

A commenter asserted that applicants should be permitted to self-report whether they have been certified by a third-party organization as a minority- and/or women-owned business and the name of the certifying organization, which it said would promote the objectives of section 1071 by encouraging responses of relevant and verifiable information. Another commenter suggested that the Bureau coordinate with the U.S. Census to create a minority and women-owned business suffix to a business's NAICS code which identifies their minority or women-owned business status.

Regarding appendix F, some commenters supported the proposed approach to collecting information. Several commenters requested that the Bureau eliminate duplication and include all mandatory statements in the rule text, rather than in the appendices.

Comments Received—LGBTQI+-Owned Business Status

As discussed in the section-by-section analysis of § 1002.102(k) and (*l*) above, regarding the definitions for LGBTQI+ individual and LGBTQI+-owned business, the Bureau sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer (LGBTQ+)-owned business status, similar to the way it proposed to collect minority-owned business status and women-owned business status.

The Bureau received comments from several banks, individual commenters, and community groups on this issue. Some commenters did not support including such a data point in the final rule, generally stating that asking for such information would be offensive, would be considered an invasion of privacy, or would damage bank-customer relationships. One commenter said that applicants are unlikely to provide this information and that an applicant's LGBTQ+-owned business status is not considered in the lending process and thus should not be part of this data collection.

A few commenters also stated that asking for such information could potentially further segregate and stigmatize LGBTQ individuals and their businesses, when they already face bias and discrimination. These commenters also raised concerns about the privacy and security of the collected information, noting that storing it with financial institutions and in a nationwide database exposes the information to not only authorized persons but also potentially to hackers. These commenters argued that although there is some protection in the Federal employment law context due to the U.S. Supreme Court's opinion in *Bostock* v. *Clayton County,*[671] there are States where discrimination against LGBTQ individuals is legal and thus inferences about one's sexuality could have serious negative impacts. They also expressed concern that this information could be used for unintended purposes. One commenter also expressed a concern that previously collected information about an applicant's LGBTQ+-owned business status could be used inappropriately.

Other commenters supported inclusion of LGBTQ+-owned business status in the final rule, generally asserting the collection of information about a business' LGBTQ+-owned status is appropriate and necessary under the law. One commenter stated that businesses owned by LGBTQ+ individuals face discrimination and bias and urged the Bureau to use its ECOA section 704B(e)(2)(H) authority to require the collection of such information. Another commenter argued that data about lending availability to LGBTQ-owned businesses will enhance the Bureau's ability to enforce fair lending laws to protect them from discrimination in credit, and identify their credit needs. Another commenter stated that collecting applicants' LGBTQ+-owned business status is necessary to ensure that LGBTQ+ small business owners are being treated fairly by lenders and fulfill the purposes of section 1071. One commenter suggested that the Bureau include an inquiry to identify businesses who have experienced impermissible sex discrimination under ECOA without requiring information on the owners' specifically held identities if they do not wish to disclose them. This commenter suggested this would be consistent with the Bureau's proposal regarding the collection of ethnicity and race.

A commenter also stated that there is public and congressional support for the collection of LGBTQ+-owned business status information, noting that H.R. 1443, the LGBTQ Business Equal Credit Enforcement and Investment Act, would have amended ECOA to include a definition for ''LGBTQ-owned business'' and require the collection of LGBTQ-owned business status.[672]

Commenters suggested that the Bureau adopt the same approach it proposed using for collecting minority-owned and women-owned business statuses, by providing applicants with a definition for LGBTQ-owned business

[671] 140 S. Ct. 1731 (2020). See the section-by-section analysis of § 1002.107(a)(19), under *Proposed Rule—Collecting Sex,* for a discussion of the Court's holdings in *Bostock*.

[672] H.R. 1443, 117th Cong. (2021).

status and allowing respondents to indicate whether they are or are not such a business. Another commenter recommended that financial institutions not be allowed to collect or report such information on the basis of visual observation, surname analysis, or any method other than applicant-provided responses. This commenter also stated that financial institutions should not be permitted or required to verify an applicant's LGBTQ+-owned business status.

Final Rule—Business Status in General

For the reasons set forth herein, the Bureau is adopting § 1002.107(a)(18) with a number of changes to require collection of minority-owned business status, to incorporate collection women-owned business status (from proposed § 1002.107(a)(19)) and to add LGBTQI+-owned business status, along with a number of conforming changes to the commentary. The Bureau has also incorporated information from proposed appendix F into the commentary to final § 1002.107(a)(18),[673] added additional commentary for parity with final § 1002.107(a)(19) regarding collection of principal owners' ethnicity, race, and sex, and updated a number of cross-references.

Final § 1002.107(a)(18) requires the collection of information regarding whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned business. When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, § 1002.107(a)(18) requires that a financial institution inform the applicant that the financial institution cannot discriminate on the basis of minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides this information.

Final comment 107(a)(18)–1 clarifies that a financial institution must ask an applicant whether it is a minority-owned, women-owned, and/or LGBTQI+-owned business. A financial institution must permit an applicant to refuse (*i.e.,* decline) to answer the inquiries and must inform the applicant that it is not required to provide the information. The financial institution must report the applicant's substantive responses, that the applicant declined to answer, or its failure to respond to an inquiry, as applicable.

Final comment 107(a)(18)–2 clarifies that a financial institution must provide the applicants with definitions of the terms minority-owned business, women-owned business, and LGBTQI+-owned business when inquiring about these business statuses. A financial institution satisfies this requirement if it provides the definitions set forth in the sample data collection form in appendix E.

Final comment 107(a)(18)–3 clarifies that a financial institution may combine on the same paper or electronic data form the business status questions along with the data requested in § 1002.107(a)(19) (principal owners' ethnicity, race, and sex) and § 1002.107(a)(20) (number of principal owners).

Final comment 107(a)(18)–4 (renumbered from comment 107(a)(18)–2 in the proposal and incorporating additional information from proposed appendix F) explains that a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of an applicant's business statuses or on whether the applicant provides the information. Under the final rule, a financial institution must also inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled (this disclosure would have been optional under the NPRM). The Bureau believes that this notice should be compulsory, rather than voluntary, to ensure that applicants receive information about the data collection rule and its purposes. See the section-by-section analysis of § 1002.107(a)(19) for further explanation and discussion of comments received on this issue.

Final comment 107(a)(18)–5 explains that a financial institution must maintain the record of an applicant's responses to the financial institution's inquiry separate from the application and accompanying information.

Final comment 107(a)(18)–6 explains that if a financial institution does not receive a response to the financial institution's inquiry for purposes of § 1002.107(a)(18), the financial institution reports that the applicant's business statuses were ''not provided by applicant.''

Final comment 107(a)(18)–7 explains that a financial institution reports that the applicant responded that it did not wish to provide the information about an applicant's business statuses if the applicant declines or refuses to provide the information by selecting such a response option on a paper or electronic form. The financial institution reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

Final comment 107(a)(18)–8 explains that if an applicant both provides a substantive response to the financial institution's inquiry regarding business status and also checks the ''I do not wish to provide this information'' box or similar for that question, the financial institution reports the applicable business status(es) provided by the applicant (rather than reporting that the applicant declined to provide the information).

Final comment 107(a)(18)–9 explains that, notwithstanding § 1002.107(b) (regarding verification of applicant-provided data), a financial institution must report the applicant's substantive response(s), that the applicant declined to answer the inquiry, or the applicant's failure to respond to the inquiry, even if the financial institution verifies or otherwise obtains an applicant's business statuses for other purposes, and provides an example of such a situation.

With regard to commenters who asserted that applicants should be able to rely upon minority-owned or women-owned business status certifications received from a third-party organization, the Bureau believes that the definitions of minority-owned or women-owned business statuses from third-party organizations may not align with the definitions found in section 1071 and codified in this rule, and thus reliance on them would not be appropriate. As addressed above, final comment 107(a)(18)–2 clarifies that a financial institution must provide applicants with definitions of the terms minority-owned business, women-owned business, and LGBTQI+-owned business, as provided in this rule, when asking questions about these business statuses.

Final Rule—LGBTQI+-Owned Business Status

For the reasons set forth herein, the Bureau is exercising its authority under ECOA section 704B(e)(2)(H) to require financial institutions to request information about whether an applicant is a LGBTQI+-owned business. The Bureau believes that the collection of this information will further section

[673] In certain instances where language in proposed appendix F and commentary to proposed § 1002.107(a)(18) and (19) were similar, language in the final regulatory text or commentary has been revised to improved clarity. In other instances, language from proposed appendix F is imported wholesale to provide clarity and streamline the rule.

1071's statutory purposes. Specifically, the Bureau believes that the collection of this information will help address an information gap about small business lending and facilitate fair lending enforcement and the identification of business and community development needs and opportunities for small businesses.

Based on the limited information available, the Bureau believes that LGBTQI+-owned businesses may experience particular challenges accessing small business credit. For example, one report found that, while LGBTQ businesses were equally likely to apply for financing, they were less likely to receive it, with about 46 percent of LGBTQ-owned businesses reporting that they had received none of the financing that they had applied for in the past year, as compared to 35 percent of non-LGBTQ businesses that applied for funding. The report noted that LGBTQ-owned businesses were more likely than non-LGBTQ businesses to explain their denial was due to lenders not approving financing for ''businesses like theirs'' (33 percent versus 24 percent), among other reasons.[674] The same report also found that LGBTQ-owned businesses that applied for Paycheck Protection Program funding in 2021 were less successful in receiving funding applied for than non-LGBTQ businesses.[675]

ECOA section 704B(e)(2)(H) provides the Bureau with broad discretion to collect ''any'' additional data it determines would aid in fulfilling the purposes of section 1071. As discussed, the Bureau has determined that the collection of business applicants' LGBTQI+-owned business status information, in addition to requiring information on principal owners' specifically held sex/gender identity, as discussed in the section-by-section analysis of § 1002.107(a)(19) below, will facilitate the purposes of section 1071 and is thus exercising its authority under section 1071 to require its collection.

[674] Spencer Watson *et al.,* Ctr. for LGBTQ Economic Advancement & Research and Movement Advancement Project, *LGBTQ-Owned Small Businesses in 2021,* 10–11 (July 2021), *http://www.lgbtq-economics.org/research/lgbtq-small-businesses-2021* (analyzing 2021 data from Small Business Credit Survey administered by the Federal Reserve Banks). As used in the report, the term ''LGBTQ-owned business'' refers to businesses where individuals who identify as lesbian, gay, bisexual, transgender, or queer own 50 percent or more of the business. *Id.* at note a.

[675] *Id.* at 8–9 (only 54 percent of LGBTQ-owned businesses received all the Paycheck Protection Program funding they applied for in 2021, and 17 percent received none of the funding applied for, compared to 68 percent and 10 percent of all non-LGBTQ owned businesses, respectively).

Similar to the proposed (and final) approaches for collecting women-owned and minority-owned business statuses, financial institutions are required to provide the definition of ''LGBTQI+-owned business'' under § 1002.102(*l*) when requesting information about an applicant's LGBTQI+-owned business status as provided by final comment 107(a)(18)–2. Financial institutions are also required to provide the same notices when requesting an applicant's LGBTQI+-owned business status, such as the notice that the applicant is not required to provide the information under final comment 107(a)(18)–1 and other notices under final comment 107(a)(18)–4. Other provisions set out in commentary for minority-owned and women-owned business statuses likewise apply to LGBTQI+-owned business status; for example, a financial institution reports only the applicant's response to the inquiry about its LGBTQI+-owned business status, even if it verifies or otherwise obtains an applicant's LGBTQI+-owned business status for other purposes. *See, e.g.,* comments 107(a)(18)–6, –7, and –9.

Final comment 107(a)(18)–5 also clarifies that an applicant's responses about whether it is an LGBTQI+-owned business must be kept separately from the small business's application form and accompanying documents. ECOA section 704B(b)(2) requires a financial institution to maintain a record of the ''responses to [the] inquiry'' required by section 704B(b)(1) separate from the application and accompanying information. As explained in part E.2 in the *Overview* to this part V, the Bureau interprets section 704B(b)(2) to refer to an applicant's responses to protected demographic information, which includes whether the applicant is a minority-owned business and/or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners. This is because these data points require financial institutions to request demographic information that has no bearing on the creditworthiness of an applicant and that financial institutions would not be otherwise able to request absent the data collection requirements under section 1071 and the final rule as a result of Regulation B's general prohibition on inquiring about the sex of an applicant or any other person in connection with a credit transaction.[676] Likewise, the Bureau considers the LGBTQI+-owned business status data point to be protected demographic information that has no bearing on an applicant's creditworthiness, as also noted by some commenters, and which financial institutions would be unable to collect without the requirement to do so in final § 1002.107(a)(18). As a result, the Bureau believes that it is necessary to require a financial institution to maintain an applicant's response to the inquiry about whether it is a LGBTQI+-owned business separately from the rest of the business's application and accompanying information under final § 1002.111(b), similar to the requirement with respect to responses about an applicant's minority-owned and women-owned business statuses.

[676] 86 FR 56356, 56386–87 (Oct. 8, 2021); *id.* at 56501–02. *See also* 12 CFR 1002.5(b).

The Bureau acknowledges commenters' concerns that requesting information as to whether applicants are LGBTQI+-owned businesses could be offensive, be considered an invasion of privacy by applicants, or damage bank-customer relationships. Final comment 107(a)(18)–4 provides that a financial institution must inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. Sample language for this notice, which provides a brief, plain language explanation of the purpose of the data collection, appears in the sample data collection form in appendix E. The Bureau believes providing such context will help to mitigate negative reactions an applicant may have to a financial institution's request for such information. Further, as stated on the sample data collection form, applicants have the right to refuse to provide this information, as provided under comment 107(a)(18)–1.

The Bureau acknowledges commenters' arguments that applicants are unlikely to respond to the inquiry about LGBTQI+ status and that therefore financial institutions should not be required to ask. However, the Bureau and other data users are unable to conduct comprehensive fair lending and business and community development analyses without this data point, even as applicants are individually entitled to refuse to provide it.

Some commenters expressed concern that LGBTQI+-owned business status could be detrimentally used against LGBTQI+ individuals and their businesses. As discussed in greater detail in part VIII below, the Bureau acknowledges that an individual person's LGBTQI+ status likely is sensitive personal information that could pose personal privacy risks as well as other non-personal commercial

privacy risks. Part VIII also contains a more comprehensive analysis of how privacy interests may be appropriately protected. In addition, the Bureau is finalizing § 1002.110(e), which prohibits financial institutions and third parties from disclosing protected demographic information except in limited circumstances.

107(a)(19) Ethnicity, Race, and Sex of Principal Owners

ECOA section 704B(e)(2)(G) requires financial institutions to compile and maintain certain information, including the race, sex, and ethnicity of an applicant's principal owners. However, section 1071 does not set out what categories should be used when collecting and reporting this information. The Bureau proposed § 1002.107(a)(20) to address how a financial institution would collect and report the ethnicity, race, and sex of an applicant's principal owners.

Proposed § 1002.107(a)(20) would have required financial institutions to collect and report the ethnicity, race, and sex [677] of the applicant's principal owners as well as whether this information is being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). It would have also required financial institutions to report, in certain circumstances, whether ethnicity and race are being reported by the financial institution on the basis of visual observation or surname analysis. Proposed § 1002.107(a)(20) would have required financial institutions to collect and report ethnicity, race, and sex data as prescribed in proposed appendix G. Proposed appendix G would have included a requirement that a financial institution inform an applicant that the applicant is not required to respond to the financial institution's questions regarding its principal owners' ethnicity, race, or sex and would have also included a prohibition on financial institutions requiring applicants to provide this information. Proposed § 1002.107(a)(20) would have also required that when the financial institution requests ethnicity, race, and sex information from an applicant, the financial institution must inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information. The Bureau also put forth for public comment a sample data collection form in proposed appendix E that financial institutions would be able use to collect ethnicity, race, and sex information.

The Bureau is finalizing the statutory requirement to collect principal owners' ethnicity, race, and sex in § 1002.107(a)(19). Below, the Bureau first discusses its general approach to collecting principal owners' ethnicity, race, and sex. Second, the Bureau discusses finalizing its proposal to collect ethnicity and race information using certain aggregate categories and disaggregated subcategories. Third, the Bureau discusses its approach to requiring the collection of sex by applicant self-identification (using only a free-form text field for a paper or electronic form, or by self-description for applications taken orally) and without the use of response categories. Finally, the Bureau discusses its decision not to require collection of principal owners' ethnicity and race via visual observation and/or surname analysis. The Bureau has incorporated information from proposed appendix G into the commentary to final § 1002.107(a)(19) [678] and has updated a number of cross-references.

Proposed Rule—Collecting Ethnicity, Race, and Sex, In General

Proposed comment 107(a)(20)–1 would have clarified how a financial institution collects ethnicity, race, and sex information. It would have stated that unless a financial institution is permitted to report ethnicity, race, and sex information based on previously collected data pursuant to proposed § 1002.107(c)(2), a financial institution must ask an applicant to report its principal owners' ethnicity, race, and sex for each covered application and that the financial institution must permit an applicant to refuse to answer the financial institution's inquiry. It would have required financial institutions to inform the applicant that it is not required to provide the information. Proposed comment 107(a)(20)–1 would have further clarified that the financial institution must report the applicant's responses, its refusal to answer the inquiries, or its failure to respond to the inquiries, and explain that in certain situations, discussed in proposed comments 107(a)(20)–7 and -8 and in proposed appendix G, a financial institution may also be required to report one or more principal owners' ethnicity and race (but not sex) based on visual observation and/or surname analysis. Proposed comment 107(a)(20)–1 would have cross-referenced proposed appendix G for additional instructions.

Proposed comment 107(a)(20)–2 would have explained that a financial institution must inform the applicant that the financial institution shall not discriminate on the basis of a principal owner's ethnicity, race, or sex or on whether the applicant provides that information. It would have also clarified that a financial institution may combine this non-discrimination notice with the similar non-discrimination notices that a financial institution would have been required to provide when requesting minority-owned business status and women-owned business status if a financial institution had requested minority-owned business status, women-owned business status, and/or a principal owner's ethnicity, race, and sex in the same data collection form or at the same time.

Proposed comment 107(a)(20)–3 would have explained how, pursuant to proposed § 1002.111(b), financial institutions must record applicants' responses regarding a principal owner's ethnicity, race, and sex pursuant to § 1002.107(a)(20) separate from the application and accompanying information. This proposed comment would have also provided examples of how responses could be recorded separately from the application and accompanying information.

Proposed comment 107(a)(20)–4 would have clarified that a financial institution is required to maintain procedures reasonably designed to collect applicant-provided information pursuant to proposed § 1002.107(c)(1), including the ethnicity, race, and sex of an applicant's principal owners. However, if a financial institution is nonetheless unable to collect the principal owners' ethnicity, race, or sex from the applicant and if the financial institution is not required to report the principal owners' ethnicity and race based on visual observation and/or surname, the financial institution would have been required to report that the principal owner's ethnicity, race, or sex (as applicable) is "not provided by applicant."

Proposed comment 107(a)(20)–12 would have clarified that a financial institution is neither required nor permitted to verify the ethnicity, race, or sex information that the applicant

[677] While ECOA section 704B(e)(2)(G) uses "race, sex, and ethnicity," the Bureau reordered them to "ethnicity, race, and sex" for purposes of the proposal, so that they would appear alphabetically and for consistency with how they appear in Regulation C. The Bureau is using the same approach for this final rule.

[678] In certain instances where language in proposed appendix G and commentary to proposed § 1002.107(a)(20) were substantially similar, language in the final regulatory text or commentary has been revised to improve clarity. In other instances, language from proposed appendix G is imported wholesale to provide clarity and streamline the rule.

provides for purposes of proposed § 1002.107(a)(20), even if the financial institution verifies or otherwise obtains the ethnicity, race, or sex of the applicant's principal owners for other purposes. The Bureau also solicited comment on whether it would be useful to expressly codify this application of the principle in the commentary.

Additionally, the proposed comment would have explained that, if an applicant refuses to respond to the inquiry pursuant to proposed § 1002.107(a)(20) or fails to respond to this inquiry, the financial institution reports that the applicant declined to provide the information or did not respond to the inquiry (as applicable), unless the financial institution is required to report ethnicity and race based on visual observation and/or surname analysis. Finally, the proposed comment would have explained that the financial institution does not report ethnicity, race, or sex pursuant to proposed § 1002.107(a)(20) based on information that the financial institution collects for other purposes.

Proposed comment 107(a)(20)–5 would have explained that generally an applicant determines its principal owners and decides whether to provide information about principal owners. It would have further stated that, nonetheless, a financial institution may be required to report ethnicity and race information based on visual observation and/or surname analysis and may need to determine if a natural person with whom the financial institution meets in person is a principal owner. It would have explained how a financial institution determines who is a principal owner in the event that the financial institution may be required to report ethnicity and race information based on visual observation and/or surname. It would have also provided examples of how the financial institution can make that determination and noted that the financial institution is not required to verify any responses regarding whether a natural person is a principal owner.

The Bureau sought comment on those proposed general aspects of collecting and reporting principal owners' ethnicity, race, and sex, including comments on the challenges that financial institutions may have implementing them.

Comments Received—Collecting Ethnicity, Race, and Sex, In General

The Bureau received comments regarding the collection of ethnicity, race, and sex for applicants' principal owners, in general, from a wide range of commenters including lenders, trade associations, community groups, individual commenters, a software vendor, and others. Within these general comments, commenters addressed a number of issues including alignment with HMDA, lack of applicant responses, verification of applicant-provided data, privacy issues, and concerns related to burden and cost. These issues, and others, are discussed in turn below.[679]

General support and concerns. The Bureau received comments from lenders, trade associations, community groups, and others regarding its proposal, at a general level, for collecting information about the ethnicity, race, and sex of principal owners.

Many commenters supported the Bureau's proposal and the creation of a comprehensive small business lending database. These commenters said that collecting information about the ethnicity, race, and sex of small business applicants' principal owners will help address a lack of such information in existing lending data; facilitate enforcement of fair lending laws; and enable stakeholders to understand and identify needs and opportunities, remove barriers, and advocate for women-owned, minority-owned, and small businesses. Some commenters also emphasized generally that the data disclosure would shed light on racial and gender gaps and discrimination, which they noted are long-standing issues and which have been exacerbated by the COVID–19 pandemic. One commenter characterized the collection of this information as long overdue.

Many commenters expressing general support for the Bureau's proposal emphasized that the demographic data collected under the final rule must be robust, disaggregated, detailed, and include information on underwriting criteria and on race, gender identity, sexual orientation, and disability status in order to enable meaningful analysis.

Several lenders and a business advocacy group stated that the data would help lenders improve their lending practices. One commenter that Congress's adjustments to the SBA's Paycheck Protection Program in the program's second round, to prioritize minority-owned and women-owned businesses and microbusinesses and set aside funds for CDFIs, could not have happened without access to Paycheck Protection Program lending data, including demographic data. Another commenter stated that the small business lending data collection is necessary to gather critical data on lending beyond what is collected by the SBA.

Some commenters emphasized that HMDA data, which include demographic and socioeconomic information, have provided valuable insight on racial and income disparities in the home mortgage lending market and have been an important tool to hold lenders accountable as well as to determine how to meet unmet credit needs. Several commenters also emphasized that after Congress included demographic information as part of the HMDA data collection, the number of mortgages to people of color and people with modest incomes increased; these commenters anticipate a similar outcome for small business lending after data collected under this final rule are published.

One commenter stated that the collection of demographic data for each of an applicant's principal owners would help provide the public with a sense of the varying percentages of ownership by women or minorities above or below the 50 percent threshold for minority-owned or women-owned businesses and help determine if businesses with different minority ownership levels have distinct borrowing experiences.

The Bureau also received comments expressing generally applicable concerns and requests for clarification about its proposal for collecting ethnicity, race, and sex information. Several commenters said that the Bureau's proposal includes duplicative content in the proposed rule text, commentary, and appendices, which they said could complicate compliance. These commenters recommended that any mandatory requirements be in the final regulatory text, rather than spread out among the regulation, commentary, and appendices. Another commenter asserted that the proposed rules for collecting demographic information are too complex.

Another argued that a significant hurdle in implementing the Bureau's proposal is that while ECOA requires financial institutions to be blind to factors such as ethnicity, race, and sex in lending, they must collect and report information on those same factors under the Bureau's proposed rule (including by visual observation and surname

[679] The Bureau also received comments about specific aspects of the Bureau's proposal for collecting and reporting principal owners' ethnicity, race, and sex information, including collecting ethnicity and race using aggregate categories and disaggregated subcategories; collecting sex; and collecting ethnicity and race via visual observation and/or surname analysis in certain circumstances. Such comments are discussed further below in this section-by-section analysis of § 1002.107(a)(19).

analysis under certain circumstances). This commenter asserted that the Bureau's proposal is irreconcilable with ECOA and cannot be reasonably implemented without compromising the data collected. Another commenter predicted that requiring financial institutions to collect ethnicity, race, or sex information would lead to possible favoritism, discrimination, and stereotyping. (Similar concerns were raised specifically with respect to collection of ethnicity and race information by visual observation and/or surname analysis; these commenters are discussed separately below.)

One commenter asked the Bureau to clarify how a financial institution should report an applicant's principal owners' ethnicity, race, and sex information if a representative of a small business applicant states they need to check with the principal owners for such information, but the application is withdrawn or declined before the information is provided. The commenter stated that because borrowers may apply to many lenders for a loan, reporting on withdrawn applications would skew collected loan data. The commenter also asked for clarification about how to report under similar circumstances, where an application has been approved, but still no information has been provided. This commenter suggested the Bureau provide options for a financial institution to report that an applicant ''declined to answer'' for applicants that specifically refused to provide responses and ''not available'' for other circumstances, including withdrawn applications or applicant non-responsiveness.

Another commenter suggested that the Bureau should collect demographic data for ''applicants,'' which it characterized as the natural persons completing the application. This commenter argued that such information would further the fair lending purposes of section 1071, because loan applicants may be subject to different treatment based on factors such as their ethnicity, race, or gender, citing a study finding that prospective loan applicants were subject to differential treatment on the basis of their race and gender in the pre-application stage.[680]

An industry commenter asked whether a financial institution could collect demographic information at a greater level of specificity than proposed by the Bureau. Another asked whether a financial institution is permitted to reconcile discrepancies or inaccuracies in self-reported ethnicity or race data with the use of software or other relevant information.

Alignment with HMDA. Some industry commenters urged the Bureau to align the collection of principal owners' ethnicity, race, and sex information under the final rule with the collection of such information for mortgage applicants under Regulation C, whether exactly or to the greatest extent possible. One commenter also suggested alignment with existing Regulation B, which also requires the collection of certain demographic information for certain mortgages.[681] These commenters said that consistency between the HMDA and section 1071 data collections would reduce confusion for financial institutions and applicants, facilitate efficient data collection such as by allowing data to be collected only once for applications covered by both HMDA and section 1071, facilitate compliance, reduce burden, and make the collected data more usable across regulations.

Several commenters identified issues that could arise for applications reportable under both section 1071 and HMDA, if the data collection requirements under the two regulatory regimes did not match. They said that financial institutions could potentially be required to collect data using different forms and to have systems capable of maintaining separate sets of data for the same transaction under the Bureau's proposal. Some also said that applicant confusion about the differences between the two regimes may reduce applicants' willingness to provide the requested information. (Commenters more specific concerns about how overlapping data collection obligations would work are discussed in more detail below.) Some commenters generally urged the Bureau to either align the HMDA and section 1071 data collection requirements or to exempt loans from one regime that are reportable under the other to avoid such issues.

Concerns related to specific transactions or institutions.[682] Some commenters expressed support for, or concerns about, the collection of principal owners' ethnicity, race, and sex information in the context of specific types of transaction or institutions.

Some commenters raised general concerns about the proposed collection of ethnicity, race, and sex information by small banks or community banks. A few commenters said that requesting ethnicity, race, and sex information has the potential to negatively impact their relationships with their customers. One stated that such inquiries could make customers distrustful of their banks and raise privacy concerns, and urged the Bureau to consider the impact that the collection of such information may have on the relationship-based banking model of community banks.

A number of commenters, including many agricultural lenders, expressed general support for the collection of demographic data. One commenter stated that the proposed collection of demographic information would help reveal and prevent unfair agricultural lending practices. Other commenters stated support for demographic data collection, provided that the rule's definition of small business is tailored for the agricultural credit context. One commenter expressed concern about the burden for collecting and reporting demographic information for agricultural lenders and farmers.

Some commenters emphasized particular difficulties for collecting ethnicity, race, and sex information for credit applications taken in retail environments (also referred to as ''point of sale'' applications/transactions). These commenters noted that credit applications taken in retail store environments differ from those typically taken at banks because customers expect speed and efficiency in the application process, and expressed their concern that the Bureau's proposal would add complexity and length to application processes, due in part to detailed questions about ethnicity, race, and sex.

[680] Nat'l Cmty. Reinvestment Coal., *Racial and Gender Mystery Shopping for Entrepreneurial Loans: Preliminary Overview* (2020), *https://ncrc.org/wp-content/uploads/2020/02/NCRC-Mytery-Shopping-Race-and-Gender-v8.pdf.*

[681] Under existing Regulation B, a creditor is required to collect applicant ethnicity, race, sex, marital status, and age information for an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling. 12 CFR 1002.13(a). Regulation B provides that the ethnicity and race information shall be requested either by using specified aggregate ethnicity and race categories, or the aggregate and disaggregated ethnicity and race categories set forth under Regulation C. *Id.*

[682] The Bureau received a number of comments responding to the Bureau's proposal regarding the collection of protected demographic information vis-à-vis certain types of institutions and transactions, many of which are discussed in the section-by-section analyses of § 1002.104 (covered transactions and excluded transactions), § 1002.105 (covered financial institutions and exempt institutions), and § 1002.107(c) (time and manner of collection). The Bureau also received comments on specific aspects of the Bureau's proposal to collect principal owners' ethnicity, race, and sex information, in the context of specific types of institutions and transactions. See the Bureau's discussion of such comments in the referenced parts of this preamble for more detail.

These commenters also expressed concerns about having retail store associates ask for this information. Commenters said that many retailers may use oral, interview-style, in-store application processes, and that retail store associates do not have the training to make such inquiries or handle customer questions or reactions. Several commenters also stated that small business applicants may feel uncomfortable providing ethnicity, race, and sex information in public retail spaces. Another commenter predicted that the majority of small business credit applications submitted at the point of sale would lack demographic information. Some of these commenters also urged the Bureau to exempt private label and co-branded credit applications, along with other types of credit originated at or facilitated through retailers such as revolving lines of credit and installment loans (*e.g.,* point of sale credit), from the rule's requirements in various ways—such as by exempting all such applications, or those for lines of credit below $50,000, from the requirement to collect demographic information.

A group of trade organizations stated that insurance premium finance transactions should not be included within the scope of the final rule, in part because State insurance law generally prohibits or discourages insurance agents from collecting information about race, religion, national origin, or ethnicity of an insured business's owners on behalf of lenders, and insurers do not collect such information as a result.

Several other trade associations urged the Bureau to clarify how the rule's data collection requirements apply to indirect vehicle finance transactions. Beyond generally urging the Bureau to exempt such transactions from the final rule, two trade associations stated a survey of their automobile and truck dealer members reflected concerns about training employees to collect ethnicity, race, and sex information, particularly with respect to implementing the Bureau's proposed visual observation and surname data collection requirement.

Lack of applicant responses. Several commenters raised concerns about a potential lack of applicant responses to the proposed demographic information questions.[683] A bank stated that it encounters difficulties in meeting the HMDA reporting requirements because mortgage loan applicants are reluctant to provide demographic information and it anticipates similar reactions from small businesses. Other commenters argued that low demographic response rates in the Paycheck Protection Program indicates that most small business applicants will likely decline or fail to provide demographic information. Thus, some commenters said, records with missing demographic data will likely need to be either excluded from fair lending analyses or data users will have to use proxies for the missing information, asserting that this outcome calls into question the benefits of the data collection versus the costs. Another commenter said that the high number of applications for small business credit made online, and situations where the person providing information for a given application may be one of several owners or a company officer and not an owner themselves, may also lead to a high percentage of applicants who do not provide responses. One commenter asserted that small business owners may react negatively to the amount of paperwork associated with this rule's data collection requirements and as a result decide not to provide their principal owners' information. Finally, a commenter suggested that the Bureau require demographic information to be collected after a credit decision has been made, rather than before.

Verification. Several industry commenters and a women's business advocacy group argued that financial institutions should not be required or permitted to verify applicant-provided data about a principal owner's ethnicity, race, or sex. One commenter suggested that the Bureau should determine if there are ways for it to verify if reported data are accurate and correct. (Similar comments specifically regarding collection of information via visual observation or surname are discussed in more detail below.)

Reduced demand for traditional credit. Several industry commenters asserted that the collection of principal owners' protected demographic information could potentially make borrowing from traditional lenders less attractive for small businesses due to applicant discomfort or objections to inquiries for such information. One predicted that applicants may, as a result, turn to credit cards, payday loans, or nontraditional online financing for their credit needs.

Privacy. Several industry commenters stated that small business customers may find the collection of protected demographic information that could become public to be an invasion of privacy. They generally expressed concern that such information could be used to re-identify borrowers, which could in turn harm the reputation or image of a small business applicant. A bank said this concern is particularly salient in small communities, and that if public information is used to determine the identities of a bank's customers and the pricing terms offered to them, it could result in a competitive disadvantage for the bank versus other lenders.

Burden and costs for collecting ethnicity, race, and sex information. Several industry commenters raised concerns about the burden or compliance costs for financial institutions associated collecting principal owners' ethnicity, race, and sex information under the proposal. Other commenters raised similar concerns in the context of specific types of transactions or institutions, or related to specific aspects of the Bureau's proposal for collecting this information, which are discussed in the relevant parts of this section-by-section analysis.

One commenter expressed concern that financial institutions may need to increase the prices and fees for credit to cover increased compliance costs related to the collection and storage of ethnicity, race, and sex information. Another stated that collecting principal owners' ethnicity, race, and sex information would require online lenders to make system changes, which it said would be different from those needed by traditional lenders. This commenter urged the Bureau to allow lenders to report aggregate, as opposed to application level, data to reduce this burden. Another commenter said that because does not currently collect ethnicity information currently and its core processing system does not include a field for this information, it would need to collect this data field manually.

One commenter stated that collecting information for up to four principal owners as proposed would be burdensome for both financial institutions and applicants. A lender said that reporting such information for all principal owners would take a large amount of space on its small business lending application register. That commenter also suggested that the Bureau require demographic information for only one principal owner instead of all principal owners, asserting that this would not impact the quality of the data because the

[683] A number of commenters also expressed concerns about data quality in the specific context of their comments about the Bureau's proposal to require financial institutions to collect at least one principal owners' race and ethnicity information via visual observation and/or surname under certain circumstances. These comments are discussed in more detail below.

applicant's minority-owned and women-owned business statuses would still be collected.

In contrast, another lender did not anticipate incurring significant costs related to the collection of ethnicity, race, and sex information because it already gathers such information or similar information for other small business lending programs and funding opportunities such as the SBA's 7(a) Loan Program; the Paycheck Protection Program; the Wells Fargo Diverse Community Capital Program; and the CDFI Fund. The commenter stated that adjusting to section 1071 data collection requirements will primarily entail updating software, compliance training, and updating materials. The commenter anticipated minimal ongoing costs that will be considered normal costs of doing business and said it does not plan on raising fees or restricting access to credit as a result. The commenter also urged the Bureau to coordinate with the CDFI Fund to streamline section 1071 reporting requirements.

Direct reporting to the Bureau or third parties, or use of other data sources. A number of industry commenters suggested that protected demographic information should be self-reported by applicants directly to a central database or registry, whether maintained by the Bureau or by third parties.

Some commenters urged the Bureau to work with Secretaries of State so that demographic data generally or information about a business's minority-owned, women-owned, and/or LGBTQI+-owned business statuses are voluntarily registered at the same time that a small business registers with its State. One commenter stated that this would allow small businesses to provide information to a trusted entity and lenders could then verify demographic data with the relevant State—thus avoiding delays and confusion from applicants during the loan application process.

Other commenters suggested that the Bureau provide ways for small businesses to report their demographic information directly to the Bureau. Several suggested the Bureau develop a form for the collection of ethnicity, race, and sex information that could be sent directly to the Bureau. Others suggested that the Bureau establish a tool, portal, or online system for applicants to input their demographic information or to certify their desire to not provide information. One commenter stated that the regulatory trend has shifted from requiring collection and reporting of beneficial ownership information by financial institutions to having small businesses report directly to the government. Generally, these commenters said that applicants should be provided with a unique identifier, either by the Bureau or the financial institutions, that could be used to match applicant demographic information with loan information. Several commenters said that the financial institution should also be given the ability to match its records with the central database, to enable their internal fair lending compliance monitoring efforts. Some commenters also suggested the Bureau coordinate with other Federal agencies, such as the SBA, U.S. Department of the Treasury, Internal Revenue Service, or the U.S. Census Bureau, to develop the database, gather information for other data points, or purge records as necessary.

Some of these commenters stated that direct reporting to the Bureau would avoid the need for financial institutions to collect ethnicity and race information via visual observation or surname analysis. These commenters also stated that this would resolve privacy concerns applicants may have in providing demographic information to their lenders. Commenters also asserted that direct reporting would inform applicants of the Bureau's role in the data collection, promote applicant self-reporting of demographic information, and likely increase response rates because it would provide applicants with assurances of confidentiality and because applicants would not be concerned that financial institutions would improperly use the data.

Several commenters argued that direct reporting to the Bureau would have other benefits for financial institutions, including lessening or eliminating the risk of inappropriate use of demographic data by financial institutions; reducing a financial institutions' compliance costs and burden; avoiding the need for financial institutions to establish firewalls; lowering litigation and regulatory risk; reducing the risk of reputational harm for asking for sensitive data; and lowering barriers to entry in financial services. Commenters also stated that direct reporting would be more efficient for applicants because information would be maintained in one place and could be updated as needed, as opposed to being provided for each application. Commenters further suggested that the Bureau would benefit from receiving real-time data on applicant demographics, which they claimed would simplify and enhance analysis and publication and would allow the Bureau to directly manage the collection, storage, and standardization of the data.

Some commenters suggested that instead of requiring financial institutions to collect data, the Bureau should coordinate with other government agencies, like the Internal Revenue Service and the U.S. Census Bureau, which already collect demographic and other data on small businesses, to avoid burden to financial institutions and which would result in the Bureau having better data to use for analyses. One commenter suggested that the Bureau should use the demographic analysis approach being used by the U.S. Census Bureau and develop educational materials for financial institutions about the methodology. Another commenter suggested the Bureau buy information from Google or Facebook.

Applicant and financial institution education and guidance. A range of commenters urged the Bureau to provide education and guidance about the final rule for applicants, the public, and financial institutions. The commenters generally stated that the Bureau should engage in an education and/or media campaign to explain the final rule and its purposes to develop trust with small business communities and comfort for applicants by explaining the role of the data collection for facilitating fair lending and to encourage small businesses to provide their protected demographic information.

Many of these commenters also suggested that the Bureau develop guidance and materials such as frequently asked questions and factsheets to explain the rule and its purposes. A few commenters suggested developing materials for applicants regarding the ethnicity, race, and sex data collection inquiries, such as how to respond if a principal owner is multi-ethnic or multi-racial, so applicants can accurately respond and financial institution employees are not asked to interpret or clarify such requirements.

Commenters also recommended developing guidance materials for financial institutions to use in explaining the final rule, including training resources and disclosures to explain the reasons and purpose for the data collection. They also suggested that such materials be translated into the top ten languages spoken in the United States according to the U.S. Census Bureau.

Final Rule—Collecting Ethnicity, Race, and Sex, in General

For the reasons set forth herein, the Bureau is finalizing the requirement to collect principal owners' ethnicity, race, and sex with certain changes. Among

other things, the Bureau is: (1) finalizing its proposed requirement for financial institutions to collect ethnicity and race information using aggregate categories and disaggregated subcategories, using the specific categories and subcategories in the proposal; (2) finalizing the requirement for financial institutions to collect information about a principal owner's sex, which generally will permit an applicant to respond to an inquiry about the principal owner's ''sex/gender'' through free-form text or self-description for oral applications; and (3) not finalizing its proposed requirement to collect and report at least one principal owner's ethnicity and race information on the basis of visual observation and/or surname analysis under certain circumstances. These three specific aspects of the final rule are each discussed in detail below.

Final § 1002.107(a)(19) (proposed as § 1002.107(a)(20)) requires financial institutions to collect and report information about the ethnicity, race, and sex of small business applicants' principal owners. In line with the proposal, final § 1002.107(a)(19) provides that when requesting such information from an applicant, the financial institution must inform the applicant that it cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on the basis of whether the applicant provides this information (non-discrimination notice).

The final rule does not require a financial institution to report whether the reported ethnicity, race, and sex information was based on previously collected data (as permitted by proposed comment 107(c)(2)–7). This information would have provided additional context for the Bureau and others when application method was reported as being other than in-person but ethnicity or race information were reported as collected through visual observation or surname. Because the Bureau has decided not to require the use of visual observation and surname analysis in the final rule, however, the Bureau does not believe that capturing information about data reuse is still necessary and thus has removed that requirement from final § 1002.107(a)(19) to streamline and facilitate compliance.

The Bureau acknowledges commenters' concerns about repetition across the rule's regulatory text, commentary, and appendices, and has made a number of changes to reduce duplication and otherwise streamline this aspect of the final rule to facilitate compliance. In particular, the Bureau has removed proposed appendix G, relocating unique content into the commentary for final § 1002.107(a)(19). The Bureau has also adjusted the commentary accompanying final § 1002.107(a)(19) to reflect changes to the regulatory text described above, as well as the addition of LGBTQI+-owned business status where women- and minority-owned business statuses are mentioned.

Final comment 107(a)(19)–1 generally clarifies how a financial institution must ask an applicant for its principal owners' ethnicity, race, and sex. The financial institution must permit an applicant to refuse to answer the financial institution's inquiries and must inform the applicant that it is not required to provide the information. It also establishes how a financial institution reports the applicant's responses to its inquiries about ethnicity, race, and sex.

Final comment 107(a)(19)–2 (incorporating instruction 3 from proposed appendix G) explains that a financial institution must provide an applicant with the definition of principal owner in final § 1002.102(o) and that a financial institution satisfies the requirement if it provides the definition as set forth in the sample data collection form in final appendix E.

Final comment 107(a)(19)–3 (incorporating instruction 2 from proposed appendix G) explains that a financial institution may combine on the same paper or electronic data collection form the questions about a principal owner's ethnicity, race, and sex with the number of the applicant's principal owners pursuant to § 1002.107(a)(20) and the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses pursuant to § 1002.107(a)(18).

Final comment 107(a)(19)–4 (based on proposed comment 107(a)(20)–2) explains that the non-discrimination notice required when a financial institution requests a principal owner's ethnicity, race, and sex may be combined with the non-discrimination notice that is required when requesting information about an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses, when such information is collected on the same form or at the same time. The comment has been updated to reflect the addition of LGBTQI+ business status to final § 1002.107(a)(18), and to state that a financial institution must (as opposed to ''may'' as proposed) inform an applicant that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled, for reasons discussed further below.

Final comment 107(a)(19)–5 (based on proposed comment 107(a)(20)–3) provides that a financial institution must maintain the record of an applicant's responses to inquiries pursuant to § 1002.107(a)(19) separate from the application and accompanying information, and cross-references final § 1002.111(b) and comment 111(b)–1.

Final comment 107(a)(19)–6 (based on proposed comment 107(a)(20)–4) addresses reporting when information about a principal owner's ethnicity, race, or sex is not provided by an applicant. While a financial institution must maintain procedures reasonably designed to collect applicant-provided data, the comment acknowledges that there may be circumstances under which an applicant does not provide ethnicity, race, or sex information. The final comment has also been updated to include explanatory examples, including examples from proposed appendix G (instruction 13).

Final comment 107(a)(19)–7 (adapted from instruction 12 in proposed appendix G) addresses how a financial institution reports an applicant's response that it declines to provide information about a principal owner's ethnicity, race, or sex.

Final comment 107(a)(19)–8 (adapted from instruction 16 in proposed appendix G) addresses how a financial institution reports an applicant's conflicting responses for its principal owner's ethnicity, race, or sex information, when the applicant selects a response option indicating it does not wish to provide the information but also selects an answer option providing a substantive response to the question at issue.

Final comment 107(a)(19)–9 (based on proposed comment 107(a)(20)–12) explains that a financial institution reports principal owners' ethnicity, race, and sex information as provided by the applicant, even if the financial institution verifies or otherwise obtains such information for other purposes. This comment no longer references collection of ethnicity and race via visual observation or surname.

Final comment 107(a)(19)–10 (substantially adapted from instruction 25 of proposed appendix G and proposed comments 107(a)(20)–6.iv, –7.iv, and –8) addresses how to report ethnicity, race, and sex information for an applicant with fewer than four principal owners.

Final comment 107(a)(19)–11 (substantially adapted from instruction 26 of proposed appendix G) explains that a financial institution reports one or

more principal owners' ethnicity, race, or sex information based on previously collected data under § 1002.107(d), the financial institution does not need to collect any additional ethnicity, race, or sex information for other principal owners (if any).

Final comment 107(a)(19)–12 (substantially adapted from instruction 24 of proposed appendix G) explains that a guarantor's ethnicity, race, and sex is not collected or reported unless they are also a principal owner of the applicant.

General support and concerns. The Bureau agrees with commenters that the statutorily required collection of detailed ethnicity, race, and sex information about small business applicants' principal owners will facilitate the stated purposes of section 1071 to assist in the enforcement of fair lending laws and enable communities, governmental entities, and creditors to understand and identify needs and opportunities of women-owned, minority-owned, and small businesses.[684] The collection of ethnicity, race, and sex information in the HMDA context under Regulation C, for example, is essential to the Bureau's efforts to monitor financial institutions for fair lending compliance in the home mortgage market and to efforts by the Bureau, policymakers, and others to identify trends, gaps, and potential solutions for addressing any issues uncovered by the data. Recent changes to Regulation C to collect disaggregated ethnicity and race data have also added to the Bureau's and others' understanding of the home mortgage marketplace.[685] The Bureau believes that the collection of principal owners' ethnicity, race, and sex information will similarly provide important insights into the small business lending market and help enable the identification of potential discriminatory lending.

The Bureau also agrees that in combination with other collected information such as the number of an applicant's principal owners under final § 1002.107(a)(20) and whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned small business under final § 1002.107(a)(18), the collection of principal owners' ethnicity, race, and sex information will help the Bureau and others to understand lending market dynamics at different levels of ownership by individuals of certain ethnicities, races, and/or sexual or gender population subgroups. Transparency will not only help facilitate fair lending enforcement, but reduce uncertainty for financial institutions and help them to identify areas of unmet credit demand into which they could consider increasing product availability. In turn, small business owners will benefit from increased credit availability. The Bureau believes that other information about a covered application is still important for fulfilling section 1071's statutory purposes even when the applicant has declined to provide any protected demographic information. Such information can still provide insight into lending to small businesses pursuant to section 1071's business and community development purpose. Moreover, the lack of demographic information for a covered application itself could be important information for the Bureau and others to assess potential reasons for and solutions to correct such information gaps in the future.

Regarding the comment its proposed rules for collecting demographic data are too complex, and comments that suggested streamlining these provisions, the Bureau notes that it is not finalizing the proposed requirement to collect ethnicity and race via visual observation or surname data. As a result, the Bureau has removed that provision, and related requirements, from the final rule. The Bureau has also moved all instructions and information about collecting and reporting ethnicity, race, and sex information to the commentary for final § 1002.107(a)(19). The Bureau believes these changes streamline and simplify the ethnicity, race, and sex data collection requirements, which will facilitate financial institutions' compliance with the final rule.

Regarding a commenter's assertion that this data collection requirement conflicts with ECOA, the Bureau notes that section 1071 amends ECOA to *require* the collection of the race, sex, and ethnicity of the principal owners of small businesses. Moreover, ECOA also provides that inquiries to collect data under section 1071 are not considered discrimination under the statute.[686] The final rule also includes protections against the improper use of protected demographic information, including the firewall requirement in final § 1002.108, the provision restricting re-disclosure of protected demographic information in final § 1002.110(e), and the recordkeeping requirements in final § 1002.111(b).

Regarding a commenter's request for clarification as to how a financial institution should report these data if responses were provided by an applicant's representative before action is taken on the application, or that an applicant declined to provide the requested information. As discussed above, final comments 107(a)(19)–1, –6, and –7 clarify the various reporting options for reporting data collected pursuant to final § 1002.107(a)(19): financial institutions will be required to report an applicant's responses to the ethnicity, race, and sex inquiries; their selection of a response that they decline to provide information (*e.g.,* by selecting an answer option of ''I do not wish to provide this information'' or similar); and a response of ''not provided by the applicant'' if an applicant does not provide any response. The final rule also requires an applicant to report the action taken on an application under § 1002.107(a)(9), including whether originated or if the application was withdrawn by the applicant or is incomplete. Given these provisions, the Bureau does not believe it is necessary to include an option for a financial institution to indicate that the applicant or a principal owner was not available, as suggested by the commenter.

The Bureau is not requiring the collection of demographic information for a natural person completing an application on behalf of a small business, as suggested by a commenter. ECOA section 704B(e)(2)(G) specifically requires financial institutions to compile and maintain information about the ethnicity, race, and sex of ''the principal owners of the business.'' The statute does not require financial institutions to collect such information for any other individuals. The Bureau acknowledges the possibility of discrimination occurring against an applicant's non-principal owner representative, but in light of the statutory directive to collect demographic information about the applicant' principal owners, and the associated complexity that adding such a requirement could involve, the Bureau does not believe that it would be appropriate to adopt such a requirement at this time. The Bureau may, however, revisit at a later date whether the collection of such information would aid in fulfilling the purposes of section

[684] *See* ECOA section 704B(a).

[685] In 2015, the Bureau issued a final rule (2015 HMDA Rule) amending Regulation C to incorporate several changes made under the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* 80 FR 66128 (Oct. 28, 2015). One of the changes that was implemented was the collection of mortgage applicants' race and ethnicity information using aggregate categories and disaggregated subcategories. *Id.* This data has been used by the Bureau, for example, to examine how home buying experiences differ among Asian American and Pacific Islander subgroups. *See* CFPB, *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf.*

[686] 15 U.S.C. 1691(b)(5).

1071 in the future as it enhances its understanding of the small business credit marketplace.

Regarding a commenter's inquiry as to whether a financial institution could collect more specific demographic data than required by the rule. Final § 1002.107(a)(19) establishes that financial institutions must inquire about applicants' principal owners' ethnicity, race, and sex and must permit applicants to provide certain specified responses; certain responses include the option of providing additional information via free-form text field.

One commenter asked whether a financial institution can reconcile discrepancies or inaccuracies in applicants' self-reported ethnicity or race data. Final comment 107(a)(19)–1 provides that the financial institution is not permitted to report a principal owner's ethnicity, race, or sex on any basis other than applicant-provided data, which may include previously provided data pursuant to final § 1002.107(d). As a result, financial institutions must report applicant responses as provided by the applicant, even if the institution perceives possible discrepancies or inaccuracies.

Alignment with HMDA. The Bureau generally agrees with commenters that some degree of alignment with the HMDA data collection requirements under Regulation C would promote consistency and may reduce potential confusion for financial institutions, applicants, and data users. However, the Bureau does not believe that the collection of data as to small business owners should necessarily be the same in each aspect as it is for home mortgage applicants. Although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, Regulation C and this final rule are authorized under different statutes and for different markets. Further, both Regulation C and this final rule were developed in consideration of the information available to the Bureau at the time of each rulemaking, including comments received in response to the Bureau's proposals and current research and standards as to the measurement of such factors. As demographic data collection best practices and standards evolve, the Bureau considers such information in its decision-making. The Bureau refers readers to the relevant parts of this section-by-section analysis for discussion of its rationale for its decisions on the collection of ethnicity, race, and sex.

The Bureau notes that it is exempting HMDA-reportable transactions from the data collection requirements of this final rule due to, in part, to commenters' concerns about potentially duplicative and/or inconsistent requirements for reporting ethnicity, race, and sex. See the section-by-section analysis of § 1002.104(b)(2) for additional information.

Concerns related to specific transactions or institutions. The Bureau is not adopting special rules for the collection of protected demographic information for particular types of transactions or lenders. The Bureau believes it is important to collect nationwide, comprehensive ethnicity, race, and sex data for all covered applications to fulfill the purposes of section 1071. However, the Bureau acknowledges commenters' concerns about the potential challenges in collecting such information in certain situations or for certain types of lenders and appreciates, in particular, the importance of trust in furthering important relationships between small businesses and their local banks. For this reason, among others, the Bureau is not finalizing its proposal to collect ethnicity and race information via visual observation or surname analysis, as explained further in the relevant part of this section-by-section analysis below.

To help applicants' understanding of the section 1071 data collection, the Bureau has made edits to the sample data collection form in final appendix E to include sample text that explains the purpose of the rulemaking and clarifies that the inquiries on the form for an applicant's status as a minority-owned, women-owned, and/or LGBTQI+-owned small business and its principal owners' ethnicity, race, and sex information are required under Federal law. The sample form, of course, continues to note that applicants are not required to provide any of the requested demographic information. The Bureau also anticipates developing materials to help small businesses understand the rule, as described at the end of part I above.

The Bureau does not believe that agricultural credit transactions should be viewed or treated differently from other covered transactions under the final rule, with regard to the collection of principal owners' ethnicity, race, or sex information. As explained in the section-by-section analysis of § 1002.104, generally there is insufficient information available about agricultural credit markets; nevertheless, there is evidence that these markets are affected by historical and/or continuing discrimination. Moreover, farms are an important means of capital formation for families and communities. Collecting principal owners' ethnicity, race, and sex information for agricultural credit transactions will help facilitate the Bureau's and others' understanding of the agricultural credit sector of the small business lending marketplace and will help to further the enforcement of fair lending laws for that part of the market. The Bureau also anticipates that the collection of this information may increase access to responsible and affordable agricultural credit for a diverse cross-section of the population, by helping creditors and others identify needs of and opportunities for small farms, including those that are minority-, women-, and/or LGBTQI+-owned.

Likewise, the Bureau is not adopting separate rules or exemptions for credit applications taken at point of sale. As explained further in the section-by-section analysis of § 1002.107(c), regarding the time and manner of collection, the Bureau generally believes that the same rules should apply across all covered credit transactions and covered financial institutions, and that the arguments made by point of sale providers are not unique in nature or can be addressed through other means. Likewise, the Bureau does not believe there should be special considerations for the collection of ethnicity, race, and sex information for private label credit, for which commenters raised similar concerns.

Because the Bureau is exempting insurance premium financing transactions from coverage under the final rule in § 1002.104(b)(3), commenters' concerns summarized above about collecting protected demographic information for such transactions are rendered moot.

With regard to comments raising concerns about collecting ethnicity, race, and sex information in the context of indirect auto finance transactions, the Bureau refers readers to its discussion at the section-by-section analysis of § 1002.109(a)(3). As discussed there, the Bureau believes that auto dealers are generally unlikely to be collecting 1071 data on behalf of covered financial institutions because they are often the last entity with authority to set the material credit terms of a covered credit transaction. But even in situations where dealers are acting as conduits and are thus collecting information on behalf of another financial institution, comment 5(a)(2)–3 to the Board's Regulation B states that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor

that is subject to HMDA or another Federal or State statute or regulation requiring data collection.[687] The Bureau also does not believe that any specialized knowledge is necessary to collect 1071 data if dealers do collect such data.

Lack of applicant responses. The Bureau acknowledges concerns raised by commenters about the potential for low applicant response rates to the required inquiries for information about their principal owners' ethnicity, race, and sex. As discussed in the NPRM, such concerns motivated the Bureau's proposal to require financial institutions to collect at least one principal owner's ethnicity and race information through visual observation and/or surname analysis under certain circumstances. The Bureau explained that the similar data collection requirement for the HMDA data collection has been an important tool in supporting response rates.

As discussed in more detail regarding the Bureau's proposal that financial institutions collect principal owners' ethnicity and race via visual observation or surname in certain circumstances, the Bureau believes that such a requirement could help support response rates in the right context. However, at this time, the Bureau has elected to address concerns about applicants' potential unwillingness to voluntarily provide their principal owners' ethnicity, race, and sex information by providing further clarification as to the requirement that an institution maintain procedures to collect applicant-provided data at a time and in a manner that are reasonably designed to obtain a response under final § 1002.107(c). For example, final § 1002.107(c)(2) sets forth minimum criteria when collecting applicant-provided data directly from the applicant that must be included within a financial institution's procedures to ensure they are reasonably designed to obtain a response, including seeking to collect such information before notifying an applicant of action taken on a covered application, ensuring that the request for applicant-provided data is prominently displayed or presented, ensuring the collection does not have the effect of discouraging applicants from providing a response, and ensuring that applicants can easily respond to a request for the data. The Bureau also anticipates developing materials to educate small business owners about the small business lending data collection and its purposes, which may impact their willingness to provide demographic information. Further, as discussed in the section-by-section analysis of final appendix E, the sample data collection form will also include language that explains, in plain language, the purpose for the collection of demographic information under the final rule. At this time, the Bureau believes that these measures will improve applicant response rates to the protected demographic information inquiries under the final rule. However, the Bureau will continue to assess whether and what further measures may be needed to improve response rates.

The Bureau's decision not to change the timing for collecting protected demographic information to after a credit decision has been made, as suggested by a commenter, is discussed in the section-by-section analysis of § 1002.107(c).

Verification. Commenters urged the Bureau to provide that financial institutions are not permitted or required to verify the ethnicity, race, or sex of a principal owner and to codify this requirement in the final rule. The Bureau agrees. Final comment 107(a)(19)–9 clarifies that a financial institution may only report an applicant's responses as to its principal owners' ethnicity, race, and sex, even if it verifies or otherwise obtains the information for other purposes.

Reduced demand for traditional credit. The Bureau appreciates some commenters' concerns that inquiries about their principal owners' ethnicity, race, and sex information might discourage small businesses from seeking credit with traditional lenders. The Bureau anticipates that while there may be some period of initial hesitation by small businesses to provide such information, small businesses will become more familiar with the requests for their demographic information over time and such requests will be considered a normal part of the process for seeking business credit. Further, as described at the end of part I above, the Bureau anticipates developing and distributing materials about the final rule directed at small businesses. The Bureau also expects that such materials, by furthering applicant understanding of the 1071 data collection, will ease the compliance burden for financial institutions in implementing the final rule.

Privacy. The Bureau received comments generally expressing concerns that small businesses' owners' demographic information could be used to identify the businesses and their owners. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with the data and make modification and deletion decisions to the public application-level dataset. The Bureau takes the privacy of such information seriously and will be making appropriate modifications and deletions to any data before making it public, and intends to continue engage with the public about how to mitigate privacy risk.

With respect to concerns that small business applicants may find the collection of protected demographic information to be an invasion of privacy, in amending ECOA to require the collection of an applicant's principal owners' ethnicity, race, and sex information, Congress implicitly determined that the benefits of collecting such information outweigh any invasion of privacy concerns. Nevertheless, the Bureau notes that it has included sample language in the sample data collection form in appendix E explaining the purpose of the data collection, and, as noted, it anticipates developing materials to further help small businesses understand the purposes of the rule. In addition, the final rule provides safeguards for applicants' protected demographic information by requiring that such information be kept separately from their applications and accompanying information under § 1002.111(b), through the firewall requirement in § 1002.108, and in § 1002.110(e) restricting financial institutions' re-disclosure of protected demographic data to third parties.

Burden and costs for collecting ethnicity, race, sex information. The Bureau appreciates that financial institutions will face some initial costs and burden in implementing the final rule, such as from making changes to its policies, procedures, systems, training programs, and in other areas. However, as noted by one commenter, the Bureau believes that for many financial institutions covered by the final rule, there will be manageable ongoing costs related to the data collection after an initial implementation period.

The Bureau does not believe it would be appropriate to permit financial institutions to report only aggregate data, as opposed to application-level data, as suggested by one commenter. First, the statute clearly contemplates the collection of individual loan-level information. Section 1071's information gathering requirement provides that a financial institution is required to collect and maintain information ''in the

[687] This language aligns with comment 5(a)(2)–3 in the Bureau's Regulation B, to which the Bureau is adding a reference to subpart B for additional clarity.

case of *any* application to a financial institution . . .'' (emphasis added).[688] Further, the statute requires the financial institution to compile and maintain ''a record of the information provided by any loan applicant,'' including loan identifying information such as the number of the application and the date on which the application was received.[689] Given this language, the Bureau believes that Congress intended that financial institutions compile and maintain application-level information and submit the information—compiled in that way—to the Bureau.

Second, the Bureau believes that it is necessary to have specific ethnicity, race, and sex data for individual principal owners to allow assessments of whether there are trends in the data, including for businesses with different amounts of ownership by individuals of certain ethnicities, races, or sex, which cannot be captured through the minority-owned, women-owned, and LGBTQI+-owned business status data points alone. As a result, the Bureau rejects a commenter's suggestion that the Bureau require the collection of only one principal owner's ethnicity, race, and sex information.

Direct reporting to the Bureau or third parties, or use of other data sources. The Bureau is not, at this time, establishing a mechanism by which small businesses might directly submit demographic information to the agency. The Bureau notes, in this respect, that the statute calls for *financial institutions* to collect these data and report them to the Bureau. In addition, the mechanisms described by the statute do not envision the Bureau ever knowing the identity of any small business submitting data, which would occur if small businesses were to file demographic data directly with the Bureau.

However, the final rule does not foreclose industry from developing mechanisms to make demographic data collection and submission more effective or efficient. For example, industry might seek to foster the development of third-party mechanisms that would let financial institutions collect and report demographic information in tokenized form so that they themselves do not have access to that demographic data. To the extent that industry stakeholders are interested in the development of such mechanisms in connection with meeting their obligations under the final rule, the Bureau is willing to engage with them on these issues in order to ensure that any such developments ensure appropriate data quality and protection, do not burden or create obligations for applicants, and otherwise accord with the rule and the statute; to the extent necessary and appropriate, the Bureau would also need to adjust certain regulations and technical guidance. In considering appropriate data quality and protection, the Bureau will want to ensure that such a third-party system does not compromise privacy or other important protections or create opportunities for the sale of personal data.

Some commenters suggested that, as opposed to requiring financial institutions to collect and report demographic data, the Bureau should instead use data, for example, that is gathered by other Federal agencies or buy it from outside sources. However, Congress's intent with ECOA section 704B was to require financial institutions to collect demographic information from applicants that would then be reported to the Bureau. Gathering such information from other sources would not be aligned with this intent. Further, the Bureau believes that requiring financial institutions to collect demographic information during the application process will help to ensure comprehensive, nationwide demographic data collection about small business lending, which will in turn help enable the identification of potential discriminatory lending practices and identification of the needs and opportunities of small businesses, including women-owned, minority-owned, and LGBTQI+-owned businesses. Data that have been collected in other contexts and for other purposes, and analyzed pursuant to those agencies' methods for those other purposes, would not achieve what the Bureau believes is necessary to meet section 1071's statutory objectives. Further, some of the approaches suggested by commenters would not be feasible, such as buying data from sources outside of the Federal government, because they do not identify a small business applicant's principal owners. The Bureau also notes that it has worked with other Federal regulators so that they can tailor data collections in this area to take advantage of data collected under this rule, thereby reducing burden on regulated entities.

Applicant and financial institution education and guidance. With respect to commenters' requests that the Bureau educate and explain the final rule and its requirements to small business applicants, the public, and financial institutions, and to provide translations of the sample data collection form into other languages, the Bureau refers readers to its discussion regarding compliance and technical assistance at the end of part I above. Likewise, the Bureau agrees with commenters that it is important to provide a disclosure to applicants to generally explain the rule and its purpose. Instruction 4 to proposed appendix G would have explained that a financial institution may inform applicants that Federal law requires it to ask for the principal owners' ethnicity, race, and sex to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. In response to comments about the importance of helping applicants to understand the reasons for the data collection,[690] under the final rule financial institutions are required to provide such information (see final comment 107(a)(19)–4); sample language effecting this provision is included on the sample data collection form at appendix E.

Proposed Rule—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

The Bureau proposed that financial institutions request principal owners' ethnicity and race using both aggregate categories as well as disaggregated subcategories.

With respect to ethnicity data collection, the Bureau proposed using the same aggregate categories (*i.e.,* Hispanic or Latino and Not Hispanic or Latino) and disaggregated subcategories as are used in Regulation C. With respect to race data collection, the Bureau proposed using the same aggregate categories as are used in Regulation C (*i.e.,* American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White). The Bureau also proposed using the same disaggregated subcategories for the Asian race category and the Native Hawaiian or Other Pacific Islander race category, as well as with respect to the American Indian or Alaska Native race category, including by inviting an applicant to provide the name of a principal or enrolled tribe. In addition, the Bureau proposed adding disaggregated subcategories for the Black or African American race category, which are not used when

[688] ECOA section 704B(b).

[689] ECOA section 704B(e)(2).

[690] This was reaffirmed in user testing. *See* CFPB, *User testing for sample data collection form for the small business lending final rule* at app. A (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.*

collecting data pursuant to Regulation C.

The Bureau explained that OMB has issued standards for the classification of Federal data on ethnicity and race.[691] OMB's government-wide standards provide a minimum standard for maintaining, collecting, and presenting data on ethnicity and race for all Federal reporting purposes. These standards have been developed to provide ''a common language for uniformity and comparability in the collection and use of data on ethnicity and race by Federal agencies.'' [692] The OMB standards provide the following minimum categories for data on ethnicity and race: Two minimum ethnicity categories (Hispanic or Latino; Not Hispanic or Latino) and five minimum race categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White). The aggregate categories for ethnicity and race in Regulation C, which the Bureau proposed to use in the section 1071 final rule, conform to the OMB standards.

The Bureau also explained that in addition to the minimum data categories for ethnicity and race, the OMB's standards provide additional key principles. First, self-identification is the preferred means of obtaining information about an individual's ethnicity and race, except in instances where observer identification is more practical.[693] Second, the collection of greater detail is encouraged as long as any collection that uses more detail is organized in such a way that the additional detail can be aggregated into the minimum aggregate categories for data on ethnicity and race. More detailed reporting, which can be aggregated to the minimum categories, may be used at the agencies' discretion. Lastly, Federal agencies must produce as much detailed information on ethnicity and race as possible; however, Federal agencies shall not present data on detailed categories if doing so would compromise data quality or confidentiality standards.[694]

The Bureau noted that although OMB received comments requesting the creation of a separate Arab or Middle Eastern ethnicity category prior to the adoption of the OMB Federal Data Standards on Race and Ethnicity in 1997, OMB accepted the Interagency Committee's recommendation not to include one in the 1997 minimum standards for reporting of Federal data on race and ethnicity. OMB stated that while it was adopting the Interagency Committee's recommendation, it believed additional research was needed to determine the best way to improve data on this population group.[695]

The Bureau further explained that in 2017, OMB requested comment on the Federal Interagency Working Group for Research on Race and Ethnicity's (Working Group's) proposals to update the OMB Federal Data Standards on Race and Ethnicity.[696] The Working Group proposed adding a Middle Eastern or North African classification to the Federal Data Standards on Race and Ethnicity and to issue specific guidelines for the collection of detailed data for American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander, and White groups.[697] The Working Group also considered whether race and ethnicity should be collected using separate questions versus a combined question. The OMB Federal Data Standards on Race and Ethnicity have not been updated, however, in the time since OMB's 2017 request for comment.

The Bureau stated its belief that it is also important to consider the data standards that the U.S. Census Bureau (Census Bureau) uses in the Decennial Census. The definition of Hispanic or Latino origin used in the 2010 and 2020 Census questionnaire refers to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.[698] The 2010 and 2020 Census disaggregated the Hispanic or Latino ethnicity into four categories (Mexican, Mexican American, or Chicano; Puerto Rican; Cuban; and Another Hispanic, Latino or Spanish origin) and included an area where respondents could provide (*i.e.,* write in) a specific Hispanic, Latino, or Spanish origin group as additional information.[699]

The Bureau explained that the 2010 and 2020 Census questionnaires listed three of OMB's five aggregate race categories (American Indian or Alaska Native; Black or African American; and White). Although the questionnaires do not list the aggregate race categories for Asian or for Native Hawaiian or Other Pacific Islander, they do list the related disaggregated subcategories for the Asian race category (*i.e.,* Asian Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, Other Asian), and for the Native Hawaiian and Other Pacific Islander race category (*i.e.,* Native Hawaiian, Chamorro,[700] Samoan, Other Pacific Islander). These questionnaires also included three areas where respondents could write in a specific race: a specific Other Asian race, a specific Other Pacific Islander race, or the name of an enrolled or principal tribe in the American Indian or Alaska Native category.[701] Additionally, the 2020 Census allowed respondents to write in a specific origin for the White category and for the Black or African American category. For respondents who did not identify with any of the five minimum OMB race categories, the Census Bureau included a sixth race category—Some Other Race—on the 2010 and 2020 Census questionnaires. Respondents could also select one or more race categories and write-in options.[702]

The Bureau noted that on February 28, 2017, the Census Bureau released its *2015 National Content Test: Race and Ethnicity Analysis Report.* This National Content Test provided the U.S. Census Bureau with empirical research to contribute to the planning for the content of the 2020 Census' race/ethnicity questions. The report presented findings to the Census Bureau Director and executive staff on research conducted to assess optimal design elements that could be used in question(s) on race and ethnicity. It noted that Americans view ''race'' and ''ethnicity'' differently than in decades past and that a growing number of people find the current race and ethnicity categories confusing, or they wish to see their own specific group reflected on the Census questionnaire. The National Content Test's research found that there have been a growing number of people who do not identify with any of the official OMB race categories, and that an increasing number of respondents have been racially classified as ''Some Other

[691] Off. of Mgmt. & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity,* 62 FR 58782, 58782–90 (Oct. 30, 1997) (OMB Federal Data Standards on Race and Ethnicity).

[692] *See id.*

[693] *See id.*

[694] *See id.*

[695] *Id.* at 58782.

[696] 82 FR 12242 (Mar. 1, 2017).

[697] *See* OMB Federal Data Standards on Race and Ethnicity.

[698] *See* U.S. Census Bureau, *2010 Official Questionnaire, https://www.census.gov/history/pdf/2010questionnaire.pdf* (2010 Census Official Questionnaire), and U.S. Census Bureau, *2020 Official Questionnaire, https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire.pdf* (2020 Census Official Questionnaire).

[699] *See* 2010 Census Official Questionnaire and 2020 Census Official Questionnaire.

[700] The questionnaire for the 2010 Census included ''Guamanian or Chamorro,'' but the questionnaire for the 2020 Census included only ''Chamorro.''

[701] *See* 2010 Census Official Questionnaire and 2020 Census Official Questionnaire.

[702] *See id.*

Race.'' This was primarily because of reporting by Hispanics who did not identify with any of the OMB race categories, but it also noted that segments of other populations, such as Afro-Caribbean and Middle Eastern or North African populations, did not identify with any of the OMB race categories.[703] The 2015 National Content Test: Race and Ethnicity Analysis Report concluded that optimal design elements that may increase reporting, decrease item non-response, and improve data accuracy and reliability include: (1) a combined race and ethnicity question with detailed checkbox options; (2) a separate ''Middle Eastern or North African'' response category; and (3) instructions to ''Mark all that apply'' or ''Select all that apply'' (instead of ''Mark [X] one or more boxes'').[704]

The Census Bureau did not ultimately incorporate these design elements into the questionnaire for the 2020 Decennial Census, but instead continued to ask about ethnicity and race in two separate questions. While the questionnaire did not provide detailed check box options for the White race category or for the Black or African American race category, the questionnaire did add write-in options and noted examples. For White, it noted examples of German, Irish, English, Italian, Lebanese, and Egyptian. For Black or African American, it noted examples of African American, Jamaican, Haitian, Nigerian, Ethiopian, and Somali.[705] Notwithstanding the approach used by the Census Bureau for the 2020 Decennial Census, the Bureau requested comment on whether the approach and design elements set forth in the *2015 National Content Test: Race and Ethnicity Report Analysis* (whether in whole or in part) would improve data collection that otherwise furthers section 1071's purposes, improve self-identification of race and ethnicity by applicants and response rates, or impose burdens on financial institutions collecting and reporting this information.

The Bureau proposed that financial institutions must permit applicants to provide a principal owner's ethnicity and race using the aggregate categories used for HMDA data collection, which conform to the OMB standards. The Bureau believed that aligning the aggregate ethnicity and race categories for this rule's data collection with the HMDA data collection would promote consistency and could reduce potential confusion for applicants, financial institutions, and other users of the data.

The Bureau also proposed that applicants must be permitted to provide a principal owner's ethnicity and race using the disaggregated subcategories used in HMDA data collection, which also conform to one of the key principles in the OMB standards: encouraging the collection of greater detail as long as any collection that uses more detail is organized in such a way that the additional detail can be aggregated into the minimum aggregate categories for data on ethnicity and race. With respect to ethnicity data collection, the Bureau proposed that applicants must be permitted to provide a principal owner's ethnicity using the disaggregated subcategories used in HMDA data collection. For race data collection, the Bureau proposed that applicants must be permitted to provide a principal owner's race using the disaggregated subcategories for the Asian race category and the Native Hawaiian or Other Pacific Islander race category. The Bureau also proposed that applicants must be permitted to provide a principal owner's race using disaggregated subcategories for the Black or African American race category, which is not currently used in HMDA data collection. Lastly, similar to HMDA, the Bureau proposed inviting an applicant to provide the name of a principal or enrolled tribe for each principal owner with respect to the American Indian or Alaska Native race category.

The Bureau explained that it was proposing use of disaggregated subcategories for this rulemaking, in part, for general consistency with existing HMDA reporting requirements. Further, collection and reporting using disaggregated subcategories could be beneficial when attempting to identify potential discrimination or business and community development needs in particular communities. While disaggregated data may not be useful in analyzing potential discrimination where financial institutions do not have a sufficient number of applicants or borrowers within particular subgroups to permit reliable assessments of whether unlawful discrimination may have occurred, disaggregated data on ethnicity and race may help identify potentially discriminatory lending patterns in situations in which the numbers are sufficient to permit such fair lending assessments. The Bureau noted that additionally, as suggested in the 2015 National Content Test: Race and Ethnicity Report Analysis, the use of disaggregated subcategories may increase response rates.

The Bureau acknowledged, however, that including the disaggregated subcategories for four principal owners may make data collection more difficult in certain situations, such as for applications taken solely by telephone or for paper applications taken at retail locations. Given these concerns, the Bureau sought comment on whether an accommodation should be made for certain application scenarios, for example by permitting financial institutions to collect ethnicity and race information using only the aggregate categories or to permit financial institutions to collect ethnicity, race, and sex information on only one principal owner in those scenarios. The Bureau also noted that FinCEN's customer due diligence rule excludes from certain of its requirements point-of-sale transactions for the purchase of retail goods or services up to a limit of $50,000.[706] The Bureau did not propose this approach given the different purposes and requirements of the customer due diligence rule (as well as FinCEN's related customer identification program rule) [707] and section 1071. Nonetheless, the Bureau sought comment on whether covered applications taken at retail locations, such as credit cards and lines of credit with a credit limit under a specified amount (such as $50,000), should be excepted from some or all of the requirement to obtain principal owners' ethnicity, race, and sex information.

The Bureau also sought comment on its proposed use of the HMDA aggregate categories, the HMDA disaggregated subcategories (including the ability to provide additional information if an applicant indicates that a principal owner is Other Hispanic or Latino, Other Asian, or Other Pacific Islander), and the proposed addition of

[703] U.S. Census Bureau, *2015 National Content Test: Race and Ethnicity Analysis Report, Executive Summary,* at ix (Feb. 28, 2017), *https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf.*

[704] *Id.* at 83–85.

[705] *See* 2020 Census Official Questionnaire.

[706] 31 CFR 1010.230(h)(1)(i). The customer due diligence rule's exclusion for certain point of sale transactions is based on the ''very low risk posed by opening such accounts at [a] brick and mortar store.'' Fin. Crimes Enf't Network, U.S. Dep't of Treas., *Guidance: Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions,* at Q 29 (Apr. 3, 2018), *https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.*

[707] FinCEN's customer identification program rule does not contain a point of sale exclusion. While the rule permits *verification* of customer identity information within a reasonable time after an account is opened, the *collection* of required customer information must occur prior to account opening. *See* 31 CFR 1020.220(a)(2)(i)(A) and (ii). For credit card accounts, a bank may obtain identifying information about a customer from a third-party source prior to extending credit to the customer. 31 CFR 1020.220(a)(2)(i)(C).

disaggregated subcategories for the Black or African American category. Additionally, the Bureau sought comment regarding whether it would be helpful or appropriate to provide additional clarification or to pursue a different approach regarding the ability of a principal owner to identify as Other Hispanic or Latino, Other Asian, or Other Pacific Islander or to provide additional information if a principal owner is Other Hispanic or Latino, Other Asian, or Other Pacific Islander. The Bureau also sought comment on whether any additional or different categories or subcategories should be used for section 1071 data collection, and whether the collection and reporting of ethnicity and race should be combined into a single question for purposes of section 1071 data collection and reporting. The Bureau further sought comment on whether an additional category for Middle Eastern or North African should be added and, if so, how this category should be included and defined. In addition, the Bureau sought comment on whether disaggregated subcategories should be added for the aggregate White category, and if so, what disaggregated subcategories should be added and whether the applicant should be permitted to write in or otherwise provide other disaggregated subcategories or additional information. The Bureau also sought comment on whether the approach and design elements set forth in the 2015 National Content Test: Race and Ethnicity Report Analysis would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for financial institutions collecting and reporting this information. Finally, the Bureau sought comment on whether, similar to data collection pursuant to Regulation C, financial institutions should be limited to reporting a specified number of aggregate categories and disaggregated subcategories and, if so, whether such a limitation should be described in the sample data collection form.

Proposed comments 107(a)(20)–6 and –7 would have provided guidance on collecting and reporting ethnicity and race information, respectively. The proposed comments would have explained that applicants must be permitted to provide a principal owner's ethnicity or race using aggregate categories and disaggregated subcategories and would have also listed the aggregate categories and disaggregated subcategories that applicants must be permitted to use. The proposed comments would have also explained that applicants must be permitted to select one, both, or none of the aggregate categories and as many disaggregated subcategories as the applicant chooses, even if the applicant does not select the corresponding aggregate category. The proposed comments would have stated that, if an applicant provides ethnicity or race information for a principal owner, the financial institution reports all of the aggregate categories and disaggregated subcategories provided by the applicant, and the proposed comments would have provided examples. The proposed comments would have stated that a financial institution must also permit the applicant to refuse to provide ethnicity or race information for one or more principal owners and explain how a financial institution reports ethnicity or race information if an applicant declines to provide the information or fails to respond. Finally, the proposed comments would have explained how a financial institution reports ethnicity or race information if an applicant has fewer than four principal owners, and they would have provided examples.

Comments Received—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

The Bureau received comments from a range of commenters, including lenders, trade associations, community groups, and a business advocacy group, on its proposal to collect ethnicity and race using aggregate categories and disaggregated subcategories.

Several banks and a group of trade associations opposed the proposal to collect ethnicity and race information using disaggregated subcategories. Specifically, these commenters asserted that the disaggregated subcategories do not add value to fair lending reviews or findings in the HMDA context because there is not enough disaggregated subcategory data from which to draw fair lending conclusions, as mortgage applicants do not often use the disaggregated subcategories. Thus, they said, disaggregated subcategories should not be adopted for this data collection. The group of trade associations also stated that the Bureau's analysis of 2018 HMDA data shows that mortgage applicants largely selected one ethnicity or race field and asserted that the Bureau has not shown that small business credit applicants are likely to behave differently. A small business owner also objected to the Bureau's proposal on the grounds that applicants would not report the ethnicity and race of their principal owners accurately and, if faced with a long list of categories, would choose not to report. This commenter also asserted that the Bureau's proposal does not align with other government data collections and would hinder data analysis.

Two of those banks and the group of trade associations also objected on the grounds that collecting disaggregated data in the HMDA context has been burdensome and frustrating for applicants and lenders. The trade associations also argued that including disaggregated subcategories would impose more burden than under Regulation C because ethnicity and race data would need to be collected for up to four principal owners under the Bureau's proposal, whereas it would generally be collected for only one or two applicants for the HMDA data collection. This commenter also emphasized that for ethnicity and race data collection under Regulation C, financial institutions are required to read aloud all of the ethnicity and race disaggregated subcategories when taking a mortgage application over the phone, which the commenter asserted has been frustrating for mortgage applicants and would likely be frustrating for small business applicants as well.

The group of trade associations and a bank further argued for use of only the aggregate categories currently used in Regulation C and the OMB Federal Data Standards on Race and Ethnicity, without any new aggregate or disaggregated categories. As discussed above regarding general comments about the Bureau's proposal for collecting ethnicity, race, and sex, the Bureau also received some comments requesting that demographic information collection generally (including on race and ethnicity) for this rule should be the same, or similar to the greatest extent possible, as for Regulation C.

In contrast, many community groups and a minority business advocacy group, as well as some industry commenters, generally supported collecting ethnicity and race using aggregate categories and disaggregated subcategories as proposed by the Bureau. These commenters stated that collecting detailed, disaggregated ethnicity and race data on small business applicants' owners, and particularly for those of color, will over time provide transparency as to the different experiences of racial and ethnic subgroups in the small business lending marketplace, further fair lending enforcement, and support the objectives of section 1071. Several commenters emphasized that disaggregated data will help capture

potential discrimination and allow for targeted support. One stated that the proposal will add nuance to fair lending assessments and that aggregate racial and ethnic categories mask economic disparities and differences in social capital and experiences.

Many of these commenters highlighted that HMDA data has revealed that racial and ethnic subgroups have different experiences in the home buying market. These commenters argued that, similarly, disaggregated ethnicity and race data are necessary to allow assessments in the small business lending marketplace. Several of these commenters specifically noted that research based on 2019 HMDA data shows that Asian American and Pacific Islander communities and Hispanic/Latino subgroups fare differently in the mortgage market. One commenter noted, as an example of different experiences, that participants in its homebuying seminars have stated that language barriers often create difficulties in the home buying process. Other commenters noted the importance of disaggregated data for business lending specifically, generally citing findings in the Federal Reserve Banks' *Small Business Credit Survey: 2021 Report on Employer Firms* that firms owned by people of color were less likely to receive the full of amount financing sought than white-owned businesses.

Some commenters stated that they supported the Bureau's proposed approach of generally aligning with HMDA's aggregate categories and disaggregated subcategories for ethnicity and race and also adding new disaggregated subcategories. Two commenters affirmed that the HMDA ethnicity and race categories and subcategories are also relevant for small business lending. A lender commented that this approach will reveal different experiences in the small business lending market, but also provide familiar reporting standards. Another lender stated that aligning many of the ethnicity and race categories with those for HMDA would promote consistency and reduce confusion. One community group stated that based on the HMDA experience, it anticipates that applicants will not have difficulty understanding the information being requested regarding race as long as the sample form is clear for both lenders and applicants to follow.

Many commenters also supported the specific ethnicity and race aggregate categories and disaggregated subcategories proposed. Some called out their support for particular groups of disaggregated subcategories, for example for the Hispanic/Latino population, Asian, and Native Hawaiian or Other Pacific Islander aggregate categories. Some commenters noted that none of these communities are monoliths and different subgroups have different experiences in seeking credit. One commenter made a similar statement regarding African American and African immigrant communities in the residential mortgage context.

A community group operating in New York City suggested adding certain subgroups listed as examples in the Other Latino or Hispanic disaggregated ethnicity subcategory and in the Other Asian disaggregated race subcategory. The community group suggested adding an ethnicity subcategory for Dominican, because in New York City Dominicans make up a larger percentage of the population than Puerto Ricans, one of the proposed disaggregated ethnicity subcategories. The commenter also suggested adding Colombian, Ecuadorian, and Honduran disaggregated ethnicity subcategories. This commenter further suggested adding Bangladeshi and Pakistani disaggregated race subcategories, under the Asian aggregate race category, stating that these populations make up 6 percent and 8 percent, respectively, of the Asian population in New York City.

Many commenters expressed specific support for the proposed disaggregated Black or African American race subcategories. One commenter stated that there are distinct differences in the experiences and treatment of different subgroups and that many of these subgroups have tight-knit communities and thus it is important that this data collection captures such nuances, and another stated that disaggregation generally has proven to have value in the HMDA context.

Regarding the American Indian or Alaska Native aggregate race category, several commenters supported the Bureau's proposal to include a write-in text field for an applicant to name a principal owner's enrolled or principal tribe, though some also were concerned that there would be insufficient information on indigenous small business owners as a result of small sample sizes, which could mask the credit needs of that community.

Some commenters supported adding an additional category for Middle Eastern or North African in the final rule, in response to the Bureau's request for comment. One commenter stated that individuals of Middle Eastern or North African descent are often left with little choice but to select White as their race, despite a long history of discrimination in the United States, and that adding this category would meet the spirit of section 1071. Several other commenters stated that a Middle Eastern or North African category should be added to capture discrimination against and barriers for applicants of Middle Eastern or North African descent. A couple of commenters suggested that North African and Middle Eastern could be addressed as its own category or as disaggregated subcategories. However, a group of trade associations argued against the proposal for a Middle Eastern or North African category, noting that OMB never finalized its proposal to include such a category in its Federal standards on race and ethnicity.

Regarding disaggregated ethnicity and race categories generally, a joint letter from community groups and business advocacy groups suggested that the Bureau provide in the final rule that the ethnicity and race categories will be maintained and updated in alignment with OMB's standards and that the specifications will be adjusted in filing instructions that the Bureau issues from time to time.

Several commenters responded to the Bureau's request for comment on whether to combine the proposed questions about ethnicity and race. These commenters did not support combining the questions. A group trade associations noted that while the Census Bureau's *2015 National Content Test: Race and Ethnicity Report Analysis* showed that many individuals that select Hispanic or Latino as their ethnicity do not make any race selections because they do not identify with the aggregate race categories, the race and ethnicity questions were ultimately not combined for 2020 Decennial Census. The commenter also reiterated that the questions are separate for HMDA data collection purposes, and stated that the same approach should be used for this rule to maintain consistency across data collection rules and with the Census Bureau's approach, reduce burden for financial institutions, and facilitate data analyses.

One commenter urged the Bureau to allow applicants to provide an additional disaggregated subcategory in addition to those specified in the proposal beside ''other'' in a text field in the same manner that American Indian or Alaska Natives can identify tribal affiliation. The commenter stated this would allow applicants to write in responses such as Nicaraguan or Hmong that may provide important additional information for fair lending enforcement.

A bank asserted that for the ethnicity and race data collection under Regulation C, when applicants select a disaggregated ethnicity or race subcategory, the selection prevents the applications from being associated with the corresponding aggregate category. The commenter stated that this issue impacts how some lenders' application and origination performance with specific communities appears and urged the Bureau to fix the issue in the Regulation C data collection and ensure it is not replicated for the section 1071 data collection.

Final Rule—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

For the reasons set forth herein, the Bureau is finalizing its proposal to collect information about the ethnicity and race of principal owners using aggregate categories and disaggregated subcategories generally as proposed. However, the Bureau has revised the commentary related to the collection of ethnicity and race data to reduce repetition among the appendices and the commentary and to reflect other changes, as explained below.

The Bureau agrees with commenters that the disaggregated ethnicity and race subcategories will provide meaningful data that will further section 1071's purposes. Such data will be beneficial in identifying potential discrimination or business and community development needs in particular communities, including by providing insight into variations in borrowing experiences by ethnicity and race across the small business lending marketplace, even if not all applicants make ethnicity or race disaggregated subcategory selections. For example, in the HMDA context, the Bureau has used disaggregated race data collected under Regulation C to find that some Asian American and Pacific Islanders subgroups fare better than others in the mortgage market.[708] Other data users have been able to draw conclusions and make policy recommendations to address differences and disparities in home lending among subgroups in the Hispanic or Latino community using disaggregated HMDA subcategories.[709] The Bureau believes that disaggregated ethnicity and race data in the section 1071 data collection will similarly advance section 1071's purpose in enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of businesses with owners that are members of ethnic and racial subgroups, regardless of whether those businesses meet the definition of a minority-owned small business.

With respect to the fair lending enforcement purpose of section 1071, the Bureau recognizes that disaggregated data may not be useful in analyzing potential discrimination where financial institutions do not have a sufficient number of applicants or borrowers within particular subgroups to permit reliable assessments of whether unlawful discrimination may have occurred. However, the Bureau believes there will be—as has proven to be the case in the HMDA data—situations in which the numbers are sufficient to permit such fair lending assessments. The Bureau also believes that the use of disaggregated subcategories may increase ethnicity and race response rates by small business applicants. Requiring the collection of disaggregated race and ethnicity data also follows a key principle set forth in the OMB Federal Data Standards on Race and Ethnicity to encourage applicants to self-identify their principal owners' race and ethnicity, by providing more inclusive options for applicant self-reporting.[710]

The Bureau is not, at this time, adding additional disaggregated ethnicity and race subcategories beyond those set forth in the NPRM. While one commenter suggested adding a few disaggregated ethnicity and race categories, such suggestions were based on the demographics of a specific city and it is unclear whether they would provide useful data in a nationwide data collection. The Bureau notes that if an applicant's principal owner does not clearly identify with any of the listed disaggregated ethnicity or race subcategories associated with a specific aggregate ethnicity or race category, many of the aggregate ethnicity and race categories have an associated ''Other'' disaggregated subcategory (*e.g.,* ''Other Hispanic or Latino,'' ''Other Asian,'' ''Other Black or African American,'' and ''Other Pacific Islander'') that give the applicant opportunities to provide a specific subcategory not listed or otherwise provide additional ethnicity or race information.[711]

The Bureau also is not adding a separate, disaggregated subcategory for applicants to write in ethnicity or race information, as suggested by a commenter. The Bureau recognizes that some applicants may not clearly identify with the Bureau's designated ethnicity and race aggregate categories and disaggregated subcategories, despite the ''Other'' disaggregated ethnicity and race subcategories associated with the aggregate ethnicity and race categories in the final rule. The Bureau also notes that the 2020 Decennial Census and the Census Bureau's American Community Survey include a separate ''Some Other Race'' category, which provided respondents with the ability to write in additional information.[712] However, the Census Bureau's use of this race category is statutorily required and the best practice for Federal agencies is to not include a ''Some Other Race'' category unless required by law.[713] The Bureau believes it is important that the race and ethnicity information be capable of being aggregated to or associated with the five OMB aggregate categories for race and the two aggregate categories for ethnicity in the OMB Federal Data Standards on Race and Ethnicity to facilitate the Bureau's and others' ability to analyze and use the collected data. As noted above, applicants will be able to use the associated ''Other'' disaggregated subcategories associated with many of the aggregate race and ethnicity categories to provide their principal owners' information and, as clarified by final comments 107(a)(19)–13 and –14, will also be able to make multiple selections for their principal owners' race and/or ethnicity to accurately reflect their racial and ethnic identities.

The Bureau likewise is not combining the questions about ethnicity and race at this point in time. Commenters generally did not support or did not state a position on combining the ethnicity and race questions. The Bureau notes that the 2020 Decennial

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[708] Bureau of Consumer Fin. Prot., *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf.*

[709] *See* Agatha So *et al.,* Nat'l Cmty. Reinvestment Coal., *Hispanic Mortgage Lending: 2019 HMDA Analysis* (2019), *https://www.ncrc.org/hispanic-mortgage-lending-2019-analysis/.*

[710] *See* 62 FR 58782, 58789 (Oct. 30, 1997).

[711] The exceptions are the ''American Indian or Alaska Native'' aggregate race category, which provides applicants with an opportunity to write in or provide additional information about their principal owner's enrolled or principal tribe, the ''Not Hispanic or Latino'' aggregate ethnicity category, and the ''White'' aggregate race category.

[712] *See* 2020 Census Official Questionnaire; 2022 American Community Survey Questionnaire.

[713] *See* Chief Statistician of the U.S., *Flexibilities and Best Practices for Implementing the Office of Management and Budget's 1997 Standards for Maintaining, Collecting, And Presenting Federal Data on Race and Ethnicity (Statistical Policy Directive No. 15),* n.32 (July 2022) (citing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Public Law 109–108, tit. II, 119 Stat. 2289, 2308–09 (2005)), *https://www.whitehouse.gov/wp-content/uploads/2022/07/Flexibilities-and-Best-Practices-Under-SPD-15.pdf; id.* at 8–9.

Census and the 2022 American Community Survey also do not combine the questions.[714]

Some commenters expressed concern that the Bureau's proposal for the American Indian or Alaska Native aggregate race category, which does not have specifically listed disaggregated subcategories but permits applicants to write in the name of a principal owner's enrolled or principal tribe, would lead to small sample sizes and thus insufficient information to make assessments about indigenous small business owners and those communities. At this time, the Bureau is not making any changes to its approach for the American Indian or Alaska Native aggregate race category. The Bureau notes that the Census Bureau's 2020 Decennial Census and 2022 American Community Survey similarly listed American Indian or Alaska Native as an aggregate race category, do not list specific disaggregated subcategories, and ask respondents to ''Print [the] name of enrolled or principal tribe(s)'' along with suggested write-in options.[715] As explained in the 2015 National Content Test: Race and Ethnicity Race Report Analysis, there are hundreds of American Indian and Alaska Native tribes, villages, and groups, and checkboxes for the largest groups would only represent a small percentage of the American Indian and Alaska Native population.[716] Given this research, the Bureau believes that its approach to the American Indian or Alaska Native aggregate race category is appropriate and is thus not including a list of suggested write-in examples at this time.

The Bureau has also decided against specifically collecting data on Middle Eastern or North African populations at this point in time, whether as an aggregate ethnicity or race category, a disaggregated ethnicity or race subcategory, or through some other inquiry, due to uncertainty about how a Middle Eastern or North African category should be defined. As detailed in the NPRM, the Census Bureau and OMB have considered, over the course of years, whether to include a separate Arab or North African, or alternatively Middle Eastern or North African, classification in the Decennial Census and the Federal Data Standards on Race and Ethnicity.[717] But, despite a 2017 recommendation by a Federal interagency working group to add such a classification to the OMB Federal Data Standards on Race and Ethnicity, the standards have not been updated. And, although it was recommended in the 2015 National Content Test: Race and Ethnicity Report Analysis that a separate Middle Eastern or North African classification be adopted for the 2020 Decennial Census, no Middle Eastern or North African classification was included due to questions about whether the information should be collected as an ethnicity or race category.[718] Given the unsettled nature of how to best collect information about Middle Eastern and North African populations, the Bureau is not including a separate classification for Middle Eastern or North African at this point in time. The Bureau notes, however, that OMB is currently in the process of reviewing and revising the standards for collecting data on race and ethnicity for the Federal government and may revise the standards by the summer of 2024.[719] The Bureau will be reviewing OMB's efforts and other developments that may arise in the area of ethnicity and race data collection and measurement.

The Bureau is not committing at this time to updating the rule's ethnicity and race aggregate categories and disaggregated subcategories to align with future changes to OMB Federal Data Standards on Race and Ethnicity. First, the data points the Bureau is finalizing under § 1002.107(a)(18) and (19), regarding minority-owned business status and the ethnicity and race of principal owners, are statutorily mandated. Second, the Bureau notes that the OMB Federal Data Standards on Race and Ethnicity establish only minimum standards for the collection of race and ethnicity information, which the data collection under Regulation C already expands upon.[720] Third, it is unknown what the changes to the Federal standards will be and whether the collection of information based on any revised race and ethnicity aggregate categories and/or disaggregated subcategories would further the purposes of section 1071. The Bureau, however, will track forthcoming developments as to the Federal government's standards for the collection of race and ethnicity information. Regarding updates to data point response options, see final comment 107(a)–4.

As supported by some commenters, the Bureau believes it is important to collect information about principal owners that identify with subgroups within the Black or African American community, particularly as the Black or African American community in the United States diversifies. The Bureau does not believe it is necessary to use the exact same aggregate categories and disaggregated subcategories for ethnicity and race as are used for data collection under Regulation C (which would preclude the Black or African American race disaggregated subcategories), as suggested by some commenters. Certainly, the Bureau's experience with ethnicity and race data collection under HMDA informed the Bureau's considerations for its proposals and for this final rule. However, although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, Regulation C and this final rule are authorized under different statutes and for different markets. The Bureau believes that the added Black or African American race disaggregated subcategories it proposed and is finalizing will provide additional

[714] The 2020 Decennial Census and the 2022 American Community Survey both ask separate questions for Hispanic, Latino, or Spanish origin, and for race. *See* 2020 Census Official Questionnaire; U.S. Census Bureau, *2022 American Community Survey Questionnaire, https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2022/quest22.pdf.*

[715] *See* 2020 Census Official Questionnaire; U.S. Census Bureau, 2022 American Community Survey Questionnaire.

[716] 2015 National Content Test: Race and Ethnicity Report Analysis, at 52 (''[W]e know from Census Bureau research that there are hundreds of very small detailed [American Indian and Alaska Native] tribes, villages, and indigenous groups for which Census Bureau data is collected and tabulated, and if we were to employ the six largest American Indian groups and Alaska Native groups as checkboxes, they would represent only about 10 percent of the entire AIAN population.'').

[717] 62 FR 58782 (Oct. 30, 1997); 82 FR 12242 (Mar. 1, 2017).

[718] Hansi Lo Wang, *No Middle Eastern or North African Category on the 2020 Census, Bureau Says,* Nat'l Pub. Radio (Jan. 29, 2018), *https://www.npr.org/2018/01/29/581541111/no-middle-eastern-or-north-african-category-on-2020-census-bureau-says. See also* U.S. Census Bureau, 2015 NCT, at xiii, 84–85.

The Bureau notes that after the NPRM was published, the U.S. Department of the Treasury published an interim final rule in March 2022 related to data collection for its State Small Business Credit Initiative (SSBCI) program, which establishes that recipients of SSBCI funding must maintain and submit information about small business program beneficiaries' principal owners' Middle Eastern or North African ancestry, through a separate ancestry question. U.S. Dep't of Treas., *State Small Business Credit Initiative; Demographics-Related Reporting Requirements,* 87 FR 13628 (Mar. 10, 2022).

[719] Off. of Mgmt. & Budget, *Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards,* 88 FR 5375 (Jan. 27, 2023). Proposals and questions for which OMB is soliciting comment include collecting race and ethnicity information using one combined question, adding a Middle Eastern or North African minimum reporting category, requiring the collection of detailed race and ethnicity categories by default, and certain updates to terminology, among others.

[720] As explained by the Bureau in 2015, the race and ethnicity disaggregated subcategories under Regulation C go beyond the minimum categories set forth in the OMB Federal Data Standards on Race and Ethnicity by adding subpopulations used in the 2000 and 2010 Decennial Census. *See* 80 FR 66128, 66190 (Oct. 28, 2015).

information that will further the purposes of section 1071, as explained below.

According to a Pew Research Center report, while 4.6 million, or one in ten, Black individuals in the United States were born in a different country in 2019, it is projected that by 2060 the number will increase to 9.5 million, or more than double the current level.[721] Within this changing demographic, there are socio-economic differences between Black immigrant-headed households and other immigrant households in the United States, between Black immigrant-headed households and U.S.-born Black American headed-households, and among Black immigrant-headed households by region of origin. For example, the report found that in 2019, poverty rates within the Black immigrant population vary by region, with fewer than one-in-five African-born (16 percent) and Central American- or Mexican-born Black immigrants (16 percent) living below the poverty line, and 11 percent and 12 percent of Caribbean- and South American-born Black immigrants, respectively.[722] The Bureau is not collecting immigrant status as part of the section 1071 data collection. However, this research indicates to the Bureau that there could be important distinctions between subgroups of the Black or African American communities in the small business lending marketplace. The Bureau believes that the collection of information about small businesses whose principal owners identify among the Black or African American subgroups will allow it and others to better understand if there are distinct differences in patterns in lending to small businesses with owners in these subgroups and help fulfill the fair lending enforcement and business and community development purposes of section 1071.

Based on its experience with Regulation C, the Bureau believes that after some initial burden to implement the ethnicity and race reporting requirements, there should be minimal ongoing burden for financial institutions related to the collection and reporting of applicants' self-provided responses regarding their principal owners' aggregate category and disaggregated subcategory ethnicity and race selections. However, the Bureau acknowledges the concern raised by one commenter that, unlike in mortgage transactions where generally there are only up to two applicants, under the Bureau's proposal, ethnicity and race information could be collected for up to four principal owners. The commenter generally noted that because of this potential for an applicant to have up to four principal owners, for applications taken over the phone, it could be frustrating for applicants and financial institution employees and officers to read all of the ethnicity and race aggregate categories and disaggregated subcategories out loud, as is currently the practice under Regulation C. In consideration of this issue, the Bureau has added a comment to provide clarification for collecting ethnicity and race information orally, such as over the phone. Final comment 107(a)(19)–16 generally clarifies that when collecting ethnicity and race information orally, the financial institution is not required to read aloud every disaggregated ethnicity and race subcategory. Instead, a financial institution will be able to orally present the lists of aggregate ethnicity and race categories, followed by the disaggregated subcategories (if any) associated with the specific aggregate ethnicity or race categories selected or requested to be heard by the applicant. Comment 107(a)(19)–16 will also clarify, among other things, that after the applicant has made its selection(s) (if any), the financial institution must also ask if the applicant wishes to hear any other lists of disaggregated subcategories. The comment also provides that the financial institution may not present the applicant with the option to decline to provide ethnicity or race information without also presenting the applicant with the specified ethnicity or race aggregate categories and disaggregated subcategories. Comment 107(a)(19)–16 also generally provides that if an applicant has more than one principal owner, a financial institution will have the flexibility to ask for the principal owners' ethnicity and race information in a way that reduces repetition.

With regard to one commenter's request that the Bureau ensure that an applicant's selection of a disaggregated ethnicity or race subcategory does not prevent the application from being associated with the corresponding aggregate ethnicity or race category, the Bureau does not anticipate that the commenter's concern will be an issue for the 1071 data collection. The Bureau also notes that the commenter's issue is not present for reporting under Regulation C, as stated by the commenter. When reporting an applicant's disaggregated ethnicity or race subcategory selections under Regulation C, the aggregate ethnicity or race category is disclosed in the derived aggregate ethnicity or race field in the publicly released data. To the extent the commenter is referring to a concern about how an applicant may select a disaggregated ethnicity or race subcategory, without also selecting the associated aggregate category, the Bureau believes that allowing applicants to make such a selection and requiring a financial institution to report that selection as it was made, and recognizes that individuals may have varying racial and ethnic identities.

To further this goal, final comment 107(a)(19)–1 states that financial institutions report responses as provided by applicants. Generally, this is the case even if they contain obvious discrepancies and inaccuracies.[723] Upon further review, however, the Bureau has revised the commentary for final § 1002.107(a)(19) to clarify that if an applicant provides additional ethnicity or race information in a write-in field on a paper or electronic data collection form but does not select (*e.g.,* by a check mark on a paper form) the corresponding ''Other'' disaggregated subcategory (*e.g.,* ''Other Hispanic or Latino,'' ''Other Asian,'' ''Other Black or African American,'' and ''Other Pacific Islander''), the financial institution is permitted, but not required, to report the corresponding ''Other'' ethnicity or race disaggregated subcategory as well. Similarly, if an applicant provides the name of an enrolled or principal tribe but does not also indicate that the principal owner is American Indian or Alaska Native on a paper or electronic data collection form, the financial institution is permitted, but not required, to report American Indian or Alaska Native as well. This change aligns with the similar instruction regarding such situations in Regulation C.[724]

The Bureau has also made changes to the commentary specifically regarding the collection of ethnicity and race information to incorporate unique

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[721] Christine Tamir & Monica Anderson, Pew Rsch. Ctr., *One-in-Ten Black People Living in the U.S. Are Immigrants,* at 7 (Jan. 20, 2022), *https://www.pewresearch.org/race-ethnicity/wp-content/uploads/sites/18/2022/01/RE_2022.01.20_Black-Immigrants_FINAL.pdf.*

[722] *See id.* at 28–31.

[723] The Bureau notes that comment 107(a)(19)–8 provides clarification that in the specific situation where an applicant both provides a substantive response to a request for a given principal owner's ethnicity, race, or sex (by identifying the principal owner's race, ethnicity, or sex) and also indicates that it does not wish to provide the information (*e.g.,* by selecting an option that states ''I do not wish to provide this information'' or similar), the financial institution reports the substantive response provided by the applicant (rather than reporting that the applicant responded that it did not wish to provide the information).

[724] *See, e.g.,* 12 CFR part 1002, appendix B, instruction 9.ii.

content from the instructions for collecting ethnicity and race information in proposed appendix G, which the Bureau is removing from the final rule, as explained earlier in this section-by-section analysis.[725] These changes include updated numbering, added references to the sample data collection form at final appendix E, and further clarification regarding applicability of the instructions when ethnicity and race information is requested on a paper or electronic data collection form, versus orally (*e.g.,* telephone applications). The Bureau has also removed proposed clarification in each of the ethnicity and race-related comments regarding ethnicity and race information that an applicant has specifically indicated it is declining to provide, which it did not provide, or which is not applicable, including because the applicant has fewer than four principal owners.[726] The Bureau has either deleted such content where duplicative of similar content in final comment 107(a)(19)–1 (''General'') or moved it to new, generally applicable comments at final comments 107(a)(19)–6 (''Ethnicity, race, or sex of principal owners not provided by applicant''), 107(a)(19)–7 (''Applicant declines to provide information about a principal owner's ethnicity, race, or sex''), and 107(a)(19)–10 (''Reporting for fewer than four principal owners'').

Proposed Rule—Collecting Sex

Proposed comment 107(a)(20)–8 would have clarified that a financial institution is required to permit an applicant to provide a principal owner's sex using one or more of the following categories: Male, Female, the applicant prefers to self-describe their sex (with the ability of the applicant to write in or otherwise provide additional information), and also would have permitted the applicant to refuse to provide the information. The sex categories would have also been on the sample data collection form proposed as appendix E, in response to a query about the principal owner's ''Sex,'' with a direction to ''Check one or more.'' Instruction 6 of proposed appendix G would have similarly required financial institutions to permit applicants to use the sex categories as listed on proposed appendix E as responses for a principal owner's sex.

In the NPRM, the Bureau stated that it was generally proposing that financial institutions use the sex categories from Regulation C when requesting that applicants provide the sex information of their principal owners, but that it was also proposing the self-describe response option. The Bureau explained that Federal, State, and local government agencies have been moving to providing additional options for designating sex. At the Federal level, the Bureau noted that, for example, the Department of State had announced that it was planning to offer the option of a new gender marker for non-binary, intersex, and gender non-conforming persons for passports and Consular Reports of Birth Abroad as an alternative to male or female.[727] The Bureau also noted that the Food and Drug Administration includes the gender options of female, male, intersex, transgender, and ''prefer not to disclose'' on certain patient forms.[728] The Bureau also discussed how a number of States and the District of Columbia, as well as some local governments, offer an alternative sex or gender designation to male and female (*e.g.,* ''X'') on government-issued documents and forms such as drivers' licenses and identification cards, and in some cases birth certificates.[729]

The Bureau further explained that the Supreme Court's 2020 opinion in *Bostock* v. *Clayton County* had concluded that sex discrimination encompasses sexual orientation discrimination and gender identity discrimination, and that these forms of discrimination necessarily involve consideration of sex.[730] The Supreme Court reached this conclusion in the context of title VII of the Civil Rights Act of 1964, as amended,[731] which prohibits sex discrimination in employment.[732] Following the issuance of the Supreme Court's opinion, the Bureau issued an interpretive rule clarifying that ECOA's and Regulation B's prohibition on discrimination based on sex protects against discrimination based on sexual orientation, gender identity, actual or perceived nonconformity with sex-based or gender-based stereotypes, and the sex of people associated with the applicant.[733] The Bureau noted that other Federal agencies have similarly clarified that other statutes that protect against discrimination based on sex protect against discrimination based on sexual orientation and gender identity.[734]

[725] These comments were proposed comments 107(a)(20)–6 and 107(a)(20)–7. These proposed comments generally correspond with final comments 107(a)(19)–13 and 107(a)(20)–14.

[726] The clarification was originally at proposed comments 107(a)(20)–6.iv and –7.iv.

[727] *See* U.S. Dep't of State, *Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad* (June 30, 2021), *https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad/.* The Department of State subsequently made this option available in April 2022. *See* U.S. Dep't of State, *X Gender Marker Available on U.S. Passports Starting April 11, 2022* (Mar. 31, 2022), *https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/.*

[728] *See* U.S. Food & Drug Admin., *MedWatch forms FDA 3500 and 3500A* (Sept. 12, 2018) (approved under OMB No. 0910–0291), *https://www.fda.gov/media/76299/download* and *https://www.fda.gov/media/69876/download.*

[729] *See, e.g.,* Cal. S.B. 179, *Gender identity: female, male or nonbinary* (Oct. 16, 2017), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179*; State of California Dep't of Motor Vehicles, *Driver's License or ID Card Updates, https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/updating-information-on-your-driver-license-or-identification-dl-id-card/* (last visited Mar. 20, 2023); Colo. Dep't of Revenue, *Change of Sex Designation, https://drive.google.com/file/d/1PeYZd7U43ar6Flg8lFAT1Etg1EPdLVUy/view*; State of Connecticut Dep't of Motor Vehicles, *Gender Designation on a License or Identification Card, https://portal.ct.gov/-/media/DMV/20/29/B-385.pdf*; District of Columbia Dep't of Motor Vehicles, *Procedure For Establishing or Changing Gender Designation on a Driver License or Identification Card* (June 13, 2017), *https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DC%20DMV%20Form%20Gender%20Self-Designation%20English.pdf, DC Driver License or Identification Card Application* (Jan. 2019), *https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DMV%20BOE%20Application_2-25-19.pdf*; Maine Bureau of Motor Vehicles, *Gender Designation Form* (Nov. 4, 2019), *https://www1.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf*; State of Nevada Dep't of Motor Vehicles, *Name Changes, https://dmvnv.com/namechange.htm*; State of New Jersey Dep't of Health, Off. of Vital Statistics and Registry, *Request Form and Attestation (REG–L2) to Amend Sex Designation to Reflect Gender Identity on a Birth Certificate—Adult* (Feb. 2019), *https://www.nj.gov/health/forms/reg-l2_1.pdf*; 2019 N.J. Sess. Law Serv. ch. 271; New Mexico Motor Vehicle Div., *Request for Sex Designation Change, http://realfile.tax.newmexico.gov/mvd10237.pdf*; New Mexico Dep't of Health, *Request to Change Gender Designation on a Birth Certificate* (Oct. 2019), *https://www.nmhealth.org/publication/view/form/5429/*; Virginia Dep't of Motor Vehicles, *Driver's License and Identification Card Application* (July 1, 2021), *https://www.dmv.virginia.gov/webdoc/pdf/dl1p.pdf*; Washington State Dep't of Licensing, *Change of Gender Designation* (Nov. 2019), *https://www.dol.wa.gov/forms/520043.pdf*; N.Y. City Dep't of Homeless Servs., Off. of Policy, Procedures and Training, *Transgender, Non-binary, and Intersex Clients* (July 15, 2019), *https://www1.nyc.gov/assets/dhs/downloads/pdf/dhs_policy_on_serving_transgender_non_binary_and_intersex_clients.pdf.*

[730] *See Bostock,* 140 S. Ct. 1731.

[731] 42 U.S.C. 2000e *et seq.*

[732] *Bostock,* 140 S. Ct. 1731.

[733] 86 FR 14363 (Mar. 16, 2021). *See also* Letter from CFPB to Serv. & Advocacy for GLBT Elders (SAGE) (Aug. 30, 2016), *https://files.consumerfinance.gov/f/documents/cfpb_sage-response-letter_2021-02.pdf.*

[734] *See, e.g.,* 86 FR 32637 (June 22, 2021) (Department of Education interpreting title IX of the Education Amendments of 1972); 86 FR 27984 (May 25, 2021) (Department of Health and Human Services interpreting section 1557 of the Affordable Care Act); Memorandum from Jeanine M. Worden, Acting Assistant Secretary for Fair Housing and Equal Opportunity, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), *https://www.hud.gov/*

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The Bureau additionally explained that some other Federal agencies had also begun to re-consider how they collect information on sex by including questions about sexual orientation and gender identity as part of questions about sex. The Bureau cited the example of the Census Bureau's Household Pulse Survey,[735] which asks questions about sex assigned at birth, current gender identity, and sexual orientation.[736] The Bureau also noted that other Federal agencies and initiatives have encouraged sexual orientation and gender identity data collection in health care settings.[737]

The Bureau explained that in light of feedback it received during the SBREFA process, among other matters, the Bureau was proposing to add the option for ''I prefer to self-describe'' (with the ability of the applicant to write in or otherwise provide additional information) for the principal owner's sex in addition to the options currently used on the HMDA sample data collection form.

Proposed comment 107(a)(20)–8 would have explained that a financial institution would have been required to permit an applicant to provide a principal owner's sex using one or more of the following categories: Male, Female, and/or that the principal owner prefers to self-describe their sex. It would have further explained that, if an applicant indicated that a principal owner preferred to self-describe their sex, the financial institution would have been required to permit the applicant to provide additional information about the principal owner's sex. The financial institution would have been required to report to the Bureau the additional information provided by the applicant as free-form text.

Proposed comment 107(a)(20)–8 would have stated that a financial institution would be required to permit an applicant to select as many categories as the applicant chooses and that the financial institution would report the category or categories selected by the applicant, including any additional information provided by the applicant, or would report that the applicant refused to provide the information or failed to respond. It would have clarified that a financial institution would not have been permitted to report sex based on visual observation, surname, or any basis other than the applicant-provided information. Finally, proposed comment 107(a)(20)–8 would have explained how a financial institution would report sex if an applicant had fewer than four principal owners, would have provided an example, and would have directed financial institutions to proposed appendix G for additional information on collecting and reporting a principal owner's sex.

The Bureau sought comment on its proposed approach to requesting information about a principal owner's sex, including the opportunity for self-identification (by allowing the applicant to write in or otherwise provide additional information). The Bureau also sought comment on whether the sample data collection form should list examples from which the applicant could choose. The Bureau also sought comment on whether, alternatively, sex should be collected solely via the ''I prefer to self-describe'' option (with the ability of an applicant to write in or otherwise provide additional information). The Bureau also sought comment on whether applicants should be restricted from designating more than one category for a principal owner's sex.

The Bureau also sought comment on whether financial institutions should be required to ask separate questions regarding sex, sexual orientation, and gender identity and, if so, what categories should be offered for use in responding to each question. The Bureau also sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer plus (LGBTQ+)-owned business status, similar to the way it proposed to collect minority-owned business status and women-owned business status under proposed § 1002.107(a)(18) and (19).[738] The Bureau also sought comment on whether including such questions would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for industry.

Finally, the Bureau also requested information on Federal, State, and local government initiatives, as well as private sector initiatives, involving questions regarding sexual orientation and gender identity in demographic information.

Comments Received—Collecting Sex

The Bureau received comments from community groups, banks, trade associations, and individuals on its proposal for collecting information about principal owners' sex. Commenters addressed both general issues as well as specific aspects of the proposal, including whether to collect sexual orientation and gender identity data.

General comments. A couple of commenters opposed collecting information about principal owners' sex. An individual commenter stated that it does not make sense to collect such information because society's view of gender is still evolving. A lender suggested removing the sex of principal owners (along with several other data points) to reduce the amount of detail in the rule.

One industry commenter supported the collection of sex data as proposed; others supported the Bureau's proposal but suggested that the Bureau use the term ''gender'' instead of ''sex'' to be consistent with modern usage. One suggested that the Bureau also include sex category options for transgender and nonbinary.

Another commenter said that sharing information about principal owners' gender identity and sexual orientation should be voluntary for applicants,

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sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf (Department of Housing and Urban Development interpreting the Fair Housing Act).

[735] U.S. Census Bureau, *Phase 3.2 Household Pulse Survey* (undated), *https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase_3.2_Household_Pulse_Survey_FINAL_ENGLISH.pdf*. As of the date of this document, the Household Pulse Survey is in Phase 3.7, which started on December 9, 2022. *See* U.S. Census Bureau, *Household Pulse Survey Phase 3.7* (Dec. 9, 2022, updated Dec. 14, 2022), *https://www.census.gov/newsroom/press-releases/2022/household-pulse-phase-3-7.html*. The survey questionnaire used for Phase 3.7 includes the same three questions noted by the Bureau in the NPRM. *See* U.S. Census Bureau, *Phase 3.7 Household Pulse Survey* (undated), *https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase_3-7_Household_Pulse_Survey_ENGLISH.pdf*.

[736] Specifically, the Household Pulse Survey includes the following three questions: (1) What sex were you assigned at birth, on your original birth certificate? (A respondent could provide a response of male or female.); (2) Do you currently describe yourself as male, female or transgender? (A respondent also could provide a response of ''none of these.''); (3) Which of the following best represents how you think of yourself? (A respondent may select from the following responses: (a) Gay or lesbian; (b) Straight, that is not gay or lesbian; (c) Bisexual; (d) Something else; or (e) I don't know.

[737] *See, e.g.,* Off. of Disease Prevention & Health Promotion, *Healthy People* (2020), *https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health*; Off. of the Nat'l Coordinator of Health Info. Tech., *2021 Interoperability Standards Advisory* (2021), *https://www.healthit.gov/isa/sites/isa/files/inline-files/2021-ISA-Reference-Edition.pdf*; Ctrs. for Disease Control & Prevention, *Collecting Sexual Orientation and Gender Identity Information* (Apr. 1, 2020), *https://www.cdc.gov/hiv/clinicians/transforming-health/health-care-providers/collecting-sexual-orientation.html*.

[738] For a discussion of the comments received by the Bureau with regard to its request for comment on whether to include a data point to collect information about applicants' LGBTQ+-owned business status, the Bureau refers readers to the section-by-section analyses of §§ 1002.102(k) (definition of LGBTQI+ individual), 1002.102(*l*) (definition of LGBTQI+-owned business), and 1002.107(a)(18) (minority-owned, women-owned, and/or LGBTQI+-owned business status).

noting that individuals that are a part of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA) community are concerned about harassment and should be protected.

Collection of sexual orientation and gender identity information. Most of the comments received by the Bureau in response to its proposal for collecting information about a principal owner's sex were in the context of whether the Bureau should also collect information about principal owners' sexual orientation and gender identity.

Several banks, trade associations, and individual commenters opposed adding inquiries about principal owners' sexual orientation and gender identity to the final rule. A few stated that bank employees would feel uncomfortable requesting this information; that applicants would refuse to provide the information or would be offended by the questions; or that separate questions for sex, sexual orientation, and gender identity would be invasive.

A few of these commenters stated that requiring financial institutions to ask separate questions for sex, sexual orientation, and gender identity could potentially further segregate and stigmatize LGBTQ individuals and their businesses, when members of that community already face bias and discrimination. These commenters also raised concerns about the security of the collected information, noting that storing it with financial institutions and in a nationwide database exposes the information to not only a number of persons with authorized access but also potentially to hackers. These commenters stated that although there is some protection from employment discrimination under Federal law due to *Bostock,* there are States where discrimination against LGBTQ individuals in other forms is legal and inferences about one's sexuality could have serious negative impacts. The commenters also expressed concern that the information could be used for other purposes, with one commenter additionally expressing a concern that such previously collected data could be used for unintended purposes. Another commenter stated that the information should be requested only if information is also provided to applicants to allow them to make informed decisions about providing the information, which includes a warning that discrimination based on sexual orientation may be allowed in certain States. Some commenters also opposed collecting information on principal owners' gender identity and sexual orientation, on the grounds that such information is not needed by financial institutions to make loans and it should have no bearing on an applicant's ability to qualify for a loan.

Several other industry commenters expressed concern that adding more inquiries to a demographic data collection form would add complexity to the collection process and increase the burden on financial institutions. One urged the Bureau to not include inquiries about such personal information in the business lending process without more stakeholder input as to the benefits and burdens of collecting the data and before publishing such sensitive information. These commenters also suggested that the Bureau give financial institutions the option of collecting the information.

Some commenters suggested that the Bureau should include only ''Male'' and ''Female'' categories as responses to a request for a principal owner's sex information. One bank opposed the inclusion of options for gender choices and free-form text, stating that there are many possible gender categories and including those categories or a write-in field could dilute the data and lead to inconclusive findings. Several lenders also specifically urged use of only ''Male'' and ''Female'' categories as answer options in the final rule, for alignment with sex categories used to collect HMDA data, on the grounds that it would avoid confusion among financial institutions and applicants, promote efficient implementation and reporting, reduce administrative complexity, and facilitate compliance. One bank expressed concern about use of the proposed self-describe sex response option for applications reported under both HMDA and section 1071.

In contrast, a range of commenters, including many community groups, research and advocacy groups, community-oriented lenders, and individual commenters, urged the Bureau to require the collection of more detailed and accurate information about gender identity and sexual orientation than would be collected under the Bureau's proposal. These commenters generally stated that more detailed information is necessary to account for small businesses owned by people with intersectional identities and orientations, to see if they experience discrimination, enforce fair lending laws, and to allow policymakers and the public to have a better understanding of and address gaps and community needs. Several commenters asserted that to the final rule should reflect that gender is not binary and be more inclusive. Others argued that collecting principal owners' gender identity information will enhance the Bureau's and the public's ability to enforce ECOA for transgender individuals and gender minorities and collecting their sexual orientation information will likewise facilitate the same as to lesbians, gays, bisexuals, and other sexual minorities, consistent with the purposes of section 1071. Another commenter stated that collecting information about gender identity and sexual orientation would reduce the burden of implementing future legislation requiring such collection.[739] Another commenter said that collecting data on gender identity and sexual orientation would allow lenders, especially CDFIs, to be more accountable to their mission of economic justice and financial inclusion. Some commenters urged the Bureau to follow best practices and directed the Bureau to resources made available and research conducted by the Williams Institute at the University of California Los Angeles School of Law.

A number of these commenters urged the Bureau to not conflate lines of inquiry for gender identity and sexual orientation, with some specifically suggesting separate sets of questions, either in addition to or in place of, the inquiry about principal owners' sex as proposed by the Bureau.[740]

One commenter stated that respondents are unlikely to consider sexual orientation and gender identity to be sensitive and would likely provide their information, citing a study as to the collection of such information in health centers and another relating to attitudes of sexual minorities responding to a 2020 survey administered by the Census Bureau. Commenters also noted that other Federal surveys ask questions about gender identity and sexual orientation, including the Census Bureau and the Centers for Disease Control and Prevention, and that questions to identify transgender respondents are included on State and investigator-led surveys. One commenter asserted that the proposal collects less information than other Federal agencies, citing the example of the Census Bureau.

[739] The commenter cited the LGBTQ Business Equal Credit Enforcement and Investment Act (H.R. 1443, 117th Cong. (2021)), which sought to amend ECOA section 704B to require the collection of an applicant's principal owners' sexual orientation and gender identity, in addition to information about sex.

[740] For example, some commenters suggested separate categories for gender (Cis woman, Cis man, Trans woman, Trans man, Non-binary or gender non-conforming, and Other (with a write-in text field)) and sexual orientation (straight/heterosexual, bisexual, and queer, and other (with a write-in text field)).

Commenters also noted that the Federal government has long considered what best practices should apply for the measurement of sexual orientation and gender identity information, such as through the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, and by commissioning a study looking at the measurement of sex, gender identity, and sexual orientation through the National Academies of Sciences, Engineering, and Medicine (the National Academies).[741]

Legal authority. Several research and advocacy organizations argued that the Bureau has the legal authority to collect information about the gender identity and sexual orientation of principal owners. Generally, these commenters stated that ECOA and section 1071 provide the Bureau with a broad grant of authority to issue regulations requiring the collection of gender identity and sexual orientation data. The commenters also highlighted that unlawful discrimination based on ''sex'' under ECOA includes discrimination based on sexual orientation and gender identity, consistent with the U.S. Supreme Court's decision in *Bostock.* As a result, they said, collecting sexual orientation and gender identity data would facilitate the purposes of section 1071 by enhancing the agency's ability to understand small business lending discrimination based on sexual orientation and gender identity, enforce fair lending laws, and identify business and community development needs and opportunities of small businesses.

However, several industry commenters argued that the collection of sexual orientation and gender identity information is not clearly required. One stated that there is no indication in the statute that Congress intended the term ''sex'' as used in section 1071 to encompass sexual orientation and/or gender identity. Another emphasized that the statute focuses on the collection and reporting of data about the defined term ''women-owned businesses,'' and asserted it is thus not apparent that the section 1071 data collection is meant to include such data. Another commenter argued that neither Congress nor the Supreme Court in *Bostock* has taken specific action to change the scope of the prohibition against sex discrimination in ECOA to include discrimination on the bases of sexual orientation and gender identity.

Need for information on gender identity and sexual orientation. Some community groups and research and advocacy organizations generally stated that data are needed to understand LGBTQI+ individuals' and business owners' experiences in accessing small business credit. Some emphasized that available Federal small business or fair lending data do not currently include sexual orientation and gender identity information. One commenter noted that the Federal data that exist on LGBTQ individuals' access to credit are generally limited to the population of cohabitating same-sex couples because such data are often collected through a marital status question on Census Bureau surveys.

Nevertheless, these commenters stated that available research suggests that sexual and gender minorities encounter discrimination when attempting to access credit. The commenters cited research, based on the 2019 Federal Reserve Board Survey of Household Economic Decisionmaking, finding that LGBT individuals (and particularly LGBT persons of color and depending on gender) are more likely to have their applications for credit rejected and that they are more likely to be approved for less credit than they wanted.[742] The commenters stated that studies based on HMDA data have also found that same-sex couples are denied home loans more often and that the loans they do receive have higher interest rates and fees than different-sex couples of similar financial and credit quality. Similarly, loans made in neighborhoods with a higher density of LGBTQI+ individuals generally have higher interest rates and fees than neighborhoods with a lower density.[743] One commenter stated that the analysis likely understates these disparities due to HMDA data limitations.[744] A research and policy organization focusing on gender identity and sexual orientation issues also cited reports and analyses highlighting disparities in home ownership between LGBT adults and non-LGBT adults, same-sex couples and different-sex couples, and among sexual minorities versus heterosexual individuals and also suggesting that home ownership among transgender adults is particularly low.[745] This commenter also stated that such research noting disparities among LGBTQI+ persons based upon race, sex, and sexual orientation suggests that the data collected under section 1071 should allow identification of individuals who may have intersectional identities.

Commenters also noted that LGBTQI+ individuals and businesses are key parts of the population and economy in this country, yet face discrimination and disparities in a number of areas. They stated that there are an estimated 11 million LGBT adults, which make up around 4.5 percent of the total U.S. adult population. They stated that high numbers of LGBTQ adults have self-reported experiences with physical and verbal abuse and violence, job loss, and workplace harassment and discrimination. They also noted that prior to the COVID–19 pandemic, LGBTQ individuals were more likely to report having experienced economic hardship, from unemployment, homelessness, and in other areas. The commenters also emphasized that studies show that during the pandemic, LGBTQ adults, and particularly LGBTQ people of color and gender minorities, have disproportionately experienced the negative financial effects of the COVID–19 pandemic, including food insecurity, job loss, and housing insecurity.[746] One

[741] Since the comment period for the NPRM closed, the National Academies published its report on the study. *See* Nat'l Acad. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation* (2022), *https://www.ncbi.nlm.nih.gov/books/NBK578625/pdf/Bookshelf_NBK578625.pdf.*

[742] Spencer Watson *et al.,* Ctr. for LGBTQ Econ. Advancement & Rsch., *The Economic Well-Being of LGBT Adults in the U.S. in 2019* (2021), *https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf.*

[743] *See* Jason Richardson & Karen Kali, Nat'l Cmty. Reinvestment Coal., *Same-Sex Couples and Mortgage Lending* (June 22, 2020), *https://ncrc.org/same-sex-couples-and-mortgage-lending/*; Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers,* 116 Procs. of the Nat'l Acad. of Sci. (PNAS) PROCs. NAT'L ACAD. SCI. 9293 (Mar. 16, 2019), *https://doi.org/10.1073/pnas.1903592116.*

[744] *See* Jason Richardson & Karen Kali, Nat'l Cmty. Reinvestment Coal., *Same-Sex Couples and Mortgage Lending* (June 22, 2020), *https://ncrc.org/same-sex-couples-and-mortgage-lending/.*

[745] Studies cited by the commenters include, for example: Adam P. Romero, Shoshana K. Goldberg, & Luis A. Vasquez, Williams Inst., *LGBT People and Housing Affordability, Discrimination, and Homelessness* (2020), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf*; Kerith Conron, Williams Inst., *Financial Services and the LGBTQ+ Community: A Review of Discrimination in Lending and Housing, Testimony Before the Subcommittee on Oversight and Investigations* (2019), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-US-House-Financial-Services-Oct-2019.pdf*; Freddie Mac, *The LGBT Community: Buying and Renting Homes* (2018), *http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf*; Kerith J. Conron, Shoshana K. Goldberg, & Carolyn T. Halpern, *Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health,* 72 J. Epidemiology & Cmty. Health 1016 (Nov. 2018), *https://pubmed.ncbi.nlm.nih.gov/30190439.*

[746] *See* Thom File & Joey Marshall, U.S. Census Bureau, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents* (Aug. 11, 2021), *https://www.census.gov/library/stories/2021/08/lgbt-*

commenter also highlighted that research shows that transgender individuals are disadvantaged as compared to their cisgendered counterparts across a number of socio-economic factors, such as education levels and percentages living at or below the poverty level, among others.[747]

One commenter cited a study estimating that about 7.7 million LGBT adults live in States without explicit statutory protections against discrimination on the basis of sexual orientation and gender identity in credit.[748] This commenter also noted research finding that while 30 States have laws analogous to ECOA, only about half explicitly prohibit discrimination on the basis of sexual orientation or gender identity, leaving a significant number of LGBT adults in the United States without protection from credit discrimination under State law.[749] Further, this commenter stated that LGBTQ businesses may generally have a particular need for credit, because they often lack the family support other small business entrepreneurs may rely upon to begin their businesses.

Suggestions for collecting sexual orientation and gender identity information. A number of commenters suggested specific modifications to the Bureau's proposal, generally by either adding response categories to the proposed (single) inquiry about a principal owner's sex; by recommending two separate inquiries for the identification of a principal owner's gender (as opposed to sex) and sexual orientation; or by suggesting separate inquiries as to each of a principal owner's sex, gender identity, and sexual orientation.

Generally, commenters who suggested additional response categories suggested adding such options in the context of a single inquiry for information about a principal owner's sex. Some commenters suggesting adding an additional category, such as ''Other,'' to allow the Bureau to analyze whether nonbinary individuals face discrimination from lenders and urged the Bureau to avoid a data collection that forces applicants to provide their principal owners' information on a strict binary sex/gender basis. Several industry commenters suggested the Bureau remove the self-describe option with a write-in text field with a third category, such as ''non-binary.'' These commenters expressed concern that the write-in text field may create data integrity problems or add complexity to reporting standards.

Other commenters suggested specific sex categories for the Bureau's consideration. A group of trade associations suggested adding sex categories for transgender and nonbinary. A community group suggested adding a ''non-binary'' sex category and any others according to best practices, in order to bring transparency as to the treatment of that population. Another suggested adding ''Non-binary,'' ''Transgender Male,'' ''Transgender Female,'' stating that these categories are widely accepted by the LGBTQ community, will provide more data, and will be more inclusive. This commenter also supported allowing applicants to select one or more options. A CDFI lender recommended that the Bureau include a list of examples that an applicant could refer to when self-describing, like intersex, non-binary, or transgender. This commenter stated that providing examples for the self-describe option would streamline the data collection and analysis.

A bank suggested that instead of requesting information from applicants about their principal owners' sex, that the Bureau identify a principal owners' information based on what is listed on the principal owner's driver's license. The bank noted that some states, like New York, allow residents who identify as nonbinary or intersex to use an ''X'' marker on their State driver's licenses and stated that beneficial owners' driver's licenses must be provided as a result of FinCEN's customer due diligence rule when an account is opened. The bank acknowledged that different states may not allow the use of an ''X'' marker and that some principal owners may not identify with the gender marker on their driver's license but suggested that aligning the data collection with this supporting documentation would remove the potential for error and regulatory scrutiny.

Some commenters urged the Bureau to revise its proposal to include two sets of inquiries, one addressing gender identity and the other sexual orientation, each with multiple categories from which an applicant could select. One community group suggested two separate inquiries are necessary, to accurately measure disparities and discrimination. The community group suggested that for the inquiry about gender identity, response options could include ''Male,'' ''Female,'' ''Transgender,'' and ''Do not identify as female, male, or transgender.'' For the inquiry about sexual orientation, the community group stated response options could include ''Straight,'' ''Gay or lesbian,'' ''Bisexual,'' and ''Transsexual, or gender non-conforming.'' This commenter also suggested the Bureau consult experts on these issues. Some other community groups suggested that, to reflect current language around gender-identity and expression, categories for gender should include ''Cis woman,'' ''Cis man,'' ''Trans woman,'' ''Trans man,'' ''Non-binary or gender non-conforming,'' and ''Other'' (with a write-in text field). For sexual orientation, the commenters suggested ''Straight/heterosexual,'' ''Bisexual,'' ''Queer,'' and ''Other'' (with a write-in text field). One commenter noted that the answer options for each inquiry should include those to allow the applicant to choose not to state its response and an ''Other'' option (with a write-in text field).

Several research and policy organizations focusing on gender identity and sexual orientation issues generally stated that because sex, sexual orientation, and gender identity are related but intellectually distinct concepts, the Bureau should collect such information through three separate inquiries addressing each concept instead of through one question asking about a principal owner's sex. A community group stated that the Bureau's proposal does not sufficiently encompass gender, gender identity, and sexual orientation to address fair lending concerns.

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community-harder-hit-by-economic-impact-of-pandemic.html; Brad Sears, Kerith J. Conron, & Andrew R. Flores, Williams Inst., *The Impact of the Fall 2020 COVID–19 Surge on LGBT Adults in the US* (Feb. 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf*; Christy Mallory, Brad Sears, & Andrew R. Flores, Williams Inst., *COVID–19 and LGBT Adults Ages 45 and Older in the US* (May 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-45-May-2021.pdf*; Kerith J. Conron & Kathryn K. O'Neill, Williams Inst., *Food Insufficiency Among Transgender Adults During the COVID–19 Pandemic* (Dec. 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf*; Movement Advancement Project, *The Delta Variant & the Disproportionate Impacts of COVID–19 on LGBTQ Households in the U.S., Results from an August/September 2021 National Poll* (Nov. 2021), *https://www.lgbtmap.org/file/2021-report-delta-impact-v2.pdf*.

[747] *See* Kerith J. Conron & Kathryn K. O'Neill, Williams Inst., *Food Insufficiency Among Transgender Adults During the COVID–19 Pandemic* (Dec. 2021), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf*.

[748] Kerith J. Conron & Shoshana K. Goldberg, Williams Inst., *LGBT People in the US Not Protected by State Non-Discrimination Statutes* (Apr. 2020), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf*.

[749] Christy Mallory, Luis A. Vasquez, & Celia Meredith, Williams Inst., *Legal Protections for LGBT People After Bostock* v. *Clayton County* (Aug. 2020), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf*.

Research and policy organizations also suggested the Bureau take an approach similar to that used in the Census Bureau's Household Pulse Survey, which they characterized as taking a ''two-step'' approach to asking about a respondent's sex, with one question about the respondent's sex assigned at birth and a second question about their current gender. They also recommended the Household Pulse Survey approach in asking a separate question about sexual orientation, which the commenters noted aligns with a recommendation from a 2009 Sexual Minority Assessment Research Team report[750] on best practices for asking questions about sexual orientation on surveys. One also urged the Bureau to examine a two-step approach to sex for the final rule, noting that it was based on research and recommended by a panel of experts known as the Gender Identity in U.S. Surveillance group, through the Williams Institute at the University of California Los Angeles School of Law, as one that is likely to have high sensitivity and specificity in distinguishing transgender and gender minority respondents from cisgender respondents.[751] The commenter also recommended that the Bureau consider if any refinements are necessary in the context of section 1071, conduct user testing, and also coordinate in the future with other Federal agencies to improve its measurements of principal owners' sex.

For the question about sexual orientation, research and policy organizations recommended using the same or similar questions as presented in the Census Bureau's Household Pulse Survey and the 2009 Sexual Minority Assessment Research Team report. A community group also suggested that the Bureau adopt the Census Bureau's approach with the Household Pulse Survey, but stated that more response categories may be necessary to better capture the LGBTQIA+ community.

Selection of multiple responses. The Bureau received several responses to the Bureau's question about whether applicants should be restricted from designating more than one category for a principal owner's sex. Two commenters supported the Bureau's proposal to allow an applicant to select multiple sex categories, stating that limiting applicants to one answer option may be viewed as marginalizing the principal owner's personal characteristics for individuals whose gender is fluid. Another suggested allowing the selection of just one response category, which it said would streamline data collection. Two research and policy organizations suggested that the Bureau limit applicants from selecting more than one response to the inquiry about sex assigned at birth because medical records in the United States generally allow only male or female sex assignments. They also suggested that the Bureau allow just one selection in response to a question about sexual orientation. But for gender identity, the applicant suggested allowing applicants to select multiple response options.

Self-describe response option. Several commenters supported the Bureau's proposed ''I prefer to self-describe'' option (with the ability to write in or otherwise provide additional information). A business advocacy group stated that the information collected from the option will bring attention to inequitable lending practices based on gender identity. As noted above, one commenter supported the proposed answer option, but suggested that the Bureau include a list of examples. The commenter opposed, however, the use of the option as the only way to collect information about principal owners' sex. Another commenter supported having the ''I prefer to self-describe'' option as the only way used to collect sex information, stating that this approach would promote diversity and acceptance and that the Bureau's proposal may make applicants feel uncomfortable expressing their true gender identity.

However, several industry and research and policy organization commenters opposed the proposed ''I prefer to self-describe'' option. One commenter said it would be confusing for applicants and bank employees, and recommended having the Bureau's data collection for principal owners' sex match that under Regulation C. Other commenters generally cited data quality concerns related to potential write-in field responses. Two such commenters noted that in the HMDA free-form ethnicity and race data, they commonly see responses that would fit into an existing category and expressed concern that similar issues would arise under the Bureau's proposal. Two industry commenters also noted that the write-in field could diminish the accuracy and utility of collected data, because fewer responses would be reported for other listed categories. One industry commenter also noted that a write-in field may add complexity to reporting standards. Another stated that the Bureau may encounter varying spellings and misspellings, which would create reporting burdens and diminish the accuracy of the information received by the Bureau.

A research and policy organization stated that because the Bureau will not be including write-in responses in what is released to or analyzed for the public, write-in responses allowing applicants to self-describe their principal owners' sex, sexual orientation, or gender identity would prevent respondents from being included in the data for analysis. The commenter suggested that the Bureau assess the performance of questions as to gender identity and sexual orientation first and then make revisions as needed. The commenter also stated that it also did not recommend including the proposed ''I prefer to self-describe'' option as a way to capture individuals with intersex traits, and noted that it is not generally recommended that researchers capture information on intersex status through a question on sex.

Other research and policy organizations stated a concern that free-form text responses would require substantial effort by the Bureau and others to distinguish transgender individuals and gender minorities from respondents using the ''I prefer to self-describe'' option, even though female or male responses would have been appropriate. This commenter noted that analysis of free-form text fields can be time-intensive and responses challenging to categorize, leading to discarded data, reduced sample sizes, lessened statistical power, and potentially errors in classification. The commenter also noted that although a write-in response for gender identity to capture the many gender identities and communities that exist may work in some circumstances, it does not recommend it for a data collection of the anticipated size and complexity of the effort under section 1071. With regard to sexual orientation, the commenter noted that most people with same-sex attraction are likely to choose the terms gay, lesbian, or bisexual if they are the only terms provided, and thus a self-describe option would just reduce the number of identifiably lesbian, gay, and bisexual principal owners in the section 1071 data collection and reduce the usefulness of the data.

[750] Sexual Minority Assessment Rsch. Team (SMART), Williams Inst., *Best Practices for Asking Questions About Sexual Orientation on Surveys* (2009), *https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf.*

[751] The GenIUSS Grp., Williams Inst., *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* (Sept. 2014), *https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey/.*

Intersex status. Research and policy organizations suggested that the Bureau add a specific inquiry regarding variations of sex characteristics in the final rule or in the future, to identify intersex business owners and their experiences. They emphasized that people with variations in sex characteristics may comprise as much as 1.7 percent of the population. And, although little population-based data exists, according to the commenter, intersex people face documented social and health disparities. This in turn, they said, could affect their economic opportunities. Moreover, according to the commenter, the increased visibility of intersex individuals could also make small business owners with intersex traits more vulnerable to discrimination. They also stated that the Department of Justice's Title IX Legal Manual rationale—finding that title IX's prohibition on sex discrimination includes discrimination based on sex characteristics, including intersex traits—should also apply to ECOA. They noted that a consensus study from the National Academies had recommended that the Federal government develop and evaluate measures to identify intersex populations and recommended that the Bureau review another pending National Academies study with recommendations on this area.[752]

Final Rule—Collecting Sex

For the reasons set forth herein, the Bureau has revised its proposal regarding the collection of information about the sex of the principal owners of a small business applicant. Under final comment 107(a)(19)–15, if collecting the information using a paper or electronic form, the financial institution must make the request using the term ''sex/gender'' and must permit applicants to respond by using free-form text. If collecting the information orally, the financial institution must inform the applicant of the opportunity to provide each principal owner's sex/gender and record the response. As with other protected demographic information, the applicant can refuse to provide the requested information. Unlike the Bureau's proposal, the final rule does not use specific sex categories, such as ''Male'' and ''Female,'' for a principal owner's sex/gender. The Bureau has made conforming changes, removed duplicative content, and updated cross-references, in comment 107(a)(19)–15 and other comments that relate to collection of principal owners' sex.

As an initial matter, the Bureau believes that collecting information about a principal owner's sex, gender identity, and sexual orientation is within section 1071's mandate. Following the Supreme Court's holding in *Bostock,* even though the term ''sex'' is not defined in ECOA or in Regulation B, the Bureau interprets ECOA's and Regulation B's prohibitions against discrimination on the basis of ''sex'' to include discrimination based on sexual orientation and gender identity.[753] As stated by the Court, sex discrimination encompasses sexual orientation discrimination and gender identity discrimination, as those forms of discrimination necessarily involve consideration of sex.[754] Because section 1071 is an enumerated provision of ECOA and the final rule is part of Regulation B, this interpretation as to what is included within the scope of the term ''sex'' necessarily applies to the collection of information about a principal owner's ''sex'' under section 1071 as well.

The Bureau believes further that available research, including that cited by commenters and discussed above, showing disparities in access to credit across gender identity and sexual orientation supports the importance of collecting gender identity and sexual orientation small business lending data.[755]

There was no clear consensus among commenters as to how information about the sex of small businesses' principal owners should be collected. As described above, the Bureau received a diverse array of comments recommending a range of response options to the proposed inquiry about a principal owner's sex and suggesting questions in addition to, or instead of, the Bureau's proposed query about a principal owner's sex. The Bureau notes that at the Federal level, there is wide variance in data collection approaches, question phrasing, and answer options, and that the Federal government's approach is in flux.[756] For example, on January 11, 2023, shortly before this rule was issued, OMB released new recommendations for agencies on the best practices for the collection of sexual orientation, gender identity, and sex characteristics data on Federal

[752] *See* Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations* (2020), *https://nap.nationalacademies.org/catalog/25877/understanding-the-well-being-of-lgbtqi-populations.* The National Academies has issued the report anticipated by the commenter. *See* Nat'l Acads. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health* (2022), *https://www.ncbi.nlm.nih.gov/books/NBK578625/pdf/Bookshelf_NBK578625.pdf.*

[753] *Bostock,* 140 S. Ct. 1731; 86 FR 14363 (Mar. 16, 2021).

[754] *See Bostock,* 140 S. Ct. 1731.

[755] *See, e.g.,* Ctr. for LGBTQ Econ. Advancement & Rsch., *The Economic Well-Being of LGBT Adults in the U.S. in 2019* (June 2021), *https://lgbtq-economics.org/research/lgbt-adults-2019/* (LGBT adults more likely than non-LGBT adults to report being turned down by lenders and to be offered credit at rates higher than desired); Hua Sun & Lei Gao, *Lending practices to same-sex borrowers,* Proceedings of the Nat'l Acad. Sci. of the U.S. of Am. (May 2019), *https://doi.org/10.1073/pnas.1903592116* (finding same-sex couples more likely to be denied a mortgage than different-sex couples); J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination,* 86 U. Chi. L. Rev. 1 (2019), *https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination* (finding that same-sex male home loan co-applicants were less likely to have their loan applications accepted compared to white, different-sex co-applicant pairs; male same-sex pairs with Black applicants had significantly worse acceptance outcomes).

[756] *See* 86 FR 56356, 56482 (Oct. 8, 2021) (discussing approach used by the Census Bureau's Household Pulse Survey, asking separate questions for sex assigned at birth, current gender identity, and sexual orientation); *id.* at 56482 n.686 (discussing other Federal agency approaches in health care settings). *See also* 31 CFR 35.28(h), (i) (in annual reports by participants in the U.S. Treasury's State Small Business Credit Initiative (SSBCI) program, requiring information about program beneficiaries' principal owner's gender (using categories: female; male; nonbinary; prefer to self-describe, with an option to write in information; prefer not to respond; or that the business did not answer) and sexual orientation (using categories: gay or lesbian; bisexual; straight, that is, not gay, lesbian, or bisexual; something else; prefer not to respond; or that the business did not answer); 2020 Census Official Questionnaire (inquiring as to each person's sex (*e.g.,* ''What is Person 1's sex? Mark (x) ONE box.''), with answer options: ''Male'' and ''Female'' and asking about the relationships with other household members (*e.g.,* ''How is this person related to Person 1? Mark (X) ONE box.''), with answer options including, *inter alia,* ''opposite-sex husband/wife/spouse'', ''opposite-sex unmarried partner, ''same-sex husband/wife/spouse'', and ''same-sex unmarried partner''); Soc. Sec. Admin., *How do I change the sex identification on my Social Security record?* (KA–01453) (last updated Oct. 25, 2022), *https://faq.ssa.gov/en-us/Topic/article/KA-01453* (individuals can provide sex identification evidence that is binary or non-binary, but stating that SSA record systems currently require a sex designation of female or male); U.S. Dep't of State, *X Gender Marker Available on U.S. Passports Starting April 11, 2022* (Mar. 31, 2022), *https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/*; U.S. Equal Emp. Opportunity Comm'n, *EEOC Adds X Gender Marker to Voluntary Questions During Charge Intake Process* (June 27, 2022), *https://www.eeoc.gov/newsroom/eeoc-adds-x-gender-marker-voluntary-questions-during-charge-intake-process*; Admin. for Children & Fams., U.S. Dep't of Health & Hum. Servs., *Proposed Information Collection Activity; Domestic Victims of Human Trafficking Program Data (OMB #0970–0542),* 87 FR 45107 (July 27, 2022) (proposing changes to collection of participant demographics for Domestic Victims of Human Trafficking Services and Outreach Program grant programs); Admin. for Children & Fams., U.S. Dep't of Health & Hum. Servs., *Proposed Information Collection Activity; SOAR (Stop, Observe, Ask, Respond) to Health and Wellness Training (SOAR) Demonstration Grant Program Data (New Collection),* 87 FR 52386 (Aug. 25, 2022) (indicating that data to be collected with regard to the SOAR program will include client sex, gender identity, sexual orientation.)

statistical surveys, including strategies to preserve data privacy and safety.[757] The Bureau also notes the consensus study from the National Academies cited by a commenter that indicates that the terms used to describe individuals who identify as or exhibit attractions and behaviors that do not align with heterosexual or traditional male-female binary gender norms are evolving.[758]

As a result of these factors, the Bureau believes that an approach that allows principal owners to designate their sex/gender with the ability to write-in or provide additional information (such as in a free-form field on a paper or electronic form) will encourage applicant self-identification using terminology that may change over time. To increase applicants' autonomy to provide responses they feel best characterize their principal owners, the final rule does not include additional sex category responses suggested by commenters nor does it require a financial institution to provide a list of example responses when requesting that an applicant provide its principal owners' sex. This approach mitigates the concern of some commenters that a list of disaggregated categories would be difficult for some lender staff to ask and for some applicants to be asked.

In partial response to the several commenters who urged that the Bureau use the term ''gender'' instead of ''sex,'' the Bureau is requiring financial institutions to use the term ''sex/gender'' when requesting information about principal owners' sex. As explained above, the Bureau interprets ECOA's and Regulation B's prohibitions against discrimination on the basis of ''sex'' to also include, *inter alia,* discrimination based on gender identity; this interpretation as to what is included within the scope of the term ''sex'' necessarily also applies to the collection of information about a principal owner's ''sex'' under section 1071.[759] The Bureau believes that requiring financial institutions to ask for information about ''sex/gender'' will provide principal owners with the flexibility and autonomy to use terms that they prefer.

Although some commenters requested that the Bureau require the collection of principal owners' sexual orientation information and intersex status in addition to the collection of information about their gender identity, the final rule does not include these specific inquiries. The Bureau believes that such specific inquiries about individuals would likely be perceived as more invasive than a general request as to ''sex/gender'' and, as explained above, the overall LGBTQI+-ownership status of the business. Accordingly, the Bureau is concerned that questions to this effect could impact the overall willingness of applicants to provide demographic information, as noted by some commenters.

Some commenters expressed concerns that collecting data via write-in text fields may lead to data analysis issues. The Bureau anticipates that its review of responses to the sex/gender inquiry will result in data that could be used by the Bureau and other regulators and, once grouped into categories, publicly released subject to any necessary modifications or deletions for privacy purposes.

The Bureau believes that principal owners' sex/gender and applicants' LGBTQI+-owned business status data points together strike a balance that respects for small business owners' autonomy in self-identification, while also providing the Bureau and the public with information needed to further section 1071's statutory purposes.

The Bureau recognizes that the way financial institutions will collect data about sex under the final rule differs from the collection of information about the sex of home mortgage applicants under Regulation C/HMDA.[760] Although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, the two regulations have different legal authorities, cover different markets, and were developed at different times. The Bureau has specifically tailored the collection of sex data under this final rule implementing section 1071 for the small business lending context, in consideration of the comments received and of continuing developments in Federal government's approach to collecting information about sex, gender identity, and sexual orientation.

The Bureau has also considered commenters' statements that small business applicants may feel uncomfortable and have privacy concerns about providing sensitive information to lenders related to the sex of their principal owners. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with this data and on that basis, make appropriate pre-publication modification and deletion decisions. The Bureau takes the privacy of such information seriously and intends to make appropriate modifications and deletions.

Commenters also included suggestions for whether to allow applicants to select only one or multiple response categories in response to questions related to a principal owner's sex. As explained above, the Bureau has decided to include only a self-describe response option in response to the question about a principal owner's sex/gender at this time, rendering these comments moot.

One commenter stated that providing information about a principal owner's sexual orientation and gender identity should be optional for the applicant. The Bureau agrees, and applicants have a right to refuse to provide responses to questions about protected demographic information. As explained in final comment 107(a)(19)–1, financial institutions must permit an applicant to refuse to answer the financial institution's inquiry and must inform the applicant that it is not required to provide the information.

With regard to some commenters' suggestion that questions about a principal owner's gender identity and sexual orientation should be optional for financial institutions, the Bureau is not requiring separate questions for sex, gender identity, and sexual orientation for the reasons above. Thus, these commenters' suggestion is moot.

The Bureau does not believe it would be appropriate, however, to remove the requirement to collect principal owners' sex, suggested by some commenters. As discussed above, the collection of information about sex is required under section 1071.

The Bureau is not requiring financial institutions to report what sex or gender is indicated on a principal owner's State driver's license, as requested by one commenter. As the commenter acknowledged, State requirements differ as to what residents may select as to their sex and/or gender on their State government-issued identification and the available selections may not be adequate as to a principal owner's self-

[757] Off. of Mgmt. & Budget, Off. of the Chief Statistician of the U.S., *Recommendations on the Best Practices for the Collection of Sexual Orientation and Gender Identity Data on Federal Statistical Surveys* (Jan. 11, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/01/SOGI-Best-Practices.pdf.*

[758] Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations* 1–2. *See also* Nat'l Acads. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation* 1–4 to 1–5 (discussing terms and identities associated with the concepts of gender, sex, and sexual orientation).

[759] 86 FR 14363 (Mar. 16, 2021).

[760] As the Bureau is exempting HMDA-reportable transactions from the data collection requirements of the final rule, in § 1002.104(b)(2), strict consistency between reporting categories is unnecessary.

identified sex and/or gender. As noted above, the Bureau believes that the collection of principal owners' sex information under this rule should be based solely on an applicant's self-identification. However, as the commenter also pointed out, some governmental authorities allow individuals to indicate their sex as ''X'' in government-issued documents. Nothing in this rule would interfere with a principal owner choosing to designate their sex in that way in the self-describe response option.

With regard to one commenter's statement that the Bureau should not allow the use of previously collected information due to concern about misuse of such data, the final rule specifies how previously collected information may be used, as discussed further in the section-by-section analyses of §§ 1002.107(d) and 1002.110(e) below.

Regarding a commenter's suggestion that the Bureau should consult further with stakeholders before finalizing any publication of information about sexual orientation and gender identity of principal owners, the Bureau intends to engage further with stakeholders before publishing data, as discussed in part VIII below.

Proposed Rule—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

The Bureau proposed that financial institutions be required to collect and report at least one principal owner's ethnicity and race based on visual observation and/or surname in certain circumstances. This would have been required if the financial institution met in person with one or more of the applicant's principal owners and the applicant did not provide ethnicity, race, or sex information for at least one principal owner in response to the financial institution's inquiry pursuant to proposed § 1002.107(a)(20).

The Bureau noted that demographic response rates in the SBA's Paycheck Protection Program data are much lower when compared to ethnicity, race, and sex response rates in HMDA data.[761] The Bureau reasoned that without a visual observation and/or surname collection requirement, meaningful analysis of principal owner ethnicity and race data could be difficult, significantly undermining section 1071's purposes. Historically, one challenge under HMDA has been the reluctance of some applicants to voluntarily provide requested demographic information, such as ethnicity and race. The Bureau explained that the requirement in Regulation C to collect race, sex, and ethnicity on the basis of visual observation or surname is an important tool to address that challenge, and that it believes that the requirement has resulted in more robust response rates in the HMDA data.

Accordingly, the Bureau proposed that financial institutions collect at least one principal owner's ethnicity and race (but not sex) on the basis of visual observation and/or surname in the circumstances described above. Under the Bureau's proposal, a financial institution would not have been required to collect ethnicity and race via visual observation and/or surname if the applicant provided *any* demographic information regarding *any* principal owner. For applicants with multiple principal owners, the financial institution may not be able to determine whether the applicant had provided the demographic information of the principal owner who met in person with the financial institution or for another principal owner. The Bureau sought comment on this proposed approach. The Bureau also sought comment on whether a financial institution should be required to collect a principal owner's ethnicity and/or race via visual observation and/or surname if the applicant has only one principal owner, the applicant does not provide all of the principal owner's requested demographic information, and the financial institution meets in person with the principal owner. The Bureau noted that in this situation, the financial institution would be able to ''match'' any demographic information that the applicant provides with the correct principal owner because there is only one principal owner.

Proposed comment 107(a)(20)–9 would have explained that a financial institution would be required to report ethnicity and race based on visual observation and/or surname in certain circumstances. It would have further explained that a financial institution would not be required to report based on visual observation and/or surname if the principal owner only meets in person with a third party through whom the applicant is submitting an application to the financial institution.

Proposed comment 107(a)(20)–10 would have clarified that a financial institution meets with a principal owner in person if an employee or officer of the financial institution or one of its affiliates has a meeting or discussion with the applicant's principal owner about an application and can visually observe the principal owner. The proposed comment would have also provided examples of situations where the financial institution meets in person with a principal owner and where it does not. The Bureau requested comment on this approach and whether there should be additional or different examples.

Proposed comment 107(a)(20)–11 would have clarified that a financial institution uses only aggregate categories when reporting ethnicity and race based on visual observation and/or surname and would have directed financial institutions to proposed appendix G for additional information on collecting and reporting ethnicity and race based on visual observation and/or surname. The Bureau requested comment on whether to permit, but not require, financial institutions to use the disaggregated subcategories as well when reporting ethnicity and race based on visual observation and/or surname.

In addition to the specific matters identified above, the Bureau sought comment on its proposed approach to this data point, the proposed methods of collecting and reporting the data, and on whether additional clarification regarding any aspect of this data point is needed.

Comments Received—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

General comments. The Bureau received comments from many banks, trade associations, community groups, members of Congress, small business owners, service providers, and others on its proposal that financial institutions be required to collect at least one principal owner's ethnicity and race on the basis of visual observation and/or surname under certain circumstances. A community group, a joint letter from community and business advocacy groups, and a CDFI lender supported the proposed requirement, emphasizing that demographic data collection via visual observation and surname analysis has been required by Regulation C for many years. The community group also commented that ethnicity and race information, including information collected via visual observation and/or surname as proposed, will allow data users to assess how the experiences of small businesses differ by approximate amount of minority ownership in the

[761] Small Bus. Admin., *Paycheck Protection Program Weekly Reports 2021, Version 11,* at 9 (effective Apr. 5, 2021), *https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210404-508.pdf.* Paycheck Protection Program data were taken from 2021 loans for which the collection form for principal owner demographics was included in the application itself and, for most of that time, was featured on the first page of the application.

business, particularly when combined with information about an applicant's number of principal owners under proposed § 1002.107(a)(21).

Many commenters objected to the proposed requirement. A number of industry commenters stated that the Bureau should require only the reporting of applicant-provided data. A number of agricultural lenders, a trade association, a service provider, a community group, and a business advocacy group stated that while they support the collection of demographic information and the need for robust data, they do not support the proposed requirement. A few industry commenters said that the Bureau should only require best efforts to collect demographic information.

Use of visual observation and surname to collect sex. A number of commenters, including banks, trade associations, community groups, and LGBTQI+ advocacy groups, supported the Bureau's proposal to not require the use of visual observation and/or surname to report a principal owner's sex. Several LGBTQI+ advocacy groups commented that visual observation of the gender expression of principal owners would inevitably rely upon sex stereotypes and lead to inaccurate determinations of sex, gender identity, or sexual orientation. A community group similarly stated that it would not be possible in some cases to use visual observation to accurately identify gender. Several industry commenters stated that requiring financial institutions to determine the sex of principal owners would make employees uncomfortable and potentially offend applicants who had declined to provide this information.

In contrast, some banks requested that the visual observation and surname requirement for this rule be aligned with Regulation C and thus apply to data on sex as well as for ethnicity and race. These commenters said that alignment with Regulation C would reduce reporting errors and financial institutions' compliance burden because financial institutions would not need to use additional resources to understand and implement different data collection requirements.

Data accuracy and related concerns. Many commenters, including a range of lenders, trade associations, community groups, several members of Congress, business advocacy groups, and others, were concerned that the proposed requirement would yield unreliable ethnicity and race data.

Some commenters argued that such a requirement would introduce error, bias, and subjectivity into the data collection process, leading to inaccurate or distorted data. Several said that such purported bias should not be part of the underwriting process or that section 1071 was intended to combat this type of bias. One commenter said that banks do not consider the ethnicity, race, or gender of small business applicants and argued that they should not be required to guess such information. Other commenters asserted that inaccuracies in the collected data would not support rigorous analysis, would not serve the purposes of section 1071, and would be inconsistent with congressional intent to collect reliable data on small business credit. Several other commenters similarly stated that data collected via visual observation or surname would impair analyses, conclusions, and policies based on such data.

Several commenters asserted that data collected pursuant to the proposed requirement would be inaccurate because the process would be based on or encourage the use of racial stereotypes or assumptions. Several other commenters asserted that ethnicity and race determinations made by visual observation have been prone to error or unreliable, with some citing materials on own-race bias, other-race effect, and similar issues. Some commenters predicted that the proposed requirement may cause some lenders to rely on surname alone to avoid determining ethnicity and race based on visual observation. Others said that the proposed requirement should not be finalized because it could risk perpetuating discrimination and insert racial stereotyping into application processes, posing risks to applicants and financial institutions alike. A community group stated that the proposed data collection method raises fair lending concerns. With respect to reporting ethnicity and race based on surname, several commenters asserted that surname analysis was unreliable and obsolete.

Commenters also identified specific circumstances that they said could lead to inaccurate ethnicity and race determinations based on visual observation and surname. Some commenters argued that the provision does not account for situations such as adoption, surname changes, and multi-ethnic or multi-racial identities. Other commenters alleged that visual observation and surname analysis would likely be inaccurate or unreliable as a result of increasing demographic diversity. Several asserted that racial and ethnic identities are personal, influenced by a number of different factors, and should be confirmed only by the applicant. Another commenter likewise stated that the Bureau should only require lenders to report based on applicant-provided data to promote accuracy and inclusivity. Several commenters noted that a principal owner's ethnicity and race could be reported differently by different lenders under the proposed requirement.

Some commenters said that loan officers and bank employees lack the expertise or training to make ethnicity and race determinations, and that the proposed requirement would lead to guessing. Another commenter said the proposed requirement would create training and other employment hurdles without producing meaningful information.

Several commenters noted that the proposed requirement would result in inaccurate data when the person filling out the application is not a principal owner of the business, but rather an employee. Commenters also asserted that data would be misleading when the ethnicity and race of the principal owner meeting with the bank is not representative of the other principal owners of the business. One commenter asserted that the proposed requirement could subject lenders to liability because they do not always interact with principal owners.

Some commenters opposed the proposed requirement on the grounds that data collected using this method would be, they said, generally unrepresentative of small business applicants. They predicted low response rates to inquiries about ethnicity and race for this rule, based on the experience of the Paycheck Protection Program, and argued that ethnicity and race data would be based on visual observation and surname analysis for a disproportionate number of applications, which these commenters posited would result in inaccurate data. Several commenters stated that, as a result, inaccuracies attributable to the use of visual observation and surname analysis would be magnified, making the data collected unrepresentative of the applicant population and not useful for any analyses. Others commented that ethnicity and race data reported based on visual observation or surname would be both inaccurate and unrepresentative because of the increased use of digital application processes with no visual component. A trade association anticipated low applicant response rates to the demographic questions based on its members' experience that customers express anger or are reluctant to provide ownership information as required by FinCEN's customer due diligence rule. This commenter expected that

applicants would not want to provide demographic information due to concerns that it would be used in the credit process, despite any assurances to the contrary on the sample data collection form.

Customer relationships. Many commenters asserted that the proposed requirement would impair customer relationships, citing small business lending as more relationship-dependent than other forms of credit. A number of commenters stated that it would make bank employees and applicants uncomfortable, with some suggesting specifically that this could occur when in-person applicants witness employees filling out demographic information that the applicants declined to provide. A number of commenters likewise said it would negatively impact customer relationships. One argued that because banks are more likely to have ongoing interactions with a small business owner than someone seeking a mortgage, offense taken from visual observation or surname analysis would be more detrimental.

Several agricultural lenders expressed concern that the disclosure on the proposed sample data collection form informing applicants about the obligation of lenders to report ethnicity and race information through visual observation and/or surname analysis would be negatively received by applicants, stating that applicants might perceive the notice as an indication that the lender intends to or must contradict the applicant's wishes. A trade association suggested that applicants would feel uncomfortable providing their demographic information if they receive notice that such information would not be subject to a firewall, which would lead to a greater use of visual observation and surname analyses.

Right to refuse. A range of commenters opposed the proposal on the grounds that applicants have a right to decline to provide demographic information. One commenter said that the proposed requirement would further damage the public's confidence in financial institutions and heighten privacy concerns, because it would contradict an applicant's decision to not provide the requested information. Several cited the high percentage of Paycheck Protection Program loan applicants that did not report demographic data as showing applicant concerns about privacy and the importance of voluntary reporting.

Some commenters stated that the proposal is inconsistent with, or that it inappropriately circumvents, section 1071's provision that an applicant may refuse to provide protected demographic information and urged the Bureau to respect that right. One commenter said that section 1071 is structured to require financial institutions to make inquiries for their customers' information and to allow applicants to refuse to provide such information; given this framework, the commenter questioned whether requiring collection would be permissible under the statute when an applicant has already refused to provide the information. One commenter said that applicants may not understand that if they decline to answer demographic inquiries that lenders will determine and report their ethnicity and race anyway. Several commenters highlighted that HMDA, in contrast to section 1071, does not provide a comparable right of refusal.

Burden and cost. A few commenters objected to the proposed requirement on the grounds that it would impose significant costs on some lenders. One commenter identified costs to create and maintain policies and procedures, apply these consistently, conduct ongoing training, and audit compliance, while another said the proposal would require substantial changes to its loan processes, systems, and compliance protocols to implement. A commenter said that reliance on proxying, inference, or visual observation would impose a number of cost and compliance concerns. Several commenters asserted that lenders may face substantial costs to train employees to make determinations; one said this training could be complex for front-line employees who are currently taught that ECOA and other laws prohibit the collection of ethnicity and race information. A CDFI lender stated that the proposed requirement would impose less burden on larger banks and online lenders, either because they will have a higher number of online loan applications or because they already report demographic information on the basis of visual observation and surname under HMDA.

Response rates. Several commenters disputed that the higher responses rates in HMDA data, compared with lower response rates in Paycheck Protection Program data, could be attributed to HMDA's visual observation and surname requirement, and also disputed that this proposed requirement could improve response rates for financial institutions complying with the small business lending rule. Some suggested that the Bureau's concern with low response rates based on the Paycheck Protection Program experience is misplaced, arguing that those response rates were attributable to the program's emergency nature, and the rush by all parties to submit and process applications. Commenters also noted that Paycheck Protection Program may not inform the likely response rates under this rule because that program covered a wider range of businesses than the Bureau's proposal.

Purported conflicts with ECOA and Regulation B. Some commenters raised concerns about conflicts between the proposed requirement and subpart A of Regulation B and ECOA. One commenter stated that the proposed requirement is prohibited by 12 CFR 202.5, which provides that a creditor may not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction. Several commenters said that the proposed requirement would require bank employees to consider factors that ECOA prohibits creditors from considering. Commenters also generally stated that the proposed requirement conflicts with the fair lending training provided to bank employees and will insert race as a factor in the credit application process.

Several commenters said that a visual observation and surname requirement would not align with, or would violate, the statutory firewall requirement, noting that the lenders would have to determine a borrower's ethnicity and race but then have to ''forget'' and isolate the information when making credit decisions. One requested that information collected via visual observation and/or surname not be subject to the firewall provision because of the difficulty in maintaining the firewall requirements for data collected this way.

In-person meetings. A number of commenters raised concerns that the proposed requirement would damage the relationships that community banks, traditional banks, or small- to mid-sized banks have with their customers. One asserted that in-person interactions are important for community lenders, such as CDFI banks, to understand customers, to make customers feel comfortable, and to identify products and services responsive to the needs of lower income and other underserved communities. Others emphasized that such lenders value and rely on repeated, in-person interactions with customers, saying that the proposed requirement would disproportionately affect them, but would favor large banks and online lenders that did not see applicants and thus would not have to employ the visual observation or surname analysis. One commenter suggested that all lenders should be subject to the

proposed requirement, because online lenders can still conduct surname analyses. Another said that the proposed requirement would disproportionately subject CDFI lenders to the risks of reporting inaccurate data, including reputational damage, and greater operational and compliance burden. A commenter urged that the Bureau exempt community banks from the proposed requirement.

In contrast, some commenters suggested that the proposed requirement would not generate much data as a result of a shift away from in-person interactions, thus limiting or negating its value. One such commenter predicted that much small business lending will likely be through credit cards, which it said would not provide an opportunity to implement the requirement, and as a result data collected via visual observation and surname would be associated with certain loan types that may be received by higher revenue applicants.

Some commenters suggested that lenders, their employees, and applicants would try to avoid visual observation and surname analysis. Several said that the proposed requirement would discourage loan officers and applicants from meeting in person or by video call. Others stated that some banks may shift applications online, impairing the personal interaction some banks have with their communities. One commenter predicted that the proposed requirement would discourage small business applicants from seeking credit.

Another commenter argued that the proposed requirement is unnecessary because financial institutions do not always meet with the principal owners of a business. Several commenters said that ethnicity and race determinations from visual observation and surname analysis may not be representative of the applicant population, would be inconsistent, and would not be comparable to other data.

One commenter said that the requirement would be difficult to apply because a financial institution may not know if the principal owner's demographic information had already been collected to assess if the visual observation and surname requirement applies, such as in the context of a brief interaction that is later determined to be an in-person meeting that would trigger the proposed requirement. Others asked for clarity on whether the proposed requirement would be triggered if any bank employee met in person with a principal owner, even if not involved with the credit application (for example when signing closing documents). Another commenter stated that financial institutions should not be required to determine if an individual is a principal owner, a necessary condition to collect data on a principal owner's ethnicity and race via visual observation and surname analysis, if the small business applicant chooses not to disclose its ownership structure.

Litigation and compliance risk. Some commenters were concerned that the proposed requirement would subject financial institutions and their employees to enforcement actions or litigation if they erred in determining a principal owner's ethnicity or race. Several stated that despite good faith efforts, such errors could subject lenders to examiner scrutiny, litigation, negative media, and erroneous discrimination claims by third parties, or subject them to customer complaints. One commenter stated that regulators could use financial institutions' best-guess, but erroneous determinations to pursue disparate impact cases, or customers could bring discrimination cases, if they are able to reverse engineer the inadvertently incorrect ethnicity or race determinations made by financial institutions. A community group suggested that financial institutions would avoid reporting ethnicity or race at all to avoid litigation risk.

Several business advocacy groups suggested that certain lenders may use this provision to fabricate ethnicity and race data in order to make their lending practices appear more equitable, accessible, and unbiased.

Implementation and other comments. A number of commenters offered specific suggestions regarding particular aspects of the proposal, notwithstanding other objections they may have raised regarding whether it should be finalized at all. Several urged the Bureau to provide guidance materials and sample disclosures, and to engage in education efforts to encourage applicants to self-report their demographic information, with some suggesting these options in place of the proposed provision. Some said the Bureau should develop guidance that lenders could use to avoid questions of interpretation and to learn about resources they can use to make ethnicity and race determinations on the basis of a principal owner's surname. Several suggested that the Bureau provide a uniform surname classification standard.

One commenter requested an exemption from the proposed requirement (and the collection of ethnicity and race generally) for retail credit, on the grounds that many applicants will decline to provide demographic information about their principal owners given the sensitivity of the information. Other commenters stated that automobile and truck dealers had expressed concerns about the proposed requirement and did not think it would be possible to report detailed demographic information based on visual observation. Another commenter recommended that the Bureau exempt sole proprietors from the proposed requirement, noting that sole proprietor transactions are unique and may not provide meaningful data on the commercial credit market served by small, non-bank lenders.

Several commenters opposed the proposed requirement, arguing that the use of visual observation and surname is outdated. Two commenters stated that these methods employed in Regulation C were implemented many years ago, and that the Bureau should follow more current government agency practices, citing a 2021 policy memo from USDA [762] rescinding the use of visual observation to determine ethnicity or race for certain Federal food programs. One commenter stated that, as with participants in the USDA programs, some small business owners may not want their ethnicity or race determined by others, may perceive discriminatory treatment, and may avoid applying for credit.

One commenter stated that the scope of the proposed requirement was unclear, noting that the NPRM preamble and proposed commentary provided that a financial institution would have to identify at least one principal owner by visual observation or surname if the applicant does not provide the ethnicity and race of at least one principal owner, even though institutions are obligated to collect the ethnicity, race, and sex of each of the small business applicant's principal owners. Several commenters requested that financial institutions should only be required to collect aggregate ethnicity and race categories.

One commenter suggested the use of an automated proxy analysis of surnames as an alternative to the proposed requirement. Another said that the Bureau could determine ethnicity and race with the data reported by lenders based on surname analysis.

Several commenters urged that, if the proposed requirement is finalized, demographic data should note when they are collected via visual observation or surname.

[762] U.S. Dep't of Agric., *Collection of Race and Ethnicity Data by Visual Observation and Identification in the Child and Adult Care Food Program and Summer Food Service Program—Policy Recission* (May 17, 2021), *https://www.fns.usda.gov/cn/Race-and-Ethnicity-Data-Policy-Rescission.*

Final Rule—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

The Bureau is not finalizing its proposed visual observation and/or surname analysis requirement for the reasons set forth below. Final § 1002.107(a)(19) (proposed as § 1002.107(a)(20)) no longer includes references to the reporting of ethnicity and race based on visual observation and surname. The Bureau is likewise not adopting proposed comment 107(a)(20)–9, regarding reporting based on visual observation and/or surname; proposed comment 107(a)(20)–10, regarding meeting in person with a principal owner; and proposed comment 107(a)(20)–11, regarding the use of aggregate categories when reporting using visual observation or surname. The Bureau has also removed other references to the collection of ethnicity and race data via visual observation and/or surname from other locations in the final rule.

In making this decision, the Bureau carefully considered the numerous comments it received, the statute, the history of the use of visual observation and surname analysis under HMDA, and the recent history of the collection of demographic information related to the Paycheck Protection Program. The Bureau believes, based on its expertise and the longstanding use of visual observation and surname analysis in HMDA, that collection of demographic information via visual observation or surname analysis has the capacity to improve response rates for demographic information—without particular risk to data accuracy,[763] introduction of bias or racial stereotyping into the underwriting process,[764] increased litigation/compliance risk, or violations of existing ECOA/Regulation B,[765] as suggested by some commenters. The Paycheck Protection Program experience also suggests that there may be benefits in such a requirement.

Nonetheless, the Bureau believes that a requirement to collect principal owners' ethnicity and race via visual observation or surname could pose particular challenges for small business lending that are not present in mortgage lending. For example, applicants and co-applicants are clearly identified as such in mortgage applications—making it obvious whose demographic information has, or has not, been self-reported. In contrast, this final rule—as mandated by section 1071—requires a record of the applicant's responses to a request for protected demographic information to be kept separate from the application, and prohibits inclusion of personally identifiable information in records compiled and maintained pursuant to this rule. This could make tracking whose information has, or has not, been self-reported by the applicant particularly challenging. As commenters pointed out, a financial institution might be interacting with a representative of a small business who is not a principal owner, or the institution may not know—particularly early in the application process—if a particular person is a principal owner.

In addition, the Bureau is mindful, consistent with the comments it received, that much of the lending to small businesses in smaller communities and in underserved and rural areas occurs through relationship banking that involves more frequent and more personal contact with applicants. The Bureau is also mindful of concerns raised by lenders that rely on in-person engagement that their customer relationships may be negatively impacted by customer discomfort with a visual observation and surname data collection requirement, particularly during initial implementation of this final rule. The Bureau also acknowledges the concerns expressed by commenters that bank employees may feel uncomfortable making ethnicity and race determinations on the basis of visual observation or surname. On the other hand, the Bureau acknowledges comments that the prevalence of online lending processes and use of credit cards in small business lending could mean few opportunities for in-person or video-enabled meetings and thus for the collection of ethnicity and race via visual observation or surname.

The Bureau's decision not require financial institutions to collect principal owners' ethnicity and race information via visual observation or surname at this time renders moot the comments about implementation of such a requirement, as well as those suggesting alternatives to the proposal.

The Bureau intends to actively monitor financial institutions' response rates to inquiries regarding demographic data to ensure that applicants are not being discouraged in any way from providing their demographic data pursuant to this final rule and to determine whether any future adjustments to the rule may be warranted.

107(a)(20) Number of Principal Owners

Proposed Rule

Proposed § 1002.107(a)(21) would have required financial institutions to collect and report the number of the applicant's principal owners. Proposed comment 107(a)(21)–1 would have explained that a financial institution would be able to collect an applicant's number of principal owners by requesting the number of principal owners from the applicant or by determining the number of principal owners from information provided by the applicant or that the financial institution otherwise obtains. If the financial institution asks the applicant to provide the number of its principal owners, proposed comment 107(a)(21)–1 explained that the financial institution would have been required to provide the definition of principal owner set forth in proposed § 1002.102(o). The proposed comment also clarified that, if permitted pursuant to proposed § 1002.107(c)(2), a financial institution could report an applicant's number of principal owners based on previously collected data.

Proposed comment 107(a)(21)–2 would have clarified the relationship between the proposed requirement to collect and report the number of principal owners in proposed § 1002.107(a)(21) with the proposed requirement to report verified information in proposed § 1002.107(b). The proposed comment would have stated that the financial institution may rely on an applicant's statements in collecting and reporting the number of the applicant's principal owners. The financial institution would not have been required to verify the number of

[763] While some commenters suggested that data inaccuracies from visual observation and surname analysis would have limited the usefulness, integrity, reliability, or quality of the collected data and conclusions or policies based upon the data, the Bureau has not found this to be the case in HMDA and would not expect it to be so here either. A loan officer reporting their perception of an applicant's ethnicity and race could not do so ''incorrectly'' (other than by intentionally mis-reporting their perception); in fact, a loan officer's perception of an applicant's protected demographic information may be more important for fair lending analyses than how the applicant self-identifies.

[764] Collecting lenders' perceptions of the ethnicity and race of applicants, whether or not such perceptions are what the applicant would consider ''accurate,'' could have enabled an analysis of potential bias by lenders. But the mere recordation of those perceptions is unlikely to create bias on the basis of those perceptions.

[765] Inquiring about an applicant's ethnicity and race (or collecting such information via visual observation or surname, if the Bureau were finalizing that aspect of the proposal) will not, in fact, violate Regulation B's prohibition on inquiring about certain protected characteristics of an applicant in connection with a credit transaction, nor is doing so under HMDA/Regulation C a violation. Regulation B implements ECOA, of which section 1071 is a part. Section 1002.5 of Regulation B, and its amendments under this final rule, make clear that the collection of ethnicity and race pursuant to this rule would not violate Regulation B.

principal owners provided by the applicant, but if the financial institution did verify the number of principal owners, then the financial institution would report the verified number of principal owners.

Proposed comment 107(a)(21)–3 would have stated that pursuant to proposed § 1002.107(c)(1), a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's number of principal owners. However, the proposed comment would have explained that if a financial institution is nonetheless unable to collect or determine the number of principal owners of the applicant, the financial institution would report that the number of principal owners is ''not provided by applicant and otherwise undetermined.''

In addition to seeking comment on its proposed approach to the collection and reporting of the number of principal owners generally, the Bureau also sought comment on whether to instead, or additionally, require collection and reporting of similar information about owners (rather than principal owners). The Bureau raised, as an example, whether financial institutions should be required to collect and report the number of owners that an applicant has that are not natural persons.

Comments Received

The Bureau received comments on this aspect of the proposal from a number of lenders, trade associations, and community groups. Two lenders and a community group supported the Bureau's proposal for collecting and reporting the number of an applicant's principal owners. The community group stated that the information would help determine whether experiences in the small business lending marketplace are different if an owner is a woman or minority, even if a small business does not meet the criteria for a minority-owned or women-owned business. Further, knowing the number of a business's principal owners would help data users identify businesses with varying percentages of ownership by women or minorities above or below the 50 percent threshold for minority-owned or women-owned businesses. One lender stated that the number of principal owners data point, along with others proposed by the Bureau, would provide insight on the quality of capital being accessed by small businesses, assist in showing how financial institutions compare across different metrics, and help determine if an institution is engaged in equitable lending. This commenter also stated that in its experience, there are a number of small business lending programs and funding opportunities that require similar data. Thus, this commenter stated its expectation that the reporting requirements in the Bureau's final rule would satisfy requirements across a number of such programs and reduce administrative burden. Specifically, the commenter noted that it had gathered similar data on owners for Paycheck Protection Program loans it originated.

A number of lenders and trade associations opposed the Bureau's proposal to collect information about the number of an applicant's principal owners. Two such commenters stated that the information does not serve the purposes of section 1071, unless it is to allow second guessing of applicant-provided responses as to their minority-owned or women-owned status or the Bureau intends to require the collection of ethnicity, race, and sex data for all of an applicant's principal owners. One bank stated that the proposed number of principal owners data point would not offer any insight into lending patterns, as it is not considered in the underwriting process. Another bank argued that the data point is not necessary because there is no evidence that lenders use an applicant's number of principal owners as a basis for discrimination. One bank questioned the benefit of collecting such information, stating that a business's ownership and principals may change on a day-to-day basis. Another commenter stated that the information collected may inadequately or erroneously describe an applicant's ownership structure, particularly where the legal structure of the applicant's ownership may make such determinations difficult. Several commenters also stated that the data point is unnecessary, because similar information is already collected in other contexts (such as under FinCEN's customer due diligence rule) and regulators already examine banks for fair lending compliance.

Several commenters cited costs and burden as the basis for their objections. Two banks stated that it would be expensive to collect the information, with one also noting that the costs would be passed down to customers and communities. Another bank stated that because it does not collect information about the number of an applicant's principal owners currently, the proposed requirement would entail changes to its operating procedures and suggested that the Bureau could obtain this information from the Internal Revenue Service instead. With regard to indirect vehicle financing transactions, a trade association stated that information about the number of principal owners is not part of the data transmitted between dealers and finance companies and is not used for business purposes, thus technical and process changes would be needed to collect and report the data.

A few industry commenters objected to the collection and reporting of the number of an applicant's principal owners on the basis of privacy, stating that the data point could be used to identify applicants. One said that this concern was particularly relevant for small communities with limited numbers of small businesses. Two others urged the Bureau to not publish the data point publicly to protect applicants' privacy.

An agricultural lender said it was unclear how financial institutions should report the number of principal owners for family farmers. This lender emphasized that the ownership of many family farm businesses is complex and may involve multiple business entities for risk management purposes, with separate entities for different farm operations. The commenter provided as an example a situation where a person owns only one farm parcel but works several farm parcels that are owned by a parent through multiple business entities and trusts.

Some industry commenters objected to this proposed data point as part of their general objection to the Bureau's data points proposed pursuant to ECOA section 704B(e)(2)(H). These commenters generally argued that such data points, including the number of an applicant's principal owners, do not add value or advance the purposes of achieving fair lending or of ECOA; are not used or collected for underwriting or financial analysis; go beyond what other laws require financial institutions to collect; add unnecessary complexity and detail to the rule; and would add to the burden and costs for implementing the rule, especially for small covered financial institutions.

Two industry commenters objected to the data point on the grounds that in the absence of other information about an applicant's ownership, such as the number of owners or percentages of ownership, the information could lead to incorrect assumptions about the ownership structure of a small business applicant. For example, the commenters noted that if demographic data are reported for one individual, it could lead to a conclusion that the applicant has only one principal owner, when the applicant has several owners, but only

one with more than a 25 percent ownership share.

Two commenters urged the Bureau to provide a regulatory safe harbor for reporting information about an applicant's number of principal owners, as part of a global safe harbor for all applicant provided data, or a safe harbor similar to that in proposed § 1002.112(c).

Several community groups suggested additional data points related to ownership. One such commenter suggested that the Bureau require financial institutions collect and report the percentage amount of a principal owner's ownership. This information, argued the commenter, would enable the Bureau to refine its data and reveal specific disparities in lending by ownership composition. Another commenter suggested that the Bureau require financial institutions to ask applicants for the number of individuals who own less than 25 percent of the applicant, to provide more insight on the distribution of small businesses and their experiences. One other commenter instead suggested that the Bureau add additional data points to measure the percentage of ownership by women and by people of color, to further enable evaluations of access to credit based on the proportion of ownership and control by such individuals.

A joint letter from community and business advocacy groups requested that the Bureau clarify proposed comment 107(a)(21)–3, which stated that if a financial institution is unable to collect or ''otherwise determine'' an applicant's number of principal owners, the financial institution should report it as unknown. The community groups asked the Bureau to clarify the meaning of the phrase ''otherwise determine,'' and specifically whether financial institutions may limit its investigation to documents obtained from the applicant in the normal course of an application, or if they have an obligation to conduct a due diligence investigation of corporate records.

Final Rule

For the reasons set forth herein, the Bureau is finalizing the requirement for financial institutions to collect and report the number of an applicant's principal owners, renumbered as § 1002.107(a)(20), and its associated commentary. In consideration of the comments received, the Bureau is doing so pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071 and under ECOA section 704B(e)(2)(H), which authorizes the Bureau to require financial institutions to compile and maintain ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].''

The Bureau believes that the information will provide important context for other information collected and reported under the rule and thus serve the purposes of section 1071. The Bureau acknowledges that, as argued by commenters, the number of an applicant's principal owners may not be information considered by financial institutions in the underwriting process or, by itself, serve as the basis of discrimination. However, as noted by other commenters, information about the number of small businesses' principal owners will help data users, including the Bureau, understand how small business applicants' experiences in the lending marketplace differ on the basis of the demographic composition of their ownership and identify business and community development needs and opportunities. Thus, even if an applicant is not a women-owned, minority-owned, or LGBTQI+-owned business under § 1002.107(a)(18), through the number of principal owners data point, data users will still have some insight into what proportion of the small business's ownership has the demographic characteristics provided by the applicant.

The Bureau acknowledges some commenters' concerns that the number of principal owners data point would not provide a comprehensive picture of an applicant's ownership structure. Final § 1002.102(o) defines a principal owner as an individual who directly owns 25 percent or more of the equity interests of a business. As a result, the requirement to collect information about the number of an applicant's principal owners will not account for individuals with either indirect ownership or less than 25 percent ownership in the business. However, the Bureau believes that this supports, rather than counsels against, inclusion of this data point in the final rule.

The Bureau also is not adding other data points related to ownership to the final rule. The Bureau considered the general likelihood that an individual responding for the applicant would know the information being requested in formulating its proposal. The Bureau believes that applicants are likely to know the number of its principal owners and will be willing to provide that information. Overall, the Bureau believes that the number of principal owners data point, particularly in combination with information about an applicant's business statuses under § 1002.107(a)(18), strikes a balance so that the Bureau is likely to receive useful data that will allow it and others to develop a nuanced understanding of small business lending practices generally, even if it does not present a complete picture of each applicant's ownership structure.

The Bureau does not believe that the fact that some applicants have complicated ownership structures necessitates removal of this data point from the final rule. Although some small business applicants, such as family farmers, may have ownership structures where there are many owners and/or where ownership is through various business entities, the rule's definition for principal owner means that applicants would be required to identify only individuals, and not entities or trusts, with direct ownership in the business and would not need to trace ownership through multiple business entities or provide information about individuals with small equity shares in the business. Under comment 107(a)(20)–1, this definition would be provided to an applicant in conjunction with the request for the number of its principal owners. The Bureau believes that the straightforward definition in § 1002.102(o) will assist applicants in providing this information.

Further, the Bureau believes the information about the number of an applicant's principal owners will be useful and facilitate the purposes of section 1071, even if a specific applicant's ownership changes over time. Under the Bureau's proposal, as with the final rule, applicants are asked for information in relation to individual, covered applications to allow data users, in the aggregate, to ascertain lending patterns at the institution or community levels. The data meets the final rule's purposes if it is accurate at the time the data are collected. Identifying changes in ownership over time will also further the business and community development and fair lending purposes of section 1071.

Some commenters suggested that the number of principal owners data point should not be required under the final rule because similar information is collected in other contexts. However, the definition of principal owner under § 1002.102(o) has been specifically tailored by the Bureau to meet the purposes of section 1071. Information about differently defined owners under different regulatory regimes, reported to other regulatory authorities, does not facilitate section 1071's purposes of fair lending enforcement and identification of business and community

development needs and opportunities, nor could such data be matched to a particular covered application reported under section 1071.

With respect to commenters' arguments that the additional burden and costs that would result from the number of principal owners data point warrant its removal from the final rule, the Bureau notes first that commenters did not identify any specific costs or burdens with reporting the number of principal owners data point in particular, as much as concern about the costs and burden of reporting data points adopted pursuant to the Bureau's statutory authority in ECOA section 704B(e)(2)(H) generally. The Bureau acknowledges that financial institutions will experience some initial expenses and burden in implementing new regulatory data collection requirements. However, the Bureau understands that financial institutions already collect and maintain information about the ownership of certain businesses under FinCEN's customer due diligence rule. The Bureau does not believe that there will be significant costs and burden associated with collecting and reporting information about applicants' principal owners specifically, as opposed to generally as part of a new data collection regime. The Bureau considers the data points it is adopting pursuant to section 704B(e)(2)(H)—including the number of an applicant's principal owners and the corresponding costs and burden to implement their collection—necessary to facilitate the purposes of section 1071.

The Bureau does not believe that a specific safe harbor is necessary for reporting the number of an applicant's principal owners, as urged by commenters. As provided in final comment 107(a)(20)–2 (proposed as comment 107(a)(21)–2), a financial institution is entitled to rely on the statements provided by the applicant in collecting and reporting the information provided by the applicant. As a result, any such good faith reporting by a financial institution of the number of an applicant's principal owners that the financial institution has no reason to believe is inaccurate will not be a violation of the regulation's requirements.

In response to commenters' concerns that information about an applicant's number of principal owners may be used to identify applicants, the Bureau will review the data received to complete the full privacy analysis to determine the privacy risks associated with the publication of the application-level data as discussed in part VIII, below. The Bureau takes the privacy of such information seriously and will be making appropriate modifications and deletions to any data before making it public.

With respect to commenters' request that the Bureau clarify financial institutions' obligation to determine the number of an applicant's principal owners, the Bureau believes that the proposed commentary is sufficiently clear and does not need to be revised. The Bureau's intent in proposed comment 107(a)(21)–3 that a financial institution report that the number of principal owners is ''not provided by the applicant and is otherwise undetermined'' was to refer to the possibility that a financial institution may not know the number of the applicant's principal owners if, despite maintaining reasonably designed procedures to obtain the information, the applicant does not provide the information and the financial institution does not otherwise verify such information. The Bureau has also revised comment 107(b)–1 to clarify what information may be used to verify information. Given these other statements in the commentary, the Bureau does not believe that further clarification of financial institutions' obligation to determine the number of an applicant's principal owners is necessary.

As explained in the section-by-section analysis of § 1002.102(o), the Bureau has changed the definition of principal owner to use the term ''individual'' instead of ''natural person'' for comprehensibility reasons. Accordingly, the commentary for final § 1002.107(a)(20) has likewise been updated to refer to individuals and not natural persons.

To streamline the commentary, the Bureau has revised comment 107(a)(20)–1 (proposed as 107(a)(21)–1) to remove the first sentence as to requesting the number of an applicant's principal owners from the applicant or determining such information from other information, as duplicative of content in comment 107(b)–1, which applies to the number of principal owners data point. For similar reasons, it has removed the last sentences of comments 107(a)(20)–1 and –2, regarding the use of previously collected data and about verification, as straightforward applications of final § 1002.107(d) and (b), respectively, that would not provide any new content. Otherwise, the Bureau is substantially finalizing the commentary for § 1002.107(a)(20) with changes to reflect updated numbering for the data point and also updating and adding cross-references to other parts of the final rule.

107(b) Reliance on and Verification of Applicant-Provided Data

Proposed Rule

ECOA section 704B(e)(1) provides that ''[e]ach financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under [section 704B(b)].'' [766] Section 1071 does not impose any requirement for a financial institution to verify the information provided by an applicant.

During the SBREFA process, a number of small entity representatives urged the Bureau to require collection and reporting of a number of data points based only on information as provided by the applicant.[767] No small entity representatives stated that they thought verification should be generally required. The industry stakeholders who commented on this issue asked that the Bureau not require verification of applicant-provided information. The Bureau did not receive any comments on this issue from community group stakeholders during the SBREFA process.

The Bureau proposed in § 1002.107(b) that unless otherwise provided in subpart B, the financial institution would be able to rely on statements of the applicant when compiling data unless it verified the information provided, in which case it would be required to collect and report the verified information. The Bureau believed that requiring verification of collected data would greatly increase the operational burden of the rule. Proposed comment 107(b)–1 would have explained that a financial institution could rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting applicant-provided data; the financial institution would not be required to verify those statements. Proposed comment 107(b)–1 would have further explained, however, that if the financial institution did verify applicant statements for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution would report the verified information. The comment would have gone on to explain that, depending on the circumstances and the financial institution's procedures, certain applicant-provided data could be

[766] ECOA section 704B(e)(1).

[767] SBREFA Panel Report at 26.

collected without a specific request from the applicant. For example, gross annual revenue could have been collected from tax return documents. In addition, the proposed comment would have made clear that applicant-provided data are the data that are or could be provided by the applicant, including those in proposed § 1002.107(a)(5) through (7), and (13) through (21).

The Bureau sought comment on its proposed approach to verification of the 1071 data points, including the specific guidance that would have been presented in comment 107(b)–1. The Bureau also sought comment on whether financial institutions should be required to indicate whether particular data points being reported have been verified or not.

Comments Received

The Bureau received comments on this aspect of the proposal from numerous lenders, trade associations, community groups, and a business advocacy group. Several lenders and trade associations supported the proposed provision, agreeing with the Bureau that requiring verification of collected data would greatly increase the operational burden of the rule. These commenters did not object to reporting verified information when a financial institution verifies applicant statements for its own business purposes. Several of these commenters did, however, object to the possible inclusion of a provision requiring financial institutions to flag whether or not they had verified reported data, a question that the NPRM had sought comment on. Although these commenters did not discuss reasons for objecting to the verification flag, the context suggests that they were concerned about the operational difficulty of carrying out such a provision.

Several banks and trade associations supported the ability to rely on unverified applicant-provided data, but objected to the requirement to report verified information when the financial institution verifies applicant statements for its own business purposes. Some of these commenters pointed out that verification may happen after the initial application, different lenders have different methods of verification, and updating the information for reporting would be operationally difficult. One of these commenters stated that the verification may be carried out by different staff using different platforms, and section 1071 does not mention verification. Other commenters suggested that the term ''verification'' was not sufficiently clear, and sometimes a financial institution would collect documents such as tax forms that contain information that conflicts with applicant statements, for example a different NAICS number, even though the financial institution is not ''verifying'' that data point. Other commenters expressed concern about how reporting information verified later would affect use of the ''firewall.'' A group of trade associations stated that collecting the verified information would provide little benefit and the already difficult implementation of the rule would be made even more onerous by this provision. In addition, one commenter stated that the verification provision was similar to HMDA, which they considered to be very onerous.

A community group and a women's business advocacy group suggested that the final rule should require additional verification. The community group stated that verification of a few key data points that are generally verified by lenders now, such as gross annual revenue, or that can be easily checked, such as the NAICS code, should be required. A business association urged the Bureau to look into ways to verify that the correct information is offered and reports are accurate.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(b) with additional language making clear that a financial institution may rely on information from appropriate third-party sources as well as the applicant, and other edits for clarity. Final § 1002.107(b) provides that unless otherwise provided in subpart B, the financial institution may rely on information from the applicant, or appropriate third-party sources, when compiling data. Section 1002.107(b) further states that if the financial institution verifies applicant-provided data, however, it shall report the verified information.

The Bureau is also finalizing associated comment 107(b)–1 with phrasing edits similar to those in the regulation text, and revised and additional cross-references to facilitate compliance. Final comment 107(b)–1 explains that a financial institution may rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting applicant-provided data; the financial institution is not required to verify those statements or that information. Comment 107(b)–1 further explains, however, that if the financial institution does verify applicant statements or information for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution reports the verified information. The comment also makes clear that when collecting certain applicant-provided data, depending on the circumstances and the financial institution's procedures, a financial institution may collect and rely on information from appropriate third-party sources without requesting it from the applicant. The comment then provides further guidance on collection and verification of applicant-provided data, including a list of applicant-provided data points. In order to facilitate compliance, final comment 107(b)–1 also adds references to two comments that explain restrictions regarding verification of certain data points.

The Bureau believes that requiring verification of applicant-provided data points would greatly increase the operational burden of the rule, and that relying on applicant-provided data, whether directly from the applicant or through appropriate third-party sources, will ensure sufficient accuracy to carry out the purposes of section 1071. As explained above, section 1071 does not speak to verification; rather it refers only to compiling and maintaining a record of certain information provided by an applicant. However, the Bureau believes that requiring financial institutions to collect and report (for this final rule) information that they have already verified will only add slight operational difficulty, and will enhance the accuracy and usefulness of the data, thereby furthering the purposes of section 1071. The Bureau is implementing this requirement pursuant to its authority under ECOA section 704B(g)(1) to prescribe rules in order to carry out, enforce, and compile data pursuant to section 1071, and as an interpretation of the statutory phrase ''compile and maintain'' in ECOA section 704B(e)(1). In the Bureau's view, the fact that the statute does not use the specific word ''verification'' is not relevant to this issue because the verification that the financial institution chooses to carry out is a standard part of compiling and maintaining the information provided by the applicant. The Bureau also believes that this requirement will improve the quality and usefulness of the resulting dataset, thereby furthering the purposes of section 1071.

In regard to the possibility of the final rule requiring financial institutions to report whether or not certain data points have been verified, the Bureau notes that no commenters expressed support for this idea, while several opposed it.

The Bureau believes that such a requirement would impose considerable operational difficulty, and it is not clear that any uses of this information would justify the increased burden. Consequently, the final rule does not include this provision.

As discussed above, several commenters suggested that verification might occur at different times on different platforms and be carried out by different personnel. Although credit processing is complex, the Bureau anticipates that financial institutions will report data using the applicant's whole credit file in order to provide accurate information, as is done with HMDA. Although implementing the final rule so that verified information can be reported will add operational difficulty, such difficulty should be greatly reduced once the rule is implemented and the gathering of data is standardized within the financial institution. In addition, the fact that different financial institutions have different processes should not cause a problem because each financial institution can implement the rule to coordinate with its own processes. As explained above, the Bureau believes that requiring reporting of the verified information when the financial institution verifies for its own purposes will benefit data users in carrying out the purposes of section 1071 by enhancing the quality of the data reported.

Several commenters were concerned about how the term ''verification'' would be interpreted in relation to unused information in the credit file that might conflict with applicant-provided data. The Bureau interprets the word ''verification'' to mean the intentional act of determining the accuracy of information provided, in this case for the purpose of processing and underwriting the credit applied for, and potentially changing that information to reflect the determination. Loan file information that may or may not be more accurate than applicant-provided data and is not part of a financial institution's verification of the file's applicant-provided data or used by the institution in processing or underwriting the loan need not be reported. For example, a financial institution that uses a tax form to verify gross annual revenue, but does not consider or use the NAICS information on the tax form, may continue to rely on the applicant-provided NAICS information. However, if a financial institution believes the tax form information to be more accurate and chooses to report it instead of the applicant-provided data, it may do so.

The Bureau does not believe that requiring the reporting of data that is later verified will interfere with the final rule's firewall provision, which exists to protect against disclosure of protected demographic information for which verification is not allowed. For further discussion of the firewall provision see the section-by-section analysis of § 1002.108 below.

The Bureau does not believe it would be appropriate, as suggested by some commenters, require financial institutions to verify applicant-provided data when they do not already do so for their own business purposes. As stated by several commenters and explained above, requiring verification merely for the purpose of data collection would impose significant operational difficulty and expense on reporters.

107(c) Time and Manner of Collection

Proposed Rule

Although the definition of ''application'' triggers a financial institution's *duty* to collect 1071 data, the application definition does not necessarily govern *when* that data must be collected. The language and structure of section 1071—which applies to ''applications'' from ''applicants''—indicates that the data must be collected sometime during the application process, but does not provide further detail.[768]

Proposed § 1002.107(c)(1) would have required a covered financial institution to maintain procedures to collect applicant-provided data under proposed § 1002.107(a) at a time and in a manner that is reasonably designed to obtain a response. The Bureau believed there would be benefits to providing a flexible approach concerning when applicant-provided data must be collected during the application process. Given the variety of application processes in the small business lending space, the Bureau believed that requiring data collection to occur within a narrow window could affect data quality and disrupt financial institution practices. On the other hand, the Bureau believed that safeguards would be necessary to ensure that financial institutions are not evading or delaying their obligation to collect data in a manner that detrimentally affects response rates.

Proposed comments 107(c)(1)–1 and –2 would have clarified the meaning of financial institution ''procedures'' and would have emphasized a financial institution's latitude to establish procedures concerning the time and manner that it collects applicant-provided data, provided that those procedures are reasonably designed to collect the applicant-provided data in proposed § 1002.107(a). Proposed comment 107(c)(1)–3 would have clarified what constitutes ''applicant-provided data'' in proposed § 1002.107(c)(1).

Proposed comment 107(c)(1)–4 would have provided additional guidance on financial institutions' procedures that are reasonably designed to obtain a response. Proposed comment 107(c)(1)–4 would have provided that a financial institution shall assess on a periodic basis whether its procedures are reasonably designed. Proposed comment 107(c)(1)–4 would have explained that one way a financial institution may be able to assess whether its procedures are reasonably designed would be, once 1071 data are made publicly available, to compare its response rate with similarly situated financial institutions (for example, those that offer similar products, use a similar lending model, or are of a similar size).

Proposed comments 107(c)(1)–5 and –6 would have provided examples of procedures that generally are and are not reasonably designed to obtain a response. Proposed comment 107(c)(1)–5 would have provided that, although a fact-based determination, a procedure reasonably designed to obtain a response is one in which a financial institution requests applicant-provided data at the time of a covered application; the earlier a financial institution seeks to collect applicant-provided information, the more likely the timing of collection is reasonably designed to obtain an applicant response. Conversely, proposed comment 107(c)(1)–6 would have provided that, as a general matter, a procedure is not reasonably designed to obtain a response if a financial institution requests applicant-provided data simultaneous with or after notifying an applicant of action taken on the covered application. Proposed comment 107(c)(1)–6 would have provided that depending on the particular facts, however, these procedures may be reasonably designed to obtain a response; for example, if the financial institution has evidence or a reason to believe that under its procedures the response rate would be similar to or better than other alternatives.

Proposed comment 107(c)(1)–7 would have explained that a financial institution reports updated applicant-provided data if it obtains more current

[768] *See, e.g.,* ECOA section 704B(b) (''[I]n the case of any *application* to a financial institution . . . .'') and 704B(c) (''Any *applicant* . . . may refuse to provide any information requested . . . .'') (emphases added)).

data during the application process. Proposed comment 107(c)(1)–8 would have provided guidance in the event a financial institution changes its determination regarding an applicant's status as a small business.

The Bureau sought comment on proposed § 1002.107(c)(1) and associated commentary.

Comments Received

The Bureau received comment on proposed § 1002.107(c)(1) from a number of lenders, trade associations, and community groups. Commenters expressed a range of views.

General comments related to proposed § 1002.107(c)(1). A number of commenters, mainly from industry, supported the flexibility provided in proposed § 1002.107(c)(1), including provisions that would have allowed financial institutions leeway to establish data collection procedures that best fit within their processes and business models. A CDFI lender emphasized that lenders have varying intake processes. Similarly, a trade association noted that while it anticipates most CDFIs will collect 1071 data as early in the application process as possible, including at the time an application is triggered, lenders should have flexibility to respond to market concerns. Trade associations representing automobile dealers urged the need for flexibility, for example, to accommodate the different methods by which data is collected (online and in-person) and the different parties involved in a credit transaction. A CDFI lender argued that the application and timeline often depends on the applicant themselves, further supporting the need for flexibility. A number of commenters argued for flexible collection, pointing out that small business lending, unlike mortgage lending, does not involve highly regimented application procedures. Trade associations representing automobile dealers further argued that flexibility would facilitate compliance without diminishing the information reported.

Commenters representing community banks similarly stressed the need for flexibility. A trade association asked the Bureau to provide community banks with flexibility in how and when to collect 1071 data during the lending process and latitude to determine what are reasonable collection practices. The commenter emphasized the iterative nature of small business lending, noting that the application process can span weeks or months to complete. The commenter urged the Bureau to avoid designating a prescriptive point in time when sufficient data has been gathered to trigger reporting. They further stated that community banks are good at satisfying regulatory requirements, do not need to be second-guessed in how or when they accomplish data collection, and that the Bureau should not be concerned about community banks' ability to maintain data quality and completeness. Even with the proposed flexibility, a community bank generally opposed proposed § 1002.107(c)(1), stating that the requirements are similar to HMDA, which are very onerous and unduly burdensome on small and mid-size institutions.

Comments related to the reasonably designed standard. As described above, proposed comments 107(c)(1)–4 through –6 would have provided additional guidance and examples of reasonably designed procedures. The Bureau received numerous comments concerning proposed comments 107(c)(1)–4 through –6 from a range of stakeholders.

The Bureau received a number of comments on its general approach in proposed comments 107(c)(1)–4 through –6 to provide examples of procedures that are and are not reasonably designed to obtain a response. A CDFI lender and a trade association representing CDFIs supported the proposed commentary and the description of ''reasonably designed'' procedures for collecting applicant-provided data. The trade association noted that the examples were helpful to identify what lenders should avoid and agreed that it is important to have safeguards to ensure the data are collected in a manner reasonably designed to obtain a response.

In contrast, other commenters argued that proposed § 1002.107(c)(1) and associated commentary are ambiguous or incomplete and urged the Bureau to provide further guidance. A trade association representing online small business lenders expressed concern that financial institutions would have increased compliance costs to avoid unintentional non-compliance. For example, financial institutions may believe they are required to compare response rates at different parts of the loan application cycle, compare results similar to an A/B testing scheme, or otherwise consistently seek to ascertain the best ways to obtain 1071 applicant-provided data. The commenter suggested the Bureau provide additional guidance so that financial institutions can ensure they meet the reasonableness standard. Another commenter similarly requested that the Bureau provide more guidance on the reasonableness standard, and in particular clarify that financial institutions have flexibility to design self-assessment methods best suited to their products, processes, and business models.

Among the proposed examples of reasonably designed procedures, the Bureau received the most comments related to the timing of collection. The comments spanned a range of positions, with some commenters advocating for a more restricted time period for collection of applicant-provided data while other commenters sought a more flexible approach. For example, some community groups argued that financial institutions should be required to collect applicant-provided data at the time of a covered application. One of these commenters said that requiring collection at the time of application would increase the likelihood of successfully receiving the requested information, and that the benefits of early collection outweigh the costs. Another commenter similarly asserted that collection at the time of a covered application would maximize responses and urged the Bureau to make it a requirement, rather than merely a suggestion, as set forth in the proposal. A credit union also said that if a customer does not provide 1071 data with an application, it will be challenging for a financial institution to accurately collect and report the required data.

In contrast, a number of industry commenters took issue with proposed comment 107(c)(1)–6, which would have provided that collection of applicant-provided data simultaneous with or after notifying an applicant of action taken is generally not reasonably designed to obtain a response. Many of these commenters argued that financial institutions should have flexibility to collect applicant-provided data after decisioning an application. A few commenters went further, arguing that collection should be permitted or required to occur after finalizing credit documents, after a credit decision is made, or during closing. One commenter stated that although the proposed rule asserts to provide flexibility for financial institutions, proposed comments 107(c)(1)–5.i and –6.i (identifying procedures concerning the timing of collection of applicant-provided data that generally would and would not be reasonably designed to obtain a response) claw back that flexibility by expressing a clear preference that would discourage financial institutions from collecting 1071 data at any time except early in the application process. The commenter suggested the Bureau instead clarify that a financial institution has flexibility to

sequence collection at a time it determines is reasonable for its business and products, subject to the self-assessment process articulated in proposed 107(c)(1)–4.

Commenters advanced several arguments for why financial institutions should be permitted to collect applicant-provided data after a credit decision is made on a covered application. First, a couple of commenters stated that it would minimize friction during the application process; they asserted that mandating 1071 data collection while the application is pending would frustrate the application process, create additional obstacles, and increase the likelihood of abandoned applications. Several technology providers and a trade association representing technology providers said that the application process is already lengthy enough given existing legal and underwriting requirements. The commenters further stated that the streamlined and user-friendly application experience that technology companies have sought to establish would be further frustrated if 1071 data is required to be collected early in the application process. Some of the commenters argued that sequencing of 1071 data collection involves a tradeoff between getting small businesses to respond to 1071 data requests and getting small businesses to apply for credit at all. Another trade association similarly emphasized the need for flexibility, particularly for fast-paced processes that render a decision in minutes.

Several of the commenters argued that collection of applicant-provided data early in the process could cause an applicant to believe that such information would be considered as part of the credit decision, therefore potentially discouraging an applicant from applying for credit. A group of technology providers stated that collection of demographic information before a credit decision is made may invite the perception of bias in the application process, especially if an applicant is later denied credit. The commenters cited a Federal Reserve Banks survey, which they stated showed that minority-owned businesses were more likely than white-owned businesses to report that they did not apply for financing because they either believed they would be turned down or found the application process too difficult or confusing.[769] The commenters argued that requiring collection of applicant-provided data before a credit decision is made would exacerbate identified concerns of discouragement and undermine the purposes of section 1071. Similarly, a couple commenters expressed concerns about discouragement if demographic information is collected early in the application process. Two CDFI lenders stated that they had received feedback from applicants that providing demographic data early in the application process felt intrusive and raised concerns for the applicant that their responses would negatively affect their application. As a result, one said that it had moved collection of demographic information from the loan application stage to the loan closing stage.

A couple of commenters challenged the Bureau's assertion that applicants will be less likely to respond to requests for the action taken. One commenter noted that the proposed rule improperly places the burden on the financial institution that wants to collect 1071 data after action is taken on an application to show that response rates would be similar to or better than alternative collection methods. Another asserted that Paycheck Protection Program data demonstrate that applicants are less likely to answer a question about their race on a credit application. A trade association representing equipment and leasing finance companies similarly asserted that post-decision collection would improve response rates.

Commenters advanced several other arguments for why applicant-provided collection should be permitted or required to occur after decisioning an application. A trade association representing equipment and leasing finance companies predicted that collecting applicant-provided data with the credit application would lead applicants to provide little information given the speed of the transaction, which is often completed in minutes. The commenter also asserted that the person initially completing the application is often not the business owner or familiar with the owner, and so would lack the requisite knowledge to provide certain 1071-required information. If, on the other hand, the financial institution can follow-up electronically or through other means with the business, the commenter asserted that the request could be directed to the person in the best position to provide the information. The commenter further stated that collecting 1071 data during the application stage would be particularly problematic for vendor finance transactions because the vendor collecting application information has no regulatory requirement to do so, and so would unlikely take the time to gather the required information. Another commenter asserted that post-decision collection would also ensure that underwriters would not have access to an applicant's responses related to ethnicity, race, and sex. The commenter asserted that financial institutions could ensure data is collected by making it part of the closing procedures for approved loans and as part of remediation efforts for non-approved loans.

In addition to seeking comment related to the timing of collection, the Bureau sought comment on proposed § 1002.107(c)(1) and associated proposed commentary generally, including on the other examples in proposed comments 107(c)(1)–5 and –6 of procedures that generally would and would not be reasonably designed to obtain a response. The Bureau further asked commenters whether it would be useful to provide additional examples. In response, commenters raised a number of issues related to the commentary on reasonably designed procedures in proposed comments 107(c)(1)–4 through –6.

Several commenters weighed in on the provision in proposed comment 107(c)(1)–4 that financial institutions shall ''reassess on a periodic basis'' whether its procedures are reasonably designed to obtain a response. One commenter stated that it would be appropriate for financial institutions to conduct periodic reassessments of their collection procedures, but urged that procedures should not need to be reexamined more frequently than once every three years. The commenter suggested an additional safeguard would be to encourage consistent collection across individual institutions and small business lending sectors. Another commenter urged the Bureau to provide greater clarity on how frequent ''periodic'' testing must occur so that financial institutions can allocate resources accordingly, and encouraged the Bureau to take into account different products and resources among financial institutions. A business advocacy group urged the Bureau not to treat an applicant's decision to not to provide 1071 data as evidence that a lender lacks reasonably designed procedures.

A couple of commenters provided feedback on the use of response rates. A community group and a minority

[769] Citing Fed. Rsrv. Bank of Atlanta *et al., Small Business Credit Survey: 2021 Report on Firms Owned by People of Color,* at 25 (Apr. 15, 2021), *https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color.*

business advocacy group asked the Bureau to reconsider guidance in proposed comment 107(c)(1)–4 that a financial institution may assess the reasonableness of its procedures by, for example, comparing its response rate with similarly situated financial institutions. The commenters argued that peers may also not be making a reasonable effort to collect the data, and that it would be better to have a concrete metric, for example, based on other data collection efforts with good response rates.

A handful of commenters asked the Bureau to take other actions related to proposed § 1002.107(c)(1), including to provide additional clarifications and guidance. First, a trade association asked the Bureau to clarify that lenders need only request 1071-required data once. Next, a group of trade associations asked for clarification on proposed comment 107(c)(1)–7, which would have provided that a financial institution reports updated applicant-provided data if it obtains more current data during the application process. The commenter said that the requirement to ''update'' information is ambiguous, and inquired whether a financial institution would be required to update information if an applicant supplies updated data without a request from the financial institution. The commenter also asserted that it was unclear how proposed comment 107(c)(1)–7 relates to proposed § 1002.107(b) related to the reporting of verified information where obtained. A network of financial institutions specializing in agricultural lending stated that certain lenders use the information included in scoring models to determine whether the applicant business is a ''small business,'' and so would not be able to identify applications involving a small business for which demographic information must be collected, until after a credit decision is made. The commenter argued that because ECOA and the Fair Credit Reporting Act require a timely decision be made and communicated, it would be a direct conflict of the regulations to delay communicating a credit decision to a customer solely to acquire data for demographic reporting purposes.

Several commenters asked the Bureau to provide additional guidance on the manner in which applicant-provided data can be collected, including disclosures and sample forms for collection. A CDFI lender asked the Bureau to share best practices on disclosures or assurances a lender can provide applicants when collecting demographic information to allay concerns about how the data will be used. A community bank and a community group urged the Bureau to provide a data collection form for financial institutions to use when collecting 1071 data from applicants. The community bank asserted that use of a data collection form would increase borrower response rates, as demonstrated by Paycheck Protection Program statistics. The commenter also argued that absent a uniform CFPB-issued form, collection will be flawed and the data useless. A community group stated that the Bureau may want to create a sample application form with all required data elements in order to facilitate data collection. Finally, a bank and a trade association urged the Bureau to expressly permit covered financial institutions to collect required data from applicants through a variety of means, including on an application form, on supplemental documents or forms, or on the proposed sample data collection form. The commenters stated that certain applicant-provided data points, such as number of workers, time in business, and NAICS code, are not on the sample data collection form. The commenters stated that except for data points required to be collected on the sample data collection form and kept separate, financial institutions should be permitted to collect the other data points through various means or forms.

Comments requesting special treatment for particular transactions or financial institutions. Several commenters urged the Bureau exempt particular types of transactions or lenders from coverage under the rule, primarily due to concerns about the specific characteristics of these application processes and the particular difficulty of collecting demographic information in light of these characteristics.[770] As discussed in the NPRM, the proposed rule would not have made any exceptions concerning the time and manner of collecting 1071 data for point of sale transactions.[771] In response to the Bureau's request for comment on point of sale transactions, two trade association commenters and a community group stated that such transactions should be provided special treatment or exceptions. The two trade associations, one representing industry and another representing retailers, opposed rule coverage for private label applications, focusing particularly on point of sale transactions. One stated that credit applications are taken at the point of sale or at a customer service desk using interview-style or interactive processes. The commenters asserted that customers would feel uncomfortable answering questions related to their race, sex, and ethnicity in such a public place, without the necessary privacy accommodations. They also argued that collecting applicant-provided data would significantly lengthen the application process, frustrating retailers' focus on speed, efficiency, and limiting time spent in the checkout line. The commenters further asserted that requiring 1071 data collection at the point of sale would impede the availability of commercial credit applications in-store, both because businesses would not want to apply for credit and because retailers would no longer offer in-store private label credit. One also argued that point of sale transaction data would be of reduced data quality: the data may be collected from persons who are not the principal owners of a business and may therefor lack the relevant knowledge, the environment is not conducive to collecting detailed information, and the data would reflect the retailer's, rather than a financial institution's, clientele. The commenter also said that retail staff are unable to manage sensitive demographic information and that retailers will not appreciate allegations of discrimination if an application is left pending or denied. A few commenters suggested that if the Bureau were to include private label or co-branded transactions (which often occur as point of sale transactions) in the final rule, it should exempt transactions under $50,000 to mitigate the impact of inclusion and provide consistency with FinCEN's customer due diligence rule. Similarly, a trade association stated that if point of sale transactions are included, credit lines below $50,000 should be excepted from the requirement to obtain demographic information.

In contrast, a community group urged the Bureau not to provide special treatment for point of sale transactions, arguing that point of sale transactions should follow a similar procedure as other covered transactions. The commenter voiced agreement for the Bureau's suggestion in the proposed rule that retail stores can use the sample data collection form (printed or online) for point of sale transactions.

Next, a trade association representing insurance premium finance lenders and insurance agents and brokers similarly argued that the Bureau's rule should not apply to insurance premium finance

[770] See also the section-by-section analysis of § 1002.104 (covered credit transactions) concerning additional comments related to private-label credit and insurance premium finance transactions, and the section-by-section analysis of § 1002.105 (covered financial institutions and exempt institutions) concerning indirect lending.

[771] 86 FR 56356, 56487–88 (Oct. 8, 2021).

lenders, asserting that such lenders cannot collect 1071 data until after funding. Comments regarding insurance premium finance are discussed in the section-by-section analysis of § 1002.104(b)(3).

Finally, one trade association argued for the exemption of captive vehicle finance lenders, based in part on concerns about the collection of small business lending data. The commenter argued that because indirect lenders do not interact with the applicant, they cannot gather certain data required by section 1071, and therefore the motor vehicle dealer would be the only party capable of requesting the applicant's protected demographic information. However, the commenter asserted, the dealer is outside the CFPB's authority and is currently prohibited by ECOA from gathering this information. The commenter stated that the proposal would put pressure on dealers to collect otherwise protected information. The commenter further noted that the employee acquiring the vehicle may not be familiar with the requested data, such as total revenue or ownership structure. In addition, the commenter voiced concerns about purportedly having to collect data at each stage of the process, potentially by multiple covered financial institutions. The commenter argued that requiring collection of 1071 data (such as ethnicity, race, and sex information) at multiple points in the process would be unnecessary, costly, and duplicative, and could expose financial institutions to liability.

Final Rule—Overview of Final § 1002.107(c)

For the reasons set forth below, the Bureau is finalizing § 1002.107(c)(1) to require a covered financial institution to not discourage an applicant from responding to requests for applicant-provided data under final § 1002.107(a) and to otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. The Bureau is adopting new § 1002.107(c)(2) to identify certain minimum components when collecting data directly from the applicant that must be included within a financial institution's procedures to ensure they are reasonably designed to obtain a response. The Bureau is also adopting new § 1002.107(c)(3) to provide the additional safeguard that a covered financial institution must maintain procedures to identify and respond to indicia that it may be discouraging applicants from responding to requests for applicant-provided data, including low response rates for applicant-provided data. Finally, new § 1002.107(c)(4) provides that low response rates for applicant-provided data may indicate that a financial institution is discouraging applicants from responding to requests for applicant-provided data or otherwise failing to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response. The Bureau is finalizing § 1002.107(c) pursuant to its authority in ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. For the reasons discussed below, final § 1002.107(c) is necessary to collect 1071 data from applicants and prevent financial institutions from discouraging or influencing an applicant's response.

Final § 1002.107(c) seeks to provide a balance between flexibility and ensuring data collection occurs without discouragement and otherwise in a time and manner likely to generate a robust response. On the one hand, the Bureau believes there are benefits to preserving some flexibility concerning the time and manner in which applicant-provided data are collected. As noted by a number of commenters, there are benefits to providing a flexible approach given the variety of application processes in the small business lending space. The Bureau believes that financial institutions may need latitude to adjust data collection practices to fit within their own processes and business models; requiring data collection at a single point in time, or only through a particular method, may affect data quality and disrupt financial institutions' practices.

On the other hand, the Bureau believes that collection of applicant-provided data is essential to fulfilling the purposes of section 1071. The Bureau therefore believes that substantial safeguards are necessary to ensure that financial institutions do not discourage applicants from responding to requests for applicant-provided data or otherwise evade or delay their obligation to collect 1071 data in a manner that detrimentally affects response rates.

The Bureau is also implementing revisions to final § 1002.107(c) to provide additional clarity to covered financial institutions concerning the reasonably designed standard and minimum requirements. These changes are responsive to feedback from commenters that proposed 1002.107(c)(1) and associated commentary would have been ambiguous and potentially inconsistent, and requesting further clarity and guidance. The revisions to final § 1002.107(c) and responses to commenter feedback are discussed in depth below.

Final Rule—§ 1002.107(c)(1) in General

Final § 1002.107(c)(1) requires a covered financial institution to not discourage applicants from responding to requests for applicant-provided data under § 1002.107(a) and to otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. As discussed above, the Bureau believes this general standard provides flexibility to accommodate various small business lending models while also imposing a general duty to maintain procedures concerning the collection of applicant-provided data that are reasonably designed to obtain a response, including not discouraging applicant responses. In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data, and procedures cannot be reasonably designed if they permit financial institutions to engage in conduct that discourages applicants from responding to requests for applicant-provided data. While the Bureau believes that reasonably designed procedures to collect applicant-provided data inherently must not discourage applicants from responding, in response to comments seeking additional clarity on the Bureau's understanding of reasonably designed procedures, the Bureau is now clearly articulating the prohibition against discouragement.

Comments 107(c)(1)–1 and –3 are finalized with minor revisions for clarity and consistency. Final comment 107(c)(1)–2 is revised to affirm a financial institution's flexibility to establish procedures concerning the time and manner that it collects applicant-provided data, provided that its procedures otherwise meet the requirements of final § 1002.107(c).

New comment 107(c)(1)–4 (part of which was proposed as part of comment 107(c)(1)–3) clarifies that applicant-provided data can be obtained without a direct request to the applicant and can be based on other information provided by the applicant or through appropriate third-party sources.

The Bureau is revising comment 107(c)(1)–5 (proposed as comment 107(c)(1)–7) to clarify that a financial institution reports updated data if it obtains more current data from the applicant during the application process. In response to a commenter's

request for additional guidance on whether a financial institution must update data if the applicant provides the information without a request from the financial institution, the Bureau notes that final comment 107(c)(1)–5 requires a financial institution to report data updated by the applicant regardless of whether the financial institution solicits the information. The commenter also asked how proposed comment 107(c)(1)–7 differs from proposed § 1002.107(b), which would have permitted a financial institution to rely on statements of the applicant when compiling data, unless verified information was available. Both final comment 107(c)(1)–5 and final § 1002.107(b) require reporting of updated information where available; the former is focused on data provided by the applicant, while the latter is focused on data verified by the financial institution. Thus, no matter the source, a financial institution should report updated data where available. To the extent a financial institution receives updates from the applicant on data the financial institution has already verified, final comment 107(c)(1)–5 is revised to clarify that a financial institution reports the information it believes to be more accurate, in its discretion.

Final Rule—§ 1002.107(c)(2) Applicant-Provided Data Collected Directly From the Applicant

The Bureau is adopting new § 1002.107(c)(2), which provides that for data collected directly from the applicant, procedures that are reasonably designed to obtain a response must include four specific components, which are further described below. The Bureau is adopting new § 1002.107(c)(2) to provide financial institutions additional clarity on minimum criteria the Bureau believes are necessary for a financial institution's procedures to be ''reasonably designed'' to obtain a response. Although proposed comments 107(c)(1)–4 through –6 would have provided examples of procedures that generally were and were not reasonably designed, as discussed above, the Bureau received feedback that proposed § 1002.107(c)(1) and associated comments would have been ambiguous, been incomplete, or increased compliance burdens on financial institutions seeking to avoid unintentional non-compliance. The Bureau also believes that greater clarity will increase compliance and help ensure financial institutions put such safeguards into place.

New comment 107(c)(2)–1 provides general guidance on what are reasonably designed procedures and the minimum criteria required under final § 1002.107(c)(2). Comment 107(c)(2)–1 clarifies that whether a financial institution's procedures are reasonably designed is a fact-based determination that may depend on a number of factors, and that procedures that are reasonably designed to obtain a response may therefore require additional provisions beyond the minimum criteria set forth in § 1002.107(c)(2). In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data.

The specific components that must be included within a financial institution's procedures pursuant to final § 1002.107(c)(2) are each discussed in turn below.

Provisions primarily related to the timing of collection. The Bureau is adopting new § 1002.107(c)(2)(i), which requires covered financial institutions to maintain procedures that provide for the initial request for applicant-provided data to occur prior to notifying an applicant of final action taken on a covered application. The Bureau believes this requirement strikes the right balance between providing financial institutions some flexibility to time the initial collection of applicant-provided data at a point that works for their business models, while also putting in place a guardrail to ensure that applicant-provided data is not collected so late in the process that it jeopardizes the likelihood of receiving a response from an applicant. Unlike proposed § 1002.107(c)(1), which did not set forth any concrete timing deadlines for the collection of applicant-provided data, final § 1002.107(c)(2)(i) requires financial institutions to initially seek to collect applicant-provided data, at the latest, before notifying the applicant of final action taken on a covered application. The Bureau is adopting this revision for several reasons, described below.

Foremost among them, the Bureau believes that initial attempts to collect applicant-provided data after notifying an applicant of action taken on an application—particularly if the action taken is a denial—are likely to result in higher rates of missing data. This view is unchanged from the Bureau's initial position at the NPRM stage, which similarly encouraged collection early in the process and before notifying the applicant of action taken on the application.[772] Not only will late collections miss withdrawn or incomplete applications—information about which is essential to the purposes of section 1071—but it will also likely jeopardize the probability of responses from declined applicants. Unlike originated applications, which have continuous touch points between an applicant and a lender, the Bureau believes it is highly unlikely that an applicant will continue to engage in any information gathering process after being denied a request for credit. Significantly, no commenter provided a viable solution for ensuring collection of 1071 data after an application is denied.

Next, final § 1002.107(c)(2)(i) provides a bright line point in the application process before which financial institutions must initially seek to collect applicant-provided data, therefore responding to certain commenter feedback that the proposed standard would be ambiguous. As noted by one commenter, although the proposal asserted to provide flexibility for financial institutions to collect applicant-provided data at any point during the application process, so long as the procedures are reasonably designed, the proposed commentary clawed back that flexibility by expressing a clear preference for collection before notifying an applicant of the outcome of its application. The Bureau agrees this fluid framing may cause confusion, and believes providing a defined time frame early enough in the process when applicant-provided data must be collected will assist financial institutions with compliance.

Finally, other changes in the final rule counsel in favor of adopting a more concrete timing standard for the collection of applicant-provided data. Unlike the proposal, which would have included a requirement in certain circumstances for financial institutions to collect information about an applicant's ethnicity and race based on visual observation and/or surname analysis if the applicant did not itself provide such information, as discussed in the section-by-section analysis of § 1002.107(a)(19) above, the final rule does not include such a requirement. As

[772] As discussed above, proposed comment 107(c)(1)–5 would have provided that although a fact-based determination, a procedure reasonably designed to obtain a response is one in which a financial institution requests applicant-provided data at the time of a covered application. Conversely, proposed comment 107(c)(1)–6 would have provided that a procedure is generally not reasonably designed to obtain a response if a financial institution requests applicant-provided data simultaneous with or after notifying an applicant of action taken on the covered application.

a result, financial institutions might be less motivated to obtain demographic information early enough in the process, when the applicant is still actively engaged and more likely to respond to data requests.

As described above, some commenters urged the Bureau to tighten the timing requirement to require collection in a narrow timeframe, while others asked the Bureau to expand the timing requirement to widely permit collection even after notifying an applicant of action taken on a covered application. The Bureau is not adopting either approach. Although the Bureau agrees with commenters who argued that collection at the time of a covered application will likely increase applicant responses rates in most instances, given the fluid and heterogenous nature of small business lending, the Bureau believes designating a narrow time-frame may be overly restrictive.

On the other hand, the Bureau is also not permitting financial institutions to attempt the initial collection of applicant-provided data after notifying an applicant of action taken on an application. Industry commenters' principal argument was that collection of sensitive applicant-provided data before decisioning an application could lead to discouragement: applicants may be concerned that the information will be used against them in the credit decision and thus will either not provide the information or not proceed with the credit transaction altogether. Industry commenters also raised the concern that financial institutions could be accused of bias if an applicant is ultimately denied credit after providing protected demographic information.

The Bureau does not believe that early collection will discourage applicants from disclosing certain demographic information and does not believe this concern expressed by commenters outweighs the benefits of early data collection. Initially, concerns of discouragement may be mitigated by the mandatory disclosure language set forth in final comments 107(a)(18)–3 and 107(a)(19)–3, and included on the sample data collection form in appendix E, which explains to applicants the reason the information is being collected and that the information cannot be used to discriminate against the applicant. If, however, an applicant remains concerned about providing applicant demographic information, the applicant can always choose to not provide any requested information (*e.g.,* by selecting ''I do not wish to provide this information'' or similar for any of the demographic information inquiries). As set forth in final comments 107(a)(18)–1 and 107(a)(19)–1, a financial institution must permit an applicant to refuse or decline to answer inquiries regarding the applicant's protected demographic information and must inform the applicant that the applicant is not required to provide the information. These protections ensure that any applicant who does not feel comfortable providing a response to the demographic inquiries, is not required to do so.

Similarly, the Bureau does not believe that requiring an initial collection attempt before notifying an applicant of action taken will result in fewer applicants voluntarily providing certain demographic information. The Bureau notes that financial institutions regularly collect, at the time of application, demographic information required by Regulation C without issue. Although certain commenters cited to the Paycheck Protection Program as evidence that the collection of demographic information at the time of application results in low response rates, the demographic response rates for Regulation C are significantly higher than for the Paycheck Protection Program, with only 14.3 and 14.7 percent of HMDA respondents not providing a response for race and ethnicity, respectively.[773] Thus, the lower response rate for Paycheck Protection Program applicants is likely due to independent factors. Moreover, to the extent that a financial institution believes that applicants may be reluctant to provide demographic data before an application is decisioned, new § 1002.107(c)(2)(i) only requires a financial institution to make an *initial* collection attempt before notifying an applicant of action taken; nothing prevents a financial institution from making *another* attempt to collect data required by this rule after the application is decisioned.

Ultimately, any applicant reluctance to provide demographic (or other applicant-provided data) pre-decision is not outweighed by the commonsense conclusion that applicants will be unwilling and unmotivated to provide information after being denied a request for credit. After a denial, an applicant will have no independent reason to continue discussions with the lender, much less respond to new requests for information. In this respect, 1071 data collection is distinct from current collection efforts by CDFIs that generally seek to collect demographic information for originated loans, but not denied loans. While CDFI commenters' practice of collecting demographic data at loan closing may make sense for other regulatory regimes, it would not be effective at capturing data on denied, incomplete, or withdrawn applications.[774] Although some commenters asserted that response rates would be better if demographic information is collected post-decision, significantly, none of the commenters were able to provide persuasive evidence in support of their assertion, to rebut the belief that applicants are unlikely to respond to information requests once they are no longer involved in the application process, or to offer a workable solution to ensure robust data collection post-decision. While one commenter suggested that financial institutions could collect applicant-provided data ''as part of remediation efforts for non-approved loans,'' the commenter provided no specifics as to what this would entail, or how or why it would be effective.

Next, commenters stated that permitting post-decision collection would minimize friction in the application process. These commenters argued that streamlining the application process is of paramount importance to their business, and any additional delay could frustrate the application process and lead to abandoned applications. The Bureau agrees that new § 1002.107(c)(2)(i) may require financial institutions to take some minimal additional steps during the information gathering stage of the application process, but believes that these additional minimal steps are necessary to fulfill the purposes of section 1071 and should not impact meaningfully the rate of abandoned applications. Moreover, as discussed in the section-by-section analysis of § 1002.107(d), the Bureau has provided flexibilities for financial institutions to reuse some applicant-provided data under certain circumstances, which may alleviate the

[773] *See* 86 FR 56356, 56483 (Oct. 8, 2021) (noting that demographic response rates in the SBA's Paycheck Protection Program data are ''much lower when compared to ethnicity, race, and sex response rates in HMDA data. For instance, roughly 71 percent of respondents in the [Paycheck Protection Program] data did not provide a response for race, compared to only 14.7 percent in the HMDA data. Roughly 66 percent of respondents in the [Paycheck Protection Program] data did not provide a response for ethnicity, compared to only 14.3 percent in the HMDA data.'') (citing Small Bus. Admin., *Paycheck Protection Program Weekly Reports 2021, Version 11,* at 9 (effective Apr. 5, 2021), *https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210404-508.pdf.*

[774] *See, e.g.,* 12 CFR 1805.803 (identifying data collection and reporting requirements for the CDFI program, which provides that a financial institution recipient shall ''compile data on gender, race, ethnicity, national original, or other information on *individuals that utilize its products and services* . . . .'') (emphasis added).

need for repeated collections. In response to an industry commenter's argument that applicants are unlikely to respond to 1071 data requests given the speed of certain application processes, the Bureau notes that the applicant is less likely to respond if the data is requested post-decision when the applicant is no longer engaged in the process at all. Given the relatively limited time it would take to collect 1071 data, the Bureau also rejects commenters' assertion that requesting 1071 data will negatively impact whether a small business applies for credit at all. No commenter provided persuasive evidence that applicants will avoid seeking credit because of data collection under this rule.

Commenters raised a handful of additional arguments. In response to a commenter's argument that the person initially completing the application may not be the business owner or have the requisite knowledge, the Bureau notes that new comment 107(c)(2)–2.v permits a financial institution to follow-up with additional attempts to collect the information through different means or at another time. Moreover, given that approximately 82 percent of small businesses are non-employer firms,[775] the Bureau believes in most instances the individual completing the form will have the relevant information.

Next, in response to a comment that post-decision collection would ensure underwriters do not have access to protected demographic information, the Bureau agrees, but does not believe that such considerations trump the importance of ensuring data are collected in the first place. Indeed, the fact that ECOA section 704B(d)(2) contemplates that underwriters and other employees involved in making a credit determination may have access to applicant-provided data demonstrates that Congress envisioned that financial institutions may collect 1071 data before decisioning an application. In any event, concerns about access to demographic information are adequately addressed by the firewall provision in final § 1002.108, as well as the general prohibition from discriminating on a prohibited basis in any aspect of a credit transaction in existing ECOA and Regulation B.

Finally, one commenter indirectly took issue with the requirement to collect applicant-provided data in advance of notifying an applicant of action taken by noting that certain lenders would use decision scoring models to also determine whether the applicant is a ''small business,'' such that demographic information could only be collected after a decision is made on the application. Initially, the Bureau notes that nothing prevents a financial institution from inquiring whether the applicant is a ''small business,'' and if so, seeking applicant-provided data before decisioning the covered application. Indeed, as discussed in final comment 107(c)(2)–2.i, the earlier in the application process the financial institution initially seeks to collect applicant-provided data, the more likely the timing of collection is reasonably designed to obtain a response. The Bureau also does not agree that delaying communicating a credit decision to an applicant in order to acquire demographic or other applicant-provided data would violate ECOA and the Fair Credit Reporting Act. The Bureau does not believe there is a conflict between the laws; any delay would be minimal, would not affect the timeframes under existing Regulation B to provide required notices when decisioning a credit application,[776] and could be avoided by collecting applicant-provided data in advance, as discussed above.[777]

For the reasons discussed above, including that collection occurring post-final action would undermine the purposes of section 1071, the Bureau is requiring financial institutions to maintain procedures to collect applicant-provided data before notifying the applicant of final action on the application.[778] The Bureau is also adopting new comment 107(c)(2)–2.i, which provides additional guidance concerning when financial institutions must initially seek to collect 1071 applicant-provided data. New comment 107(c)(2)–2.i clarifies that § 1002.107(c)(2) requires that under no circumstances may the initial request for applicant-provided data occur simultaneous with or after notifying an applicant of final action taken on a covered application.[779]

Although new § 1002.107(c)(2)(i) requires a financial institution to make an initial collection attempt prior to notifying an applicant of action taken, new comment 107(c)(2)–2.v clarifies that a financial institution has latitude to make additional requests for applicant-provided data, including after notifying the applicant of action taken. In response to a trade association's request that the Bureau clarify how many times a financial institution must request 1071 data, new comment 107(c)(2)–2.v clarifies that a financial institution is permitted, but not required, to make more than one attempt to obtain applicant-provided data if the applicant does not respond to an initial request. For example, a financial institution may decide to make multiple requests if it is concerned that applicants may not be as forthcoming early in the process, if it has multiple opportunities to request 1071 data that work well within its business processes, or as another method to encourage greater applicant response.

Provisions primarily related to the manner of collection. New § 1002.107(c)(2)(ii) through (iv) sets forth provisions that financial institutions must incorporate into their procedures for collecting applicant-provided data directly from the applicant to ensure that such procedures are reasonably designed to obtain a response and do not discourage a response. New § 1002.107(c)(2)(ii) requires financial institutions to maintain procedures that provide the request for applicant-provided data is prominently displayed or presented. New comment 107(c)(2)–2.ii provides further guidance on the requirement, clarifying that a financial institution must ensure an applicant actually sees, hears, or is otherwise presented with the request for applicant-provided data, and that if the request is obscured or likely to be overlooked or missed by the applicant, it is not reasonably designed. For example, a financial institution

[775] White Paper at 8; *see also* U.S. Small Bus. Admin., Off. of Advocacy, *2022 Small Business Profile,* at 2 (2022), *https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/30121338/Small-Business-Economic-Profile-US.pdf* (identifying 33,185,550 small businesses, of which 27,104,006 have no employees).

[776] Existing Regulation B § 1002.19(a)(1) requires a creditor to notify an applicant of action taken within 30 days after receiving a completed application.

[777] *See Epic Sys. Corp.* v. *Lewis,* 138 S. Ct. 1612, 1624 (2018) (''When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.' '' (citation omitted)).

[778] Although final § 1002.107(c)(2)(i) requires collection before *notifying* an applicant of final action on an application, the Bureau anticipates that in the vast majority of cases financial institutions will also collect applicant-provided data before *decisioning* an application. The Bureau is requiring collection based on when an applicant is notified of final action on the application, however, given the concerns noted above (particularly related to the applicant's willingness to stay engaged) and because a financial institution may have an easier time controlling when an applicant is notified, versus when an application is decisioned.

[779] Nor may a financial institution seek to evade § 1002.107(c)(2)(i) by initially seeking to collect applicant-provided data after it has signaled to the applicant that its application has been decisioned and the likely outcome, even if the financial institution has not yet formally notified the applicant of action taken on the covered application. Such conduct would not constitute procedures reasonably designed to obtain a response, as required pursuant to § 1002.107(c)(1).

seeking to collect 1071 data in connection with a digital application likely does not have reasonably designed procedures if it uses a bypassable hyperlink for 1071 data collection while other data are requested through click-through screens.

New § 1002.107(c)(2)(iii) requires that the financial institution's procedures must not have the effect of discouraging applicants from responding to a request for applicant-provided data. New comment 107(c)(2)–2.iii clarifies that a covered financial institution that collects applicant-provided data in a time or manner that directly or indirectly discourages or obstructs an applicant from responding or providing a particular response violates the rule. The comment also provides further guidance on procedures that may avoid the effect of discouraging a response. For example, comment 107(c)(2)–2.iii.B explains a covered financial institution avoids discouraging a response by requiring an applicant to provide a response in order to proceed with a covered application, including, as applicable, a response of ''I do not wish to provide this information'' or similar. While optional, requiring an applicant to provide a response, particularly for the collection of demographic applicant information, may be one of the most effective methods a financial institution can use to maximize collection of such data.

The Bureau notes that other aspects of this final rule are similarly directed at ensuring applicants are not discouraged from providing a response. For example, in response to a commenter's request that the Bureau provide potential disclosure language and sample collection forms financial institutions can use with applicants to allay concerns about how data will be used, the Bureau notes that the final rule provides for such required disclosure language and a sample disclosure form. For instance, final comments 107(a)(18)–4 and 107(a)(19)–4, concerning collection of applicant demographic information, require financial institutions to inform the applicant both that a financial institution cannot discriminate on the basis of the applicant's responses to data collected pursuant to § 1002.107(a)(18) and (19) and that Federal law requires them to ask for an applicant's demographic information to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. The Bureau believes such explanations, which are included in the sample data collection form in appendix E, are important to inform applicants why the request is being made and to assure them that financial institutions may not use the information collected for a discriminatory purpose.[780]

Finally, new § 1002.107(c)(2)(iv) requires that the financial institution's procedures include provisions that ensure applicants can easily respond to a request for applicant-provided data. New comment 107(c)(2)–2.iv provides additional guidance and examples of procedures that would and would not make it easy for an applicant to provide a response. The comment further clarifies that a financial institution complies with § 1002.107(c)(2)(iv) if it requests the applicant to respond to inquiries made pursuant to § 1002.107(a)(18) and (19) through a reasonable method intended to keep the applicant's responses discrete and protected from view. For example, if an applicant is completing a paper application form, a financial institution may request that the applicant return a paper data collection form requesting demographic data in a sealed envelope provided by the financial institution.

In response to a commenter's suggestion that the Bureau permit financial institutions to collect applicant-provided data through a variety of means, the Bureau notes that nothing requires a financial institution to request applicant-provided data in a single format or manner, and indeed new comment 107(c)(2)–2.iv expressly contemplates that a financial institution may use multiple methods to collect applicant-provided data.

Final Rule—§ 1002.107(c)(3) Procedures To Monitor Compliance

The Bureau is adopting new § 1002.107(c)(3) to require that a covered financial institution maintain procedures designed to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data. The Bureau is adopting new § 1002.107(c)(3) in order to provide greater clarity and safeguards on the type of infrastructure financial institutions are expected to have in place in order to ensure compliance with final § 1002.107(c)(1) and (2). Although the Bureau anticipates that the particular components of a financial institution's procedures will vary from institution to institution, to provide regulatory clarity, new comment 107(c)(3)–1 provides a list of procedures the Bureau generally expects financial institutions will maintain in order to identify and respond to indicia of potential discouragement.[781]

In response to commenters' request for additional guidance on proposed comment 107(c)(1)–4, which would have required financial institutions to reassess on a periodic basis, based on available data, whether its procedures are reasonably designed to obtain a response, the Bureau notes that new § 1002.107(c)(3) and comment 107(c)(3)–1 clarify the type of monitoring expected of financial institutions. In response to a commenter's question about whether a financial institution is permitted or required to engage in testing beyond peer analysis, such as A/B testing or other methods, the Bureau notes that nothing in the final rule requires a financial institution to do so. While a financial institution is certainly free to experiment with different procedures to see which are most effective for its business model, a financial institution may typically comply with final § 1002.107(c) by following the minimum factors and guidelines set forth in final § 1002.107(c)(1) through (3) and associated commentary. In response to a commenter's request for further guidance on what constitutes ''periodic'' peer testing, the Bureau notes initially that the term ''periodic'' does not appear in new § 1002.107(c)(3) or its associated commentary. The Bureau does anticipate, however, regular monitoring under new § 1002.107(c)(3) in order to identify and respond to indicia of potential discouragement. There is no designated number or time frame for how often that monitoring must occur; rather, the precise cadence and scope will vary depending on the financial institution's procedures for collecting applicant-provided data, its business model, and other relevant factors.

Final Rule—§ 1002.107(c)(4) Low Response Rates

The Bureau is adopting new § 1002.107(c)(4) to provide that a low

[780] In response to a community group's suggestion that the Bureau create a sample form with all required data elements, the Bureau notes that, except for collection of certain demographic information, many financial institutions already collect some or all of the data required by this final rule, or may opt do so in a myriad of ways. See the section-by-section analysis of appendix E for further discussion of why the Bureau is not adopting sample or model forms for the collection of other types of data required by this rule.

[781] The Bureau acknowledges that financial institutions may not have all the necessary data to conduct a robust peer analysis of response rates until after 1071 data collection has been in effect for some period of time, and that the availability and robustness of a peer analysis will also depend on the extent to which 1071 data are made publicly available. In the meantime, the Bureau still expects financial institutions to monitor response rates internally and in comparison to public data, as available.

response rate for applicant-provided data may indicate discouragement or other failure by a covered financial institution to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response. Similar to proposed comment 107(c)(1)–4, which would have provided that a financial institution may compare its response rate to peer institutions as a method to assess whether its procedures are reasonably designed, final § 1002.107(c)(4) identifies the importance of response rates as a method to assess whether a financial institution has reasonably designed procedures. The Bureau anticipates that in many instances, a low response rate may indicate a failure to comply with final § 1002.107(c)(1) and (2). The Bureau is adopting § 1002.107(c)(4) in order to provide covered financial institutions clarity on the type of information that may be used to assess a financial institution's procedures.

The Bureau is adopting new comment 107(c)(4)–1 to provide further guidance on how to assess response rates. The comment clarifies that ''response rate'' generally refers to whether the financial institution has obtained some type of response to requests for applicant-provided data (including, as applicable, a response from the applicant of ''I do not wish to provide this information'' or similar). However, significant irregularities in a particular response (for example, very high rates of ''I do not wish to provide this information'' or similar) may also indicate that a financial institution does not have reasonably designed procedures. In particular, significant irregularities may indicate the financial institution is somehow steering, improperly interfering with, or otherwise discouraging or obstructing an applicants' preferred response. New comment 107(c)(4)–1 further clarifies that response rates may be measured, as appropriate, as compared to financial institutions of a similar size, type, and/or geographic reach, or other factors, as appropriate.

In response to commenters' concern that peer comparisons may not be an effective method to assess the reasonableness of a financial institution's procedures if all peers are not making reasonable efforts, the Bureau agrees that peer comparisons alone are not determinative. Comparing a financial institution's response rates to its peers is just one possible indicator of whether a financial institution has procedures reasonably designed to obtain a response. Even if a financial institution maintains a response rate commensurate with its peers, if all peers have low response rates overall or maintain procedures not reasonably designed to obtain a response, the financial institution may still violate § 1002.107(c). The Bureau does not believe it would be appropriate at this time, however, to set a specific percentage or metric for response rates, as suggested by some commenters, as the appropriate response rate may depend on a number of factors, differ from institution to institution, and change over time, for example, as financial institutions refine their collection methods.

Requests for Special Treatment for Particular Types of Transactions or Types of Financial Institutions

The Bureau is not adopting exceptions concerning the time and manner of collection of demographic information for particular types of transactions or by particular financial institutions, as requested by some commenters. For the reasons described below, the Bureau believes the same time and manner rules should apply across all covered credit transactions and all covered financial institutions.

Initially, the Bureau believes that point of sale transactions should follow the same rules as all covered credit transaction types, and thus does not believe that an exemption for such transactions, as suggested by some commenters, would be appropriate. The Bureau understands that many (though not all) point of sale applications, particularly those for smaller credit amounts or to purchase particular goods in a store, are submitted on-site at the point of sale and decisioned in real time. Many of the commenters' arguments for exclusion of point of sale transactions were identical to the arguments set forth by commenters above for why financial institutions should be permitted to collect 1071 data after decisioning an application, including arguments based on the speed and fast-paced nature of the application process, that applicants would be discouraged from responding or proceeding with the transaction, and that the person completing the application may lack the requisite knowledge. For the same reasons discussed above, the Bureau likewise does not believe that an exemption would be appropriate for point of sale transactions.

In response to commenters' concerns that applicants will not feel comfortable answering questions related to their ethnicity, race, and sex in a public place, the Bureau believes that financial institutions can develop procedures to accommodate collection in this setting, including by using the sample collection form developed by the Bureau (in paper or electronic format) or creating more private locations for the collection of data in-store. The Bureau also does not believe that specialized knowledge is necessary to collect these data, and believes that retailers and their employees can collect and maintain data with the necessary precautions to safeguard applicant information, as they do with other sensitive data provided in connection with a credit application. As to a commenter's argument that retailers will have limited motivation to collect small business lending data, the Bureau notes that a financial institution that retains a third party to offer its financial products has significant control and responsibility over how its products are offered, including the power and responsibility to require third-party partners to seek to collect required data and otherwise comply with applicable law. In response to a commenter's argument that data collected on point of sale transactions will reflect the retailer's, rather than the financial institution's, footprint, the Bureau notes that a financial institution chooses its retail partners. Finally, although some commenters asserted that the collection of 1071 data will deter applicants from seeking credit or retailers from providing in-store private label credit, they provided no evidence to support this claim.

Several commenters requested that if the Bureau includes point of sale or similar transactions in the final rule, the Bureau should nonetheless exempt such transactions under $50,000 or except such transactions from the requirement to obtain demographic data. These commenters stated that such an exemption would be consistent with FinCEN's customer due diligence rule, which excludes from certain of its requirements point of sale transactions to provide credit products solely for the purchase of retail goods/services up to a limit of $50,000. The Bureau is not adopting such an approach here, given the different purposes and requirements of the customer due diligence rule and section 1071. The purpose of FinCEN's rule is to improve financial transparency and prevent criminals and terrorists from misusing companies to disguise their illicit activities and launder their ill-gotten gains.[782] The

[782] *See* Fin. Crimes Enf't Network, *Information on Complying with the Customer Due Diligence (CDD) Final Rule, https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule* (last visited Mar. 20, 2023).

customer due diligence rule's exclusion for certain point of sale transactions is based on the ''very low risk posed by opening such accounts at [a] brick and mortar store.'' [783] While the customer due diligence rule focuses on accounts (including certain originated loans), obtaining data on denials is essential to section 1071's purposes. Moreover, unlike FinCEN's rule, which requires covered financial institutions to collect certain essential information, section 1071 only requires that financial institutions seek to collect applicants' protected demographic information, and permits applicants to refuse to provide that information. Given these key differences, the Bureau is not adopting an exclusion for point of sale applications below $50,000. See also the section-by-section analysis of § 1002.104, which discusses requests for minimum transaction amount thresholds.

Next, trade associations representing insurance premium finance lenders and insurance agents and brokers similarly argued that the Bureau's rule should not apply to insurance premium finance lenders, in part because such lenders cannot collect 1071 data until after funding. New § 1002.104(b)(3) excludes insurance premium financing, therefore resolving these commenters' concerns.

Finally, the Bureau does not believe it would be appropriate to categorically exclude captive vehicle finance lenders should be excluded from coverage. The commenter's request was primarily based on the argument that dealers—who primarily interact with applicants—are currently prohibited by ECOA from gathering certain protected demographic information. As further discussed in the section-by-section analysis of § 1002.109(a)(3), Regulation B issued by the Board of Governors of the Federal Reserve System (12 CFR part 202) and applicable to dealers provides in comment 5(a)(2)–3 that ''[p]ersons such as loan brokers and correspondents do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to [HMDA] or another Federal or State statute or regulation requiring data collection.'' In response to the commenter's concern that dealers may not be familiar with all required data under section 1071, such as gross annual revenue or ownership structure information, the Bureau first notes that dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting 1071 data on behalf of other reporting financial institutions. Second, even in situations where the dealer is acting as a mere conduit, and thus may be collecting information on behalf of another financial institution, the Bureau expects that the dealer can request 1071 data from the applicant, just like a covered financial institution would do. Finally, the commenter's concerns that data must be collected at each stage of the process, potentially by multiple covered financial institutions, may be misplaced; nothing in the proposed or final rule would require a financial institution (or a third party collecting data on its behalf) to collect data multiple times in connection with a single covered application.

107(d) Previously Collected Data

Proposed Rule

Proposed § 1002.107(c)(2) would have permitted, but not required, a financial institution to reuse previously collected data to satisfy proposed § 1002.107(a)(13) through (21) if the data were collected within the same calendar year as the current covered application and the financial institution had no reason to believe the data are inaccurate. The Bureau believed that, absent a reason to suspect otherwise, recently collected 1071 data are likely to be reliable.

Proposed comments 107(c)(2)–1 through –7 would have provided additional guidance and examples of when certain data can be reused by a financial institution, including what data can be reused, when information is considered collected in the same year, when a financial institution may have reason to believe data are inaccurate, and when a financial institution may reuse data regarding minority-owned business status, women-owned business status, and data on the principal owners' ethnicity, race, and sex.

The Bureau sought comment on § 1002.107(c)(2) and associated commentary.

Comments Received

The Bureau received comment on proposed § 1002.107(c)(2) from a range of lenders, trade associations, and community groups. A few commenters noted that it is commonplace for lenders to receive multiple applications from a borrower. For example, a community bank stated that it is typical for borrowers to submit numerous loan requests during the year, and expressed concern about what it referred to as ''repetitive completion'' of data points. A trade association similarly noted that financial institutions often have customers with multiple facilities, which may have been obtained all at once or over time.

Some commenters generally supported a provision that would allow financial institution to reuse certain data for some period of time. A community group supported allowing lenders to use previously collected data if an application is continued at a later date. However, the commenter urged against permitting reuse beyond a year, noting that the characteristics of the small business may change (such as revenue size).

In response to the Bureau's request for comment on the issue, a number of commenters urged the Bureau to adjust the time frame for reuse. A CDFI lender urged that, at a minimum, the Bureau update the time frame to ''within 12 months,'' rather than the same calendar year, noting that there is no reason to believe data are inaccurate for applications submitted close in time, but that fall between two calendar years. A trade association urged the Bureau to permit reuse for ''the same or prior calendar year.'' The commenter argued that permitting reuse of data would reduce applicant burden and that it would be unnecessarily restrictive to require financial institutions to collect anew previously obtained data that is still likely to be accurate. The commenter further noted that a financial institution can repopulate previously provided data, and the applicant can certify that the data are still accurate or update the data. A community bank argued that a one-year period was too short considering that its agricultural clients often annually reapply for draw down lines of credit (used to purchase crop inputs for the year), during which period a borrower's small business and principal owner status are unlikely to change.

A couple of community banks and group of trade associations urged the Bureau to permit reuse for a 24-month or two-year period. One of the banks stated that it is common for businesses to obtain a new product from a financial institution in the first three years, rather than the first year alone. Another trade association argued for a three-year reuse period. The commenter also argued that reuse should be permitted for any data the financial institution does not normally gather in connection with credit applications, such as data regarding minority-owned business status, women-owned business status,

[783] Fin. Crimes Enf't Network, *Guidance,* at Q 29 (Apr. 3, 2018), *https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.*

and data on the principal owners' ethnicity, race, and sex, as well as gross annual revenue information if not typically collected. A community bank argued that if there are no changes to the data, a financial institution should be permitted to reuse data indefinitely. Finally, a community bank asserted that prior collected data should be reusable for the same amount of time across all data points, unless there is a reason to believe they are inaccurate. However, the commenter continued, reuse of gross annual revenue data should be updated every fiscal year and gender should be updated every year given that gender identity may change. The commenter asserted that ethnicity and race information about the principal owner(s) should not change absent a change in principal owner(s).

In contrast, a community groups, community-oriented lenders, and business advocacy groups, as well as an individual commenter opposed reuse of prior collected data in certain circumstances. The joint letter and the minority business advocacy group specifically opposed reuse of information about a principal owner's ethnicity, race, and sex information if the business previously responded ''I do not wish to provide this information.'' The commenters asserted that opinions may shift, which may make a person more likely to provide the requested information. The commenters further noted that it is not a big burden on financial institutions to attempt to gather the information again and doing so goes to the purposes of section 1071. An individual commenter argued that the proposed reuse of previously collected data about an applicant's sex, sexual orientation and gender identification would have a negative impact on members of the LGBTQ community. The commenter was concerned that information collected for one purpose would be used for a non-intended purpose, such as to classify and segregate LGBTQ members applying for a small business loan. The commenter stated that by collecting data on an applicant's sex, sexual orientation, and gender identification, LGBTQ members are at risk that their data may be used for unintended purposes outside 1071 data collection.

In response to the Bureau's request for comment on whether financial institutions should be required to notify applicants that information they provide may be reused for subsequent applications, one community bank suggested the Bureau add a disclosure on the sample data collection form noting that the information may be reused, and if the information has changed, to inform the applicant's lender.

A community bank asked how the reuse provision could be implemented in light of the proposed firewall provision. The commenter noted that because the firewall provision prohibits review by underwriters of demographic information, it is unclear how a financial institution can reasonably rely on data collected in the same calendar year if that data is inaccessible to the lender. Another commenter asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections. Specifically, the commenter gave the example of an applicant that provides demographic information for one application, and then chooses not to provide demographic information for a subsequent application, and asking which collection should be reported.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(d) (proposed as § 1002.107(c)(2)) to permit, but not require, a financial institution to reuse previously collected data to satisfy § 1002.107(a)(13) through (20) if (a) the data were collected within the 36 months preceding the current covered application (except that to satisfy § 1002.107(a)(14), on gross annual revenue, the data must be collected within the same calendar year as the current covered application) and (b) the financial institution has no reason to believe the data are inaccurate. As discussed above, the majority of commenters to weigh in on this issue supported reuse of data for some period of time, with many commenters urging the Bureau to extend the time period for reuse from the same calendar year to multiple years. As noted by one bank, it is common for businesses to seek a new product within three years of a prior origination, with fewer requests occurring within one year. Allowing reuse will also reduce the need for applicants to repeatedly provide the same information over a short period of time, as noted by some commenters. The Bureau also believes permitting reuse will reduce burden on financial institutions, particularly those with an established relationship with a business. In addition, the Bureau believes that permitting reuse will assist in fast-paced transactions, such as requests for additional credit amounts on an existing account. Based on these reasons and the feedback from commenters, the Bureau now believes that 36 months strikes the appropriate balance of permitting reuse for a short enough period of time that the data are likely to be reliable, while also permitting a long enough period of reuse to avoid a financial institution from having to make repeated information requests to returning customers.

In response to a commenter's concern that characteristics of a small business may change during a time period greater than a year, the Bureau notes that any dramatic shifts will likely be known to a financial institution considering a new covered application. In those circumstances, the financial institution either will have already collected updated information (in which case the updated information would be reported pursuant to final comment 107(d)–4) or the financial institution will have reason to believe certain data are inaccurate, in which the case the financial institution cannot reuse that data pursuant to final § 1002.107(d)(2). Indeed, the Bureau believes that final § 1002.107(d)(2), the provision prohibiting reuse of data if the financial institution has reason to believe the prior collected data are inaccurate, will identify the majority of situations where the data are no longer reliable. For example, as set forth in final comment 107(d)–6, a financial institution may have reason to believe data are inaccurate if it knows that the applicant has had a change in ownership or a change in an owner's percentage of ownership. Similarly, a financial institution may also have reason to know data are inaccurate if the business indicates that is has opened several new store locations recently. In that case, the financial institution may have reason to ask for updated data on gross annual revenue, number of workers, and potentially other data points.

Some commenters raised concerns about reuse of data regarding a principal owner's race, sex, and ethnicity information, particularly if the business previously responded ''I do not wish to provide this information.'' Another commenter stated that identities, and particularly gender identity, may shift, and so the information should be collected at least every year. The Bureau understands that how an applicant wishes to identify may shift over time. However, as noted above, the Bureau believes that a 36-month period provides the right balance of permitting reuse for a period of time to reduce repetitive collections, but also require financial institutions collect the data anew once a substantial amount of time has passed. Although the final rule permits reuse of applicant demographic data pursuant to final § 1002.107(d), final comment 107(d)–9 provides that a financial institution may not reuse data

to satisfy § 1002.107(a)(18) and (19) unless the data were collected in connection with a prior covered application pursuant to subpart B. The Bureau believes that reuse of applicant demographic data should be limited in this manner to ensure that data reported were collected in a manner that aligns with the protections and selection options set forth in final § 1002.107(a)(18) and (19).

Although the Bureau is finalizing § 1002.107(d) to permit reuse of certain data collected within a 36-month period, the Bureau notes that a financial institution may—at any time, even outside a three-year period—use reasonable procedures to reaffirm data previously collected. The Bureau understands that many financial institutions have years of experience serving a particular small business's credit needs and so may seek to streamline new credit requests to avoid duplicative or unnecessary collection efforts. In this respect, it is important to note that the final rule does not prevent a financial institution from identifying efficient ways to gather 1071 required data, including by leveraging prior 1071 data to streamline the collection process. For example, even if it has been more than three years since a business submitted an application for credit, a financial institution may reaffirm prior collected data about whether the business is minority-owned, women-owned, and LGBTQI+-owned, and the ethnicity, race, and sex of the principal owners of the business by, for example, providing the applicant with a data collection form pre-populated with its prior responses and confirming with the applicant that the information remains accurate or making any changes noted by the applicant. Methods that reaffirm prior collected data may be particularly useful in faster-paced transactions, such as requests for additional credit amounts.

A bank asked how the reuse provision can be implemented in light of the proposed firewall provision, noting that because the firewall provision prohibits review by underwriters of demographic information, it is unclear how a financial institution can reasonably rely on previously collected data if it is inaccessible to the lender. The Bureau does not believe that the firewall provision in final § 1002.108 will conflict or render unusable the reuse provisions in final § 1002.107(d), as suggested by some commenters. Initially, the Bureau notes that the firewall provision only applies to information regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under § 1002.107(a)(18) and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19), but not other applicant-provided data. In any event, if an employee or officer is typically tasked with collecting data required under § 1002.107(a)(18) and (19), and is otherwise not involved in making any determination concerning a covered application, providing that employee with access to an applicant's prior responses to data requests under § 1002.107(a)(18) and (19) would not violate the firewall. Thus, final comment 108(a)–1(ii)(f) provides the example that reviewing previously collected data to determine if it can be used for a later covered application pursuant to § 1002.107(d) is not an activity that constitutes being involved in making a determination regarding a covered application. Finally, if a financial institution determines that it is not feasible to limit an employee's or officer's access to an applicant's prior responses to the financial institution's inquiries under final § 1002.107(a)(18) and (19) and provided the notice required under final § 1002.108(d) to the applicant at the time the data were collected, the financial institution can permit that employee or officer to reuse the collected data for a 36-month period as set forth in final § 1002.107(d).

In response to a commenter's question concerning what previously reported data can be used, and how to resolve conflicting answers provided at different times, the Bureau notes that final comment 107(d)–4 provides that a financial institution should use updated information if available.

In response to its request for comment on the issue in the NPRM, the Bureau received feedback from an industry commenter that the sample data collection form should include a disclosure that information can be reused for section 1071 reporting purposes, and that an applicant should inform its lender if there have been any changes. The Bureau is finalizing the sample data collection form without a disclosure about potential reuse of data. Including such language could distract an applicant from other language on the form (such as why the data is being collected) and risks potentially confusing an applicant, who might not understand that reuse is limited to 1071. Relatedly, the collection form accurately identifies why the information is being collected whether or not the data are later reused—to help ensure that all small business applicants are treated fairly and that communities' small business credit needs are being fulfilled.

Final comment 107(d)–1 (proposed as comment 107(c)(2)–1) is revised to clarify that reuse of data pursuant to final § 1002.107(d) is limited to reuse for the purpose of reporting such data pursuant to § 1002.109. In response to an individual commenter's concern about potential misuse of 1071 data, the Bureau has adopted new § 1002.110(e), which prohibits a financial institution from disclosing or providing to third parties the information it collects pursuant to final § 1002.107(18) and (19) except in limited circumstances. In addition, financial institutions remain prohibited from using 1071 data—particularly data about whether the business is minority-owned, women-owned, or LGBTQI+-owned, and the ethnicity, race, and sex of the principal owners of the business—in a manner that violates ECOA, existing Regulation B, or any other applicable law. For example, existing § 1002.4(a) prohibits a creditor from discriminating against an applicant on a prohibited basis in any aspect of a credit transaction. Similarly, existing § 1002.6(b)(1) prohibits a creditor from taking a prohibited basis into account in any system of evaluating the creditworthiness of an applicant, except as expressly provided for by ECOA or Regulation B. Thus, just because this final rule gives a financial institution permission to *collect* ethnicity, race, and sex/gender information for the limited purposes of section 1071, a financial institution still remains prohibited from *considering* that data in a manner that violates ECOA, existing Regulation B, or any other applicable law.

Final comments 107(d)–2 and –3 (proposed as comments 107(d)–2 and –3) contain minor revisions for consistency and clarity. Final comment 107(d)–2 identifies the particular data that can be reused. The comment also clarifies that other data required by final § 1002.107(a) cannot be reused, as those data points are specific and unique to each covered application. Final comment 107(d)–3 clarifies instances where data have not been ''previously collected'' and so cannot be reused under final § 1002.107(d).

The Bureau is adopting new comment 107(d)–4 to clarify that if a financial institution obtains updated information relevant to the data required to be collected and reported pursuant to final § 1002.107(a)(13) through (20), and the applicant subsequently submits a new covered application, the financial institution must use the updated information in connection with the new covered application or seek to collect the data again. Final comment

107(c)(2)–4 also provides an example of updated information.

Final comment 107(d)–5 (proposed as comment 107(c)(2)–4) is revised to provide guidance on how to measure the 36-month period for potential reuse of certain data, and provides an illustrative example.

Final comment 107(d)–6 (proposed as comment 107(c)(2)–5) contains minor revisions for consistency and clarity, and an example of when a financial institution has reason to believe data may be inaccurate and so cannot be reused for a subsequent covered application.

As noted above, final § 1002.107(d)(1) permits a financial institution to reuse gross annual revenue data if collected within the same calendar year as the current covered application. The Bureau is adopting a narrower window for the reuse of gross annual revenue data than other previously collected data given the language in ECOA section 704B(e)(2)(F) requiring financial institutions to compile ''gross annual revenue of the business in the last fiscal year . . . preceding the date of the application.'' Given that the statute identifies a specified time frame for the collection of gross annual revenue, it would be more consistent with the statute to permit reuse of gross annual revenue only within the same calendar year. Moreover, given that gross annual revenue data already looks back to the prior fiscal year, adding an additional 36-month period could affect data quality. The Bureau is also adopting new comment 107(d)–7 to provide guidance on when gross annual revenue information is considered collected in the same calendar year, and so may be reused by a financial institution in certain circumstances. In particular, the comment discusses applications that span more than one calendar year.

The Bureau is adopting new comment 107(d)–8 to clarify that if a financial institution decides to reuse data about the applicant's time in business, the financial institution must update the data to reflect the passage of time, and provides an illustrative example.

Lastly, final comment 107(d)–9 (proposed as comments 107(c)(2)–6 and –7) is revised to provide guidance on when data regarding minority-owned business status, women-owned business status, LGBTQI+-owned business status, and data on the principal owners' ethnicity, race, and sex may be reused by a financial institution in a subsequent covered application.

Section 1002.108 Firewall

Background

ECOA section 704B(d) generally limits the access of certain individuals at a financial institution or its affiliates to certain information provided by an applicant pursuant to section 1071. The Bureau calls this requirement in 704B(d) to limit access to information a ''firewall.''

More specifically, ECOA section 704B(d)(1) states that ''[w]here feasible,'' underwriters and other officers and employees of a financial institution or its affiliates ''involved in making any determination concerning an application for credit'' cannot have access to any information provided by the applicant pursuant to a request under 704B(b). That is, the statute limits access not only by underwriters and persons making an underwriting decision but also by anyone else involved in making any determination concerning an application. However, it does not expressly define the term ''feasible'' or provide clarification regarding what it means to be ''involved in making any determination concerning an application for credit.''

Additionally, under ECOA section 704B(d)(2), if a financial institution determines that an underwriter, employee, or officer involved in making a determination ''should have access'' to any information provided by the applicant pursuant to a request under 704B(b), the financial institution must provide a notice to the applicant of the underwriter's access to such information, along with notice that the financial institution may not discriminate on the basis of such information. Section 704B(d)(2) does not expressly define or describe when an underwriter, employee, or officer ''should have access,'' nor does it explain the relationship, if any, between when a financial institution determines that an individual ''should have access'' under 704B(d)(2) and whether it is ''feasible'' to implement and maintain a firewall under 704B(d)(1).

Proposed Rule

Scope of the firewall. In the NPRM, the Bureau explained its belief that section 1071 is ambiguous with respect to the meaning of ''any information provided by the applicant pursuant to a request under subsection (b).'' On the one hand, ECOA section 704B(b)(1) directs financial institutions to inquire whether a business is ''a women-owned, minority-owned, or small business,'' so the phrase could be interpreted as referring only to these three data points. However, section 704B(e) indicates that the scope of 704B(b) is much broader. It instructs financial institutions that ''information provided by any loan applicant pursuant to a request under subsection (b) . . . shall be itemized in order to clearly and conspicuously disclose'' data including the loan type and purpose, the amount of credit applied for and approved, and gross annual revenue, among other things. In other words, 704B(e) designates all of the information that financial institutions are required to compile and maintain—not simply an applicant's status as a women-owned, minority-owned, or small business—as information provided by an applicant ''pursuant to a request under subsection (b).''

Information deemed provided pursuant to 704B(b) is subject not only to the firewall under 704B(d) but also to a right to refuse under 704B(c) and separate recordkeeping requirements under 704B(b)(2). Applying these special protections to many of the data points in 704B(e), such as an applicant's gross annual revenue or the amount applied for, would be extremely difficult to implement because this information is critical to financial institutions' ordinary operations in making credit decisions.

In order to resolve these ambiguities, the Bureau gave different meanings to the phrase ''any information provided by the applicant pursuant to a request under subsection (b)'' with respect to ECOA section 704B(e) as opposed to 704B(b)(2), (c), and (d). With respect to the scope of the firewall, the Bureau interpreted the phrase to refer to the data points in proposed § 1002.107(a)(18) (minority-owned business status) and proposed § 1002.107(a)(19) (women-owned business status), as well as proposed § 1002.107(a)(20) (ethnicity, race, and sex of principal owners). None of these data points has any bearing on the creditworthiness of the applicant. Moreover, a financial institution generally could not inquire about this demographic information absent section 1071's mandate to collect and report the information, and ECOA prohibits a financial institution from discriminating against an applicant on the basis of the information. Thus, the Bureau believed that the best effectuation of congressional intent was to apply section 1071's limitation on access and right to refuse provisions to all demographic information collected pursuant to section 1071 and not to whether an applicant is a small business or any of the non-demographic data points proposed in § 1002.107(a).

Accordingly, the Bureau proposed that financial institutions need only limit access under ECOA section 704B(d) to an applicant's responses to the financial institution's specific inquiries regarding women-owned business status and minority-owned business status and the ethnicity, race, and sex of principal owners, but not to an applicant's small business status.[784] Additionally, the proposal would have clarified that this prohibition on allowing certain employees and officers to access certain information does not extend to ethnicity or race information about principal owners that the financial institution collects via visual observation or surname. It would have also clarified that the prohibition does not extend to an applicant's responses to inquiries regarding demographic information made for purposes other than data collection pursuant to section 1071 or to an employee's or officer's knowledge due to activities unrelated to the inquiries made to satisfy the financial institution's obligations under section 1071 (*e.g.,* an employee knows that the applicant is a minority-owned business or women-owned business due to information provided to qualify for a special purpose credit program or an officer knows a principal owner's ethnicity, race, or sex due to participation in a community group or association).

As noted above, section 1071 prohibits access to certain information by underwriters and other officers and employees of a financial institution or its affiliates ''involved in making any determination concerning an application for credit.'' Consistent with the statute, the Bureau proposed that a financial institution need only prohibit the access of an employee or officer to demographic information pursuant to section 1071 if that employee or officer is involved in making a determination concerning an applicant's covered application. The Bureau further proposed defining the phrase ''involved in making any determination concerning a covered application'' to mean participating in a decision regarding the evaluation of a covered application, including the creditworthiness of an applicant for a covered credit transaction. The NPRM noted that this group of employees and officers includes, but is not limited to, employees and officers who serve as underwriters. Additionally, the NPRM would have explained that the decision that the employee or officer makes or participates in must be about a specific covered application. An employee or officer would not be involved in making a determination concerning a covered application if the employee or officer is involved in making a decision that affects covered applications generally, the employee or officer interacts with small businesses prior to them becoming applicants or submitting a covered application, or the employee or officer makes or participates in a decision after the financial institution has taken final action on the application, such as decisions about servicing or collecting a covered credit transaction.

Feasibility of establishing and maintaining a firewall. In the NPRM, the Bureau also noted that ECOA section 704B(d) contains significant ambiguities with respect to how financial institutions, in practical terms, should determine how to implement a firewall to limit access to certain information provided by applicants pursuant to section 1071. Indeed, based on feedback from stakeholders during the SBREFA process, it appeared that in many instances financial institutions that find it not ''feasible'' to implement and maintain a firewall will be the same institutions determining that relevant individuals ''should have access'' to the information provided by an applicant pursuant to 704B(b). The Bureau believed that reading these two provisions in isolation from each other would likely result in significant confusion and challenges, particularly for smaller financial institutions.

Accordingly, the Bureau proposed that section 1071's firewall requirement be implemented by reading the ''should have access'' language in ECOA section 704B(d)(2) in conjunction with the ''feasibility'' language in 704B(d)(1). As proposed, it *would not be feasible* for a financial institution to implement and maintain a firewall with respect to a given employee or officer involved in making a determination concerning a covered application if the financial institution determines that employee or officer should have access to one or more of the applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). Conversely, it *would be feasible* for a financial institution to implement and maintain a firewall if the financial institution determines that no employee or officer involved in making a determination concerning a covered application should have access to the applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). Thus, the Bureau proposed that the prohibition on certain individuals accessing information as set forth in proposed § 1002.108(b) would not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to one or more of an applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20), and the financial institution provides the notice required under proposed § 1002.108(d) to the applicant.

The Bureau further proposed that it is not feasible to limit access as required pursuant to proposed § 1002.108(b) if the financial institution determines that an employee or officer involved in making any determination concerning a covered application should have access to one or more applicants' responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). The Bureau proposed to define the phrase ''should have access'' to mean that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. As proposed, a financial institution may determine that an employee or officer should have access for purposes of proposed § 1002.108 if that employee or officer is assigned one or more job duties that may require the employee or officer to collect (based on visual observation, surname, or otherwise), see, consider, refer to, or use information otherwise subject to the prohibition in proposed § 1002.108(b). The employee or officer would not have to be required to collect, see, consider, refer to or use such information or to actually collect, see, consider, refer to or use such information. It would be sufficient if the employee or officer might need to do so to perform the employee's or officer's assigned job duties. Additionally, a financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of proposed § 1002.108. However, if a financial institution determines that one or more employees or officers involved in making any determination concerning a covered application should have access for purposes of proposed § 1002.108, the financial institution would have been responsible for ensuring that the employees or officers only access and use the protected information for lawful purposes.

Exception to establishing and maintaining a firewall. As explained above, the Bureau proposed to implement the statutory exception to the requirement to establish and maintain a firewall in § 1002.108. The

[784] SBREFA Outline at 36–37.

exception would allow financial institutions to give certain employees or officers access to protected demographic information if the financial institution determines that they should have access to that information. However, in such circumstances, the financial institution would need to comply with the statutory requirement to provide a notice in lieu of limiting access. Thus, the Bureau proposed that, in order to satisfy the exception, as set forth in proposed § 1002.108(c), a financial institution would be required to provide a notice.

The Bureau proposed that the financial institution be required to provide the notice to, at least, each applicant whose responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20) would be accessed by an employee or officer involved in making a determination concerning that applicant's covered application. As an alternative, the Bureau proposed that the financial institution could provide the required notice to a larger group of applicants, including all applicants, if it determines that one or more officers or employees should have access to protected demographic information.

The Bureau further proposed that the notice provided to satisfy the exception in proposed § 1002.108(c) must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, its women-owned business status, and its principal owners' ethnicity, race, and sex. The Bureau proposed language for the required notice and stated that a financial institution would be required to use the language set forth in proposed comment 108(d)–2 or substantially similar language when providing the notice.

The Bureau also proposed timing requirements for providing the notice. The Bureau proposed that, if the financial institution provides the notice orally, it must provide the notice prior to asking the applicant if it is a minority-owned business or women-owned business and prior to asking for a principal owner's ethnicity, race, or sex. If the financial institution provided the notice on the same paper or electronic data collection form as the inquiries about minority-owned business status, women-owned business status, and the principal owners' ethnicity, race, or sex, the financial institution would have been required to provide the notice at the top of the form. If the financial institution provided the notice required by proposed § 1002.108(d) in an electronic or paper document that is separate from the data collection form inquiring about the applicant's minority-owned business status, its women-owned business status, and its principal owners' ethnicity, race, and sex, the financial institution would have been required to provide the notice at the same time as or prior to providing the data collection form. Additionally, the NPRM would have clarified that the notice required pursuant to proposed § 1002.108(d) must be provided with the non-discrimination notices required pursuant to proposed § 1002.107(a)(18) through (20).

Requests for comment. The Bureau sought comment on its proposed approach to the statutory firewall requirement and whether a different approach might result in a better policy outcome. The Bureau also sought comment on the scope of the proposed firewall requirement and the exception to establishing and maintaining a firewall. The Bureau specifically sought comment on whether the proposed firewall should apply to information about principal owners' ethnicity and race that is obtained via visual observation and/or surname analysis. Finally, the Bureau generally requested comment on whether additional clarification is needed regarding the firewall requirement.

Comments Received

The Bureau received comments on its proposed approach to the firewall requirement from a wide range of commenters including lenders, trade associations, business advocacy groups, community groups, small business owners and other individuals, and members of Congress. A majority of these comments addressed the feasibility of establishing and maintaining a firewall and/or addressed the notice required to rely on the exception. Numerous commenters sought the elimination of or exemptions to the firewall requirement. Other commenters sought additional guidance on some or all of the firewall provisions, including the scope of the firewall and determining who ''should have access'' to the protected information.

General. A community group commenter said that the proposed firewall provisions appropriately protect applicants, and another stated that the formulation of the proposed firewall provisions was reasonable. A CDFI lender said that while smaller financial institutions might not be able to establish and maintain a firewall, the NPRM provided sufficient flexibility in its firewall provisions to facilitate implementation. A women's business advocacy group encouraged the Bureau to look at ways to make a more secure firewall and noted that the feasibility standard in the proposed rule seemed to remove the firewall's effectiveness. Another commenter cautioned that the proposed firewall would not stop lenders from using information inappropriately and in a manner that harms small business applicants.

In contrast, a large number of lenders, trade associations, and individual commenters requested that the Bureau eliminate the firewall. Some of these commenters said that the firewall should be eliminated because it would create competitive disadvantages or overburden certain financial institutions. Others said that it should be eliminated because the firewall would overburden all covered financial institutions. Many commenters said that the firewall will add complexity, create burden and regulatory risk, and/or increase the cost of compliance. A few commenters said that the firewall provisions could result in financial institutions being required to purchase or create new technology or systems. Some commenters noted that the additional expense could result in an increased cost of credit, limited access to credit, and/or the cessation of certain products being offered. One commenter further stated that the costs of such a requirement would likely decimate small businesses' access to credit because financial institutions will either decrease or stop their small business lending.

One bank commenter asked that the Bureau create a simple way for the commenter to certify that the firewall concept cannot work for its entire institution without exception, equivocation, or a repetitive review. This commenter further indicated that it would provide a short and simple disclosure (one half of a letter size page or less) to all of its commercial applicants to document its compliance. The commenter said that the proposed firewall requirements gave it concern and appeared to be a ''gotcha'' clause in the proposed rule. In particular, they indicated it was concerned with a portion of proposed comment 108(c)–1 that would have said that a financial institution cannot permit all employees and officers to have access simply because it has determined that one or more employees or officers should have access.

Some commenters said that they had not been able to devise a workable method for improving what they called

the firewall's ''prohibit-or-disclose regime,'' and suggested that the Bureau needed to exercise its statutory authority to eliminate the firewall provision. These commenters and others also noted that eliminating the firewall requirement would align the rule implementing section 1071 with HMDA/Regulation C, which they said has required collection of demographic information for decades without any known incidents, despite the absence of any firewall.

Some commenters said that the Bureau should eliminate the firewall because it is unnecessary. A commenter also noted that the firewall requirement presents unique compliance challenges because the requirement is different than HMDA and will require unique systems. A few commenters said that the firewall serves no purpose or has no practical value. A few other commenters noted that the firewall is impractical or serves no purpose when applications are not anonymous, such as in smaller communities or where the employee or officer making determinations has an existing relationship with the applicant.

A few commenters asked the Bureau to create a platform, portal, or other system for applicants to report demographic information directly to the Bureau so that financial institutions could avoid having to intake such information at all.

Scope of the firewall. Comments on the scope of the proposed firewall requirement largely requested clarification. These commenters requested additional guidance regarding the types of employees and officers that would be subject to the firewall with one commenter asserting that the standard in the proposed rule was vague and subjective. This commenter also requested additional clarity regarding the definition of the phrase ''involved in making any determinations concerning an application for credit.'' Some commenters requested that specific groups of employees (such as software engineers and data scientists, bankers and managers who provide information or counseling on available credit products, and employees who gather information and submit applications to unrelated financial institutions who may take assignments of the credit contract) explicitly be excluded from the scope of the firewall requirement. However, a trade association said it supported the proposed definition of the phrase ''involved in making any determination concerning a covered application.''

One commenter specifically agreed that the firewall should not extend to an applicant's status as a small business.

Regarding application of the proposed firewall requirement to demographic information collected via visual observation or surname, one commenter requested guidance on how to comply with the firewall for such information. Another commenter urged the Bureau not to include information collected via visual observation or surname within the scope of the firewall. In contrast, another commenter noted that if the firewall is meant to prevent a credit decision based on protected information, it should not matter how the demographic information is collected.

Some commenters requested clarification or guidance regarding the firewall's applicability to information collected pursuant to HMDA or other laws or regulations. One commenter said that an employee or officer should not be subject to the firewall if the employee or officer accessed demographic information collected pursuant to section 1071 in order to satisfy HMDA or another regulatory requirement.

A commenter said that the firewall should only apply to applications originated completely online.

Feasibility of establishing and maintaining a firewall. A significant majority of the comments about the firewall provisions specifically addressed the feasibility of establishing and maintaining a firewall. Overwhelmingly, these commenters said that the firewall would be impossible, difficult, inefficient, and/or costly to implement for certain financial institutions.

Numerous commenters said that the firewall is not or may not be feasible for smaller institutions, such as credit unions and other community-based financial institutions with limited staff and resources. Numerous commenters also said that the firewall would not be workable with some business models, loan processes, and/or decision-making structures. Specifically, commenters asserted that the firewall would be impossible or impractical with high-contact and relationship-based lending models and with lending models that rely on loan officers to collect information from applicants. One commenter said that the logistics of implementing a firewall would be too much for most lenders.

While some commenters said that the firewall requirement would unfairly burden and punish smaller financial institutions or traditional financial institutions in favor of larger financial institutions and online lenders, others said that the firewall may not be feasible for larger institutions or online lenders. Specifically, some commenters said that the firewall would not be feasible for larger institutions because they would have to make substantial investments in technology to implement a firewall. One commenter said that while it was a larger financial institution, its business lending department was small, which would make establishing and maintaining a firewall impossible, infeasible, or burdensome.

Many commenters said that lenders would need to change their operations, hire additional staff, reconfigure systems, and/or invest significant sums in technology in order to establish and maintain a firewall. Some commenters asserted that the costs of doing these things may be prohibitive. A few commenters said that the firewall would disrupt their process, and one commenter said that the firewall requirement could diminish a loan officer's ability to fully engage with their clients efficiently and timely. With regard to indirect vehicle financing, a few commenters said that there is not currently a mechanism to shield and transmit data for such transactions and noted there would be a one-time cost exceeding $4 million to develop such a mechanism.

Some commenters requested additional clarification or guidance on the feasibility standard. A few commenters specifically requested a clearer feasibility standard. Some recommended that the Bureau provide clear guidance about when a firewall is or is not feasible and how a covered financial institution may determine the feasibility of establishing and maintaining a firewall. A few commenters said that the Bureau should clarify the operational factors (such as existing staffing, software capability, other existing systems and operations, and costs of making changes) that a financial institution may consider when determining feasibility and when an employee or officer should have access to protected demographic information collected pursuant to section 1071. Two of these commenters requested that the commentary specifically state that a financial institution may determine that a firewall is not feasible if it would need to hire additional staff in a line of business. Another commenter said that a financial institution should be permitted to consider department size in determining feasibility.

Two commenters said that the Bureau should expressly state that a financial institution has discretion to determine when a firewall is or is not feasible. These commenters further said that a financial institution's determination that a firewall is not feasible should be

left to the sole and exclusive discretion of financial institutions, effectively creating a safe harbor for institutions' determinations of feasibility. Another commenter said that the Bureau should also consider adding a feasibility-related safe harbor provision in § 1002.112(c) that allows for variations in determining feasibility. Other commenters recommended that a determination of feasibility or infeasibility should satisfy the rule if done in conformity with written procedures. Finally, one commenter said that it did not believe that the Bureau could create a feasibility standard that would allow a financial institution to determine whether it is required to implement a firewall pursuant to the rule.

Providing a notice in lieu of establishing and maintaining a firewall. A significant number of the commenters who said that it would not or may not be feasible to implement and maintain a firewall also opposed providing a notice in lieu of establishing and maintaining a firewall. Generally, commenters said that the notice may raise privacy concerns among some applicants, create confusion, and/or create competitive disadvantages for financial institutions that provide the notice. Some commenters said that requiring a notice would create an additional compliance and/or administrative burden, and one said that the notice may slow down the loan process because financial institutions will need to explain the required language. Several commenters said that the notice could cause customer complaints (as well as customer confusion) if some financial institutions are not required to provide the notice. Several commenters said that applicants may want to obtain loans from financial institutions that do not provide the notice, and some said this ultimately could result in a reduction of applicant choice, a reduction of applicant access to credit, or increased cost of credit.

A number of commenters said that providing the applicant with notice of the fact that their demographic data will be shared could raise questions or suspicions of whether the data plays a role in credit decisions or doubts about the impartiality of the credit decision, or could cause unwarranted scrutiny from individuals receiving the notice. Some commenters said that the notice may cause applicants to think the financial institution is not adequately staffed or cannot maintain the confidentiality of applicant information. One commenter suggested that the language of the proposed notice is inflammatory. Another commenter said that the proposed notice implied that some financial institutions are inherently more likely to engage in unfair lending, to the extent that a ''government warning'' is necessary. The commenter further stated that this implication is an unwarranted insult to the integrity and fairness of the shareholders and management of smaller community banks, and they would most likely prefer to withdraw from or significantly curtail small business lending than rely on the proposed exception to the firewall requirement by providing the notice.

Different commenters identified financial institutions that would need to provide the notice as smaller financial institutions, mid-sized financial institutions, community banks, credit unions, or more traditional financial institutions (*i.e.,* not online lenders). However, one commenter predicted that lenders of many sizes, business models, and regulatory levels will conclude that employees and officers involved in making a determination concerning an application should have access to demographic information collected under section 1071 and provide the notice.

A number of commenters suggested that the notice could inhibit the collection of demographic information and/or undercut section 1071's statutory purposes because it might influence applicants not to provide the requested information. One commenter said the notice might result in more applicants at community banks opting not to provide their demographic information, and in turn, more community banks having to report ethnicity and race information based on visual observation or surname. Another commenter said that providing the notice may affect an applicant's willingness to provide demographic information as the notice gives the perception that the information would likely be used to discriminate. Likewise, some commenters said that providing the notice to qualify for the firewall exception at the same time as the non-discrimination notice is especially problematic and could result in applicants declining to provide the requested information. Some commenters said that giving the notices together could result in other harms, such as harm to existing customer relationships. Two commenters suggested that the notice requirement is counterproductive because applicants may be less inclined to provide demographic information if they are told that decision makers may access their demographic information.

A bank said that the Bureau should eliminate the notice because applicants will know that the person making the inquiries pursuant to section 1071 will be making determinations regarding applications. Another bank said that the notice is useless because no one reads disclosures, and customers already know that lenders cannot discriminate.

A few commenters requested specific revisions to the notice. One commenter said that the Bureau should revise the notice to align with a HMDA notice. Another commenter requested that the Bureau align the notice with the disclosure used for HMDA and stated that this means that the disclosure would be provided with requests for demographic information on covered applications, regardless of whether the financial institution can maintain a firewall, and would emphasize that the information is being requested/collected for government monitoring of lenders' fair lending performance and compliance, cannot influence credit decisions, and is voluntary for applicants to provide. A third commenter said that in lieu of having a firewall requirement, the Bureau should develop a model disclosure to applicants explaining the data gathering process, similar to the disclosure provided in the government monitoring section of the home mortgage application.

A commenter said that the Bureau should exercise its authority to allow institutions to provide a Bureau-developed disclosure to applicants explaining that there may be access to the data and explain that the institution must not discriminate based on the information. The commenter further said that the Bureau should develop and provide the disclosure in Spanish as well as English when it publishes the final rule and add other translations over time.

A trade association supported the Bureau's proposal to develop model disclosures that lenders could use when notifying applicants of an employee's or officer's access to personal information. Another trade association supported an exception to the firewall requirement and a model disclosure that alerts applicants that an employee or officer may have access to demographic information, but does not tell applicants that such individuals will have access to such information. Two other commenters supported allowing financial institutions to provide a notice to applicants in lieu of restricting access to applicants' protected demographic information if a financial institution determines that it is not feasible to limit access to one or more of an applicant's responses to the financial institution's inquiries. A community group

commenter said that the notice is an important aspect of the proposed rule.

Requests for exemptions from the firewall requirements. Many commenters requested that the Bureau exempt certain financial institutions from the firewall requirement, though not all commenters agreed on which institutions should be exempted. One commenter requested an exemption for financial institutions with assets of less than $1.384 billion (the CRA small bank threshold as of January 1, 2022),[785] and another for institutions with assets of less than $5 billion. A few commenters said that financial institutions with assets of less than $10 billion should be exempted. Other commenters said that ''smaller'' or ''community based institutions'' or ''community banks'' or ''credit unions'' should be exempted. One commenter said that community banks should be exempt from the notice requirement.

Other commenters said that certain institutions should be provided an ''automatic'' exception to the firewall, such that smaller institutions could avoid the analysis and documentation required to show that an institution qualifies for the exception.

Several commenters said that, due in whole or in part to the firewall requirement, certain institutions should be exempted from the entire rule. One commenter said that banks under $1 billion should be exempted on this basis, a few said community banks should be exempted on this basis, and one commenter said that all but the largest lenders or all depository lenders should be exempted.

One commenter said that as an alternative to exempting community banks from the firewall requirement, the Bureau could require all financial institutions to provide the notice to all applicants, regardless of whether information is firewalled.

Final Rule

For the reasons set forth herein, the Bureau is generally finalizing the firewall requirement with additional clarifications in the commentary regarding the definitions of ''involved in making any determination concerning a covered application'' and ''should have access,'' the scope of the firewall, determining feasibility, the nature of the exception, and applying the exception to a specific employee or officer or group of similarly situated employees or officers. In addition, the Bureau has eliminated the requirement to use specific language when providing the notice required to qualify for the exception and, instead, has provided sample language for the notice. This sample language appears in the sample data collection form at appendix E. The Bureau has also revised the firewall provisions to align with other changes to the final rule, such as the inclusion of LGBTQI+-owned business status collected pursuant to final § 1002.107(a)(18) as protected demographic information subject to the firewall and the elimination of the requirement to collect certain information via visual observation or surname.

Final § 1002.108(b) states the general prohibition on access to applicants' protected demographic information by certain persons. The Bureau is finalizing § 1002.108(b) and comments 108(b)–1 and 108(b)–2 with changes for clarity and consistency with other portions of the final rule. Specifically, § 1002.108(b) has been revised to include LGBTQI+-owned business status, and cross-references have been updated to reflect changes elsewhere in the final rule. Final § 1002.108(b) states that unless the exception under final § 1002.108(c) applies, an employee or officer of a covered financial institution or a covered financial institution's affiliate shall not have access to an applicant's responses to inquiries that the financial institution makes pursuant to this subpart regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under final § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under final § 1002.107(a)(19), if that employee or officer is involved in making any determination concerning that applicant's covered application. Comments 108(b)–1 and –2 have been re-ordered. Final comment 108(b)–1 and final comment 108(b)–2 have been revised to clarify the scope of the prohibition.

While many commenters said that the Bureau should eliminate the firewall requirement, or should exempt certain covered financial institutions or certain types of transactions from the firewall requirement, the Bureau does not believe it is appropriate to abrogate this statutory requirement through section 1071's general exception authority beyond the exception provided in the statutory firewall provision itself. Congress, which would have been aware of the HMDA data collection regime (including its lack of a firewall) at the time that section 1071 was enacted, specifically required that financial institutions limit certain employees' and officers' access to demographic information that financial institutions request from applicants in order to comply with section 1071. While Congress allowed an exception to the general requirement to establish and maintain a firewall in certain circumstances (*i.e.,* when the financial institution determined that an employee or officer should have access to the demographic information and a firewall would not be feasible), the language of the statute suggests that Congress did not intend for the Bureau to eliminate the prohibition on access more broadly. Furthermore, Congress only authorized the Bureau to create exceptions to the requirements in section 1071 where necessary or appropriate to carry out section 1071's purposes. The Bureau does not believe that eliminating the firewall is necessary or appropriate to carry out section 1071's purposes.

Moreover, the Bureau believes that it has separately addressed many of the concerns about the ability of smaller institutions and institutions with limited staff to implement a firewall in other sections of the final rule. In particular, the Bureau has increased the origination threshold for coverage in § 1002.105(b). As a result, many smaller institutions and institutions with limited staff will not be subject to any provisions of the final rule, including the firewall requirement.

Because the requirement to collect certain information via visual observation or surname is not included in final § 1002.107(a)(19), it is not necessary to address the comments about the applicability of the firewall requirements to information collected via those methods. The Bureau has accordingly removed references to collecting information via visual observation or surname from final comments 108(a)–2.i and 108(b)–2.ii. Similarly, because HMDA reportable loans are excluded transactions pursuant to final § 1002.104(b)(2), it is not necessary to address comments asking for guidance on how to apply the firewall requirement if a loan is subject to both HMDA and this final rule.

Regarding comments that the Bureau establish a platform or system that applicants can use to report demographic data directly to the Bureau, thereby eliminating the need for institutions to implement a firewall, in line with its discussion of this issue in the section-by-section analysis of § 1002.107(a)(19), the Bureau does not

[785] Bd. of Governors of the Fed. Rsrv. Sys. & Fed. Deposit Ins. Corp., *Agencies release annual asset-size thresholds under Community Reinvestment Act regulations* (Dec. 16, 2021), *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211216a.htm;* Fed. Fin. Insts. Examination Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (Dec. 16, 2021), *https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.*

intend to create such a system at this time but is open to engaging further with stakeholders on alternative approaches for how financial institutions might collect and report protected demographic information.

Final § 1002.108(a) provides certain relevant definitions, including the definition of the phrase ''involved in making any determination concerning a covered application from a small business.'' Generally, the Bureau is finalizing the definition of the phrase ''involved in making any determination concerning a covered application'' in § 1002.108(a)(1) with revisions for clarity. The Bureau also is revising comment 108(a)–1 to provide additional clarity that the covered application must be from a small business and to provide clarity and examples regarding which employees and officers are subject to the prohibition set out in final § 1002.108(b) and which employees and officers are not subject to the prohibition. In response to the comments, the Bureau has clarified that certain activities do not constitute being involved in making a determination concerning a covered application from a small business and that other activities do constitute being involved in making such determinations.

While the Bureau recognizes that the ''involved in making any determination concerning an application for credit'' standard that Congress created in the statute is broad, the Bureau does not believe that the standard in final § 1002.108(a)(1), as further explained in the commentary, is unduly vague or subjective, as asserted by some commenters.

As explained in final comment 108(a)–1.i, an employee or officer is involved in making a determination concerning a covered application from a small business for purposes of final § 1002.108 if the employee or officer makes, or otherwise participates in, a decision regarding the evaluation of a covered application or the creditworthiness of a small business applicant for a covered credit transaction. Final comment 108(a)–1.i also explains that the decision that an employee or officer makes or participates in must be about a specific covered application or about the creditworthiness of a specific applicant. Thus, activities undertaken prior to the submission of a covered application do not constitute being involved in making a determination about a covered application. Similarly, activities undertaken after a financial institution has taken final action on a covered application do not constitute making a determination regarding a covered application. Furthermore, an employee or officer is not involved in making a determination concerning a covered application if the employee or officer is only involved in making a decision that affects covered applications generally. Finally, the comment clarifies that an employee or officer may be participating in a determination even if the employee or officer is not the ultimate or sole decision maker and provides examples.

Additionally, in response to comments requesting further clarification regarding the definition of the statutory phrase ''involved in making any determination concerning an application for credit,'' the Bureau has added several examples to the list of the types of activities in final comment 108(a)–1.ii that do not constitute being involved in making a determination concerning a covered application from a small business for purposes of § 1002.108. The Bureau has also added a list of examples in comment 108(a)–1.iii of the types of activities that do constitute being involved in making a determination concerning a covered application from a small business for purposes of § 1002.108.

Section 1002.108(c), which the Bureau is finalizing with updated cross-references to reflect other changes in the rule, explains the exception to the general prohibition set forth in final § 1002.108(b). Final § 1002.108(c) establishes an exception to the prohibition in final § 1002.108(b) and states that the prohibition does not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to an applicant's responses to the financial institution's inquiries under final § 1002.107(a)(18) or (19) and the financial institution provides the notice required under final § 1002.108(d) to the applicant. It further provides that it is not feasible to limit access as required pursuant to final § 1002.108(b) if the financial institution determines that an employee or officer involved in making any determination concerning a covered application from a small business should have access to one or more applicants' responses to the financial institution's inquiries under final § 1002.107(a)(18) or (19).

However, in response to comments (including comments requesting clarification about how a financial institution should be permitted to determine feasibility pursuant to the final rule) and to provide additional clarity and guidance, the Bureau has divided proposed comment 108(c)–1 into two comments and revised and supplemented both comments. Specifically, the Bureau has added language in final comment 108(c)–1 to clarify that a financial institution is not required to separately determine the feasibility of maintaining a firewall. A determination that an employee or officer should have access means that it is not feasible to maintain a firewall as to that particular employee or officer, and the exception applies to that employee or officer if the financial institution provides the notice required by final § 1002.108(d).

The comment also clarifies the nature of the exception (*i.e.,* that it applies on an individual employee or officer basis, not an institution-wide basis). The comment states that the fact that a financial institution has made a determination that an employee or officer should have access does not mean that the financial institution can permit other employees and officers who are involved in making determinations concerning a covered application to have access to the information collected pursuant to final § 1002.107(a)(18) and (19). A financial institution may only permit an employee or officer who is involved in making a determination concerning a covered application to have access to information collected pursuant to final § 1002.107(a)(18) and (19) if it has determined that employee or officer or a group of which the employee or officer is a member should have access to the information.

The Bureau is not adopting one commenter's suggestion that the Bureau permit a financial institution to determine that a firewall is not feasible for a single employee and then allow all employees and officers to have access to protected demographic information. As explained above, the final rule clarifies that a financial institution can permit an employee or officer who is involved in making a determination concerning a covered applications from a small business to access that small business's protected demographic information only if the financial institution has determined that employee or officer should have access (*i.e.,* either individually or as part of a group). This requirement is not intended to be a ''gotcha,'' as suggested by the commenter, but rather a reasonable means of allowing a financial institution to provide employees and officers to have access to protected demographic information when such access may be necessary to perform assigned job duties without allowing such information to be widely accessible to those employees and officers who make determinations concerning covered applications but do not need the information to perform

their jobs. The sample data collection form at appendix E includes sample language for the firewall notice, but the Bureau is not requiring use of that specific language for the firewall notice.

Final comment 108(c)–2 addresses how a financial institution may apply the exception to a specific employee or officer or a group of similarly situated employees or officers. It clarifies that a financial institution may determine that several employees and officers, all of a group of similarly situated employees or officers, and multiple groups of similarly situated employees or officers should have access to information collected pursuant to § 1002.107(a)(18) and (19). It also provides examples. Final § 1002.108(a)(2) defines the phrase ''should have access,'' which is used in § 1002.108(c) and related commentary. This phrase means that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. However, in response to comments, the Bureau has revised comment 108(a)–2 and added a comment 108(a)–2.iii. The Bureau has also revised comment 108(a)–2 to align with other changes finalized in the rule (*i.e.,* the elimination of requirements to collect information via visual observation or surname and the inclusion of the LGBTQI+-business status in final § 1002.107(a)(18)). These comments clarify how a financial institution may determine who should have access.

Final comment 108(a)–2.i explains that a financial institution may determine that an employee or officer who is involved in making a determination concerning a covered application should have access to protected demographic information if that employee or officer is assigned one or more job duties that may require the employee or officer to collect, see, consider, refer to, or use such information. The employee or officer does not have to be required to collect, see, consider, refer to, or use such information or to actually collect, see, consider, refer to or use such information in order for the financial institution to determine that the employee or officer should have access. It is sufficient if the employee or officer might need to do so to perform the employee's or officer's assigned job duties.

Final comment 108(a)–2.ii explains that a financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of final § 1002.108. If a financial institution assigns one or more tasks that may require access to one or more applicants' protected demographic information to a particular job title, the financial institution may determine that all employees and officers who share that job title should have access for purposes of § 1002.108.

Although the final rule does not provide a safe harbor for a financial institution's determination to account for variations in determining feasibility (*i.e.,* determining which employees and officers should have access) as two commenters requested, new comment 108(a)–2.iii states that a financial institution is permitted to choose what lawful factors it will consider when determining whether an employee or officer should have access to protected demographic information. A financial institution's determination that an employee or officer should have access may take into account relevant operational factors and lawful business practices. For example, a financial institution may consider its size, the number of employees and officers within the relevant line of business or at a particular branch or office location, and/or the number of covered applications the financial institution has received or expects to receive. Additionally, a financial institution may consider its current or its reasonably anticipated staffing levels, operations, systems, processes, policies, and procedures. A financial institution is not required to hire additional staff, upgrade its systems, change its lending or operational processes, or revise its policies or procedures for the sole purpose of determining who should have access.

The Bureau believes this new comment makes clear that different financial institutions may make different determinations regarding which employees and officers should have access and that those different determinations are permissible. Additionally, in response to commenters' suggestions that determinations of feasibility should satisfy the final rule if they are made in conformity with written procedures, the Bureau notes that a financial institution may choose to make its determinations regarding who should have access to protected demographic information pursuant to written procedures, but is not required to do so in order to have a determination satisfy the final rule. Furthermore, in light of the flexibility provided in § 1002.108, and because the firewall requirement was explicitly set forth by Congress in section 1071, the Bureau does not believe that providing further discretion in determining feasibility or adopting a safe harbor, as suggested by some commenters, would be appropriate.

Final § 1002.108(d) explains the requirement to provide a notice in order to qualify for the exception. The Bureau is finalizing § 1002.108(d) and comments 108(d)–1 and –3 largely as proposed, and has revised comment 108(d)–2 regarding the content of the notice. Final § 1002.108(d) has been revised to include LGBTQI+-owned business status, and cross-references have been updated to reflect changes elsewhere in the final rule. Specifically, final § 1002.108(d) states that in order to satisfy the exception set forth in final § 1002.108(c), a financial institution shall provide a notice to each applicant whose responses to inquiries for protected demographic information will be accessed, informing the applicant that one or more employees or officers involved in making determinations concerning the covered application may have access to the applicant's responses to the financial institution's inquiries regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and regarding the ethnicity, race, and sex of the applicant's principal owners. The financial institution shall provide the notice required by final § 1002.108(d) when making the inquiries required under final § 1002.107(a)(18) and (19) and together with the notices required pursuant to § 1002.107(a)(18) and (19).

Final comment 108(d)–1, which includes minor revisions for clarity, explains that if a financial institution determines that one or more employees or officers should have access pursuant to § 1002.108(c), the financial institution must provide the required notice to, at a minimum, the applicant or applicants whose responses will be accessed by an employee or officer involved in making determinations concerning the applicant's or applicants' covered applications. Alternatively, a financial institution may also provide the required notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants for covered credit transactions or all applicants for a specific type of product.

Final comment 108(d)–3, which includes minor revisions to align with changes made elsewhere in the final rule, explains the timing for providing the notice. Generally, the financial institution must provide the notice required by § 1002.108(d) prior to asking the applicant if it is a minority-owned, women-owned, or LGBTQI+-owned business and prior to asking for a

principal owner's ethnicity, race, or sex. Additionally, the notice must be provided with the non-discrimination notices required pursuant to § 1002.107(a)(18) and (19).

While many commenters said that the Bureau should eliminate the notice requirement or should exempt certain covered financial institutions from the notice requirement, the Bureau does not believe it is appropriate to eliminate this statutory requirement or to except certain financial institutions from providing the notice if they are relying on the exception to the firewall requirement. Congress explicitly required that a financial institution provide a notice to an applicant if the financial institution does not limit certain employees' and officers' access to protected demographic information. Congress also required that applicants be permitted to refuse to provide the requested demographic information. Thus, an applicant should be told that certain employees and officers may have access to the protected demographic information so that the applicant can make an informed decision of whether to exercise the applicant's statutory right to refuse. The Bureau does not believe it would be appropriate to allow some or all financial institutions to forego providing applicants with the information they may need to determine whether to exercise this statutory right. Although some commenters said that the notice may undercut section 1071's purposes because the notice may cause applicants to refuse to provide the requested demographic information, the Bureau believes that Congress was aware of this potential result when it provided applicants with the right to receive a notice and the right to refuse to provide the requested information.

Additionally, other commenters undercut or contradicted the reasoning put forth by commenters opposed to providing the notice. For example, while a group of commenters opposed providing the notice based on the belief that it would create competitive disadvantages or burdens only for smaller institutions, other commenters said that larger institutions would also likely provide the notice in lieu of establishing and maintaining a firewall.[786] Other commenters supported allowing financial institutions to provide a notice in lieu of establishing and maintaining a firewall, and one commenter said that the notice was an important aspect of the proposed rule.

Nonetheless, in order to address commenters' concerns about the specific content proposed for the notice, the Bureau has revised comment 108(d)–2. That comment reiterates that the notice must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex. However, the comment no longer prescribes language to be used for the notice and, instead, directs financial institutions to the sample data collection form included in the final rule for sample language that a financial institution may opt to use when providing the notice.[787] Alternatively, a financial institution may opt to use different language as long as the notice provides an applicant with the statutorily required information (*i.e.,* that one or more employees and officers involved in making determinations regarding the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex). Final comment 108(d)–2 also notes, for clarity, that if a financial institution establishes and maintains a firewall and chooses to use the sample data collection form, it may delete the sample language for the firewall notice from the form because employees and officers involved in making determinations concerning applicants' covered applications will not have access to the applicants' responses to inquiries for protected demographic information.

Section 1002.109 Reporting of Data to the Bureau

Final § 1002.109 addresses several aspects of financial institutions' obligations to report small business lending data to the Bureau. First, § 1002.109(a) requires data to be collected on a calendar year basis and reported to the Bureau by June 1 of the following year, and addresses several related issues. Second, § 1002.109(b) details the information that financial institutions must provide about themselves when reporting data to the Bureau. Finally, § 1002.109(c) addresses technical instructions for submitting data to the Bureau.

The Bureau is finalizing § 1002.109 to implement ECOA section 704B(f)(1) and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.109(b) pursuant to 704B(e)(2)(H), which requires financial institutions to compile and maintain as part of their data any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071.

Details regarding each aspect of final § 1002.109, including a discussion of what the Bureau proposed and comments received, are provided in the section-by-section analyses that follow.

109(a) Reporting to the Bureau

109(a)(1) Annual Reporting

Proposed Rule

ECOA section 704B(f)(1) provides that ''[t]he data required to be compiled and maintained under [section 1071] by any financial institution shall be submitted annually to the Bureau.''

Proposed § 1002.109(a)(1)(i) would have required that by June 1 following the calendar year for which data are collected and maintained as required by proposed § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau. This approach to reporting frequency and reporting period is consistent with the annual submission schedule specified in the statute. The Bureau sought comment on this aspect of the proposal, and how best to implement it in a manner that minimizes cost and burden to small financial institutions.

Proposed § 1002.109(a)(1)(ii) would have required that an authorized representative of the covered financial institution with knowledge of the data submitted certify to the accuracy and completeness of data submitted pursuant to proposed § 1002.109(a). A similar provision exists in Regulation C (§ 1003.5(a)(i)), and the Bureau believed it appropriate to adopt a similar requirement here as well. Based on the Bureau's experience with HMDA and Regulation C, the Bureau believed that

[786] Aside from being speculative, such a competitive effect, if it existed, would be a direct consequence of the statutory mandate regarding the firewall: if the financial institution determines that an employee or officer should have access to protected demographic information, the notice must be provided.

[787] Regarding the comment that the Bureau should develop and provide the notice in Spanish as well as English when it publishes the final rule and add other translations over time, the Bureau notes that it will be translating the sample data collection form in appendix E (including the sample language for the notice on the form) into several languages. See also the discussion regarding compliance and technical assistance at the end of part I above.

having a specific person responsible for certifying to the accuracy and completeness of data is likely to lead to financial institutions providing better quality data.

Proposed § 1002.109(a)(1)(iii) would have clarified that when the last day for submission of data prescribed under proposed § 1002.109(a)(1) falls on a date that is not a business day, a submission is considered timely if it is submitted no later than the next business day.

The Bureau sought comment on its proposed approach to the aspects of reporting addressed in proposed § 1002.109(a), including that the reporting frequency be annual, that the reporting period be the calendar year, and that the submission date be June 1 of the next calendar year. In particular, the Bureau sought comment with respect to proposed § 1002.109(a)(1)(i) on whether requiring the submission of small business lending application registers by June 1 might give rise to complications for any persons or entities relying on data from the registers for other purposes, such as Federal regulators scheduling examinations.

Comments Received

In response to proposed § 1002.109(a)(1)(i), the Bureau received comments from lenders, trade associations, community groups, and others. Commenters discussed the reporting deadline of June 1, the calendar year reporting period, and the annual reporting frequency. Several commenters supported the Bureau's reporting frequency and period, as well as the reporting deadline of June 1. One bank urged the Bureau to permit reporting as early as March 1 for institutions who wished to do so. A few community groups and a CDFI lender supported the reporting frequency and period, but only supported the proposed deadline of June 1 contingent upon the Bureau's timely publication of the data later on in the year.

Some commenters supported the reporting frequency and period but did not support the reporting deadline. Of this group of commenters, one trade association urged the Bureau against aligning the section 1071 reporting deadline with the HMDA reporting deadline of March 1, citing a strain on resources. A trade association and a bank supported annual reporting but requested a later deadline. Finally, two trade associations requested the Bureau to permit ongoing reporting alongside annual reporting. Both of these commenters suggested the Bureau create a portal or centralized system where banks could input data as it is received. Both commenters mentioned the burden that would come along with maintaining a database internally, as well as concerns about system maintenance, cost, and risk. One of those trade associations also described an alternative whereby the Bureau could provide a link where small business loan applicants could input their own data or opt out of sharing their data altogether.

One bank did not support any aspect of proposed § 1002.109(a)(1)(i). This bank argued that adding another reporting regime, in addition to HMDA and CRA, would add significant burden to their staff, both at the loan origination stage and at the reporting stage. It also argued that having a mid-year reporting deadline would tie up critical compliance resources and would require them to spend one quarter of the year on reporting requirements.

Two trade associations touched on quarterly reporting. The first commented that large banks (for CRA purposes) should be required to provide their data within 30 days of a request to do so. They argued that if the Bureau absolves lenders of the requirement to respond to individual requests, then data should be reported quarterly. The second commented that the frequency of reporting that financial and regulatory agencies expect to receive is quarterly (Call Reports). They also stated that non-regulated lenders, CDFIs and other similar providers should be required to report no less than semi-annually.

Many commenters did not support the June 1 reporting deadline and the calendar year reporting period in particular. A lender and a business advocacy group urged the Bureau to adopt a reporting deadline of July 1 instead of June 1 to provide more time between HMDA reporting and section 1071 reporting. The business advocacy group stated that for institutions who report HMDA data quarterly, 60 days after quarter end, a deadline of June 1 would leave no separation between reporting requirements. A cross-sector group of lenders, community groups, and small business advocates urged the Bureau to adopt a May 1 to April 30 reporting period with a reporting deadline in July, citing that staggering reporting periods would ease regulatory burden for lenders who also report HMDA data. A joint letter from community groups suggested a reporting period of July 1 to June 30, citing that covered lenders would benefit by having six months to prepare before data collection begins.

Several banks requested the reporting deadline be no earlier than June 30 so that there would be more time to perform data integrity reviews for those lenders that are HMDA and/or CRA reporters. Several commenters requested, as a general matter, that reporting-related changes be effective January 1 rather than midyear.

Finally, several lenders urged the Bureau to coordinate section 1071 reporting with CDFI Fund reporting. They argued that CDFIs are required to report for a three-year period through the CDFI Fund's Transaction Level Reporting data points that are well beyond the scope of section 1071. They also suggested that the Bureau standardize data formats to match those used in CDFI Fund reporting, and to coordinate across agencies in order to streamline data collection and reporting requirements. This, they argue, would minimize the burden on CDFIs.

The Bureau did not receive any comments in response to proposed § 1002.109(a)(1)(ii) and (iii).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(1)(i) and (ii) as proposed, and finalizing § 1002.109(a)(1)(iii) with a revision for clarity. Specifically, under final § 1002.109(a)(1)(i), on or before June 1 following the calendar year for which data are compiled and maintained as required by § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau. While several commenters advocated for more frequent reporting, the Bureau believes that its approach is consistent with the annual submission schedule specified in the statute. The Bureau is not permitting financial institutions to submit their data on a real-time basis or ongoing basis, as this approach could result in financial institutions treating the Bureau as their official recordkeeper for their data.[788] Regarding the comments supporting a June 1 submission date, contingent on rapid publication of data soon after, the Bureau addresses such comments in the section-by-section analyses of § 1002.110(a) and (b), and the privacy section in part VIII. While some commenters requested that financial institutions have the ability to submit data as early as March 1, the Bureau intends to make it possible for financial institutions to report as early as possible before June 1 each year once the small

[788] With respect to comment that it should build an online platform to receive data from applicants on a real-time basis, the Bureau does not, at this time, intend to take this step, in line with its analysis of demographic data submission in the section-by-section analysis of § 1002.107(a)(19).

business lending data reporting platform is established.

While some commenters suggested alternate reporting periods, the Bureau believes there are advantages to having data collected and reported on a calendar year basis. Calendar year reporting may facilitate other aspects of the rule that depend on data that is typically recorded on a calendar year basis. For instance, other parts of the rule look to annual data, such as § 1002.105(b), which would use a financial institution's loan volumes over the prior two calendar years to determine whether it is a covered financial institution. Further, the Bureau understands that financial institutions would generally prefer to have such data collections occur on a calendar year basis because such an approach would be generally consistent with their operations. An annual reporting period other than the calendar year—such as July 1 to June 30—could result in additional challenges for financial institutions in complying with the rule, which could in turn increase the probability of errors in collecting and reporting data to the Bureau.[789]

Regarding submission date, several commenters requested alternate deadlines such as March 1 or July 1. However, the Bureau believes that a June 1 submission deadline gives the compliance staff of financial institutions, especially smaller institutions, adequate time and resources to dedicate to preparing a small business lending application register, after meeting other reporting obligations earlier in the year, such as under HMDA or CRA. This remains true even though the final rule excludes all HMDA-reportable loans and even though the Federal prudential regulators have proposed amendments to the CRA rules that would use small business and small farm data from this rule. Many institutions will still have March deadlines for their HMDA and CRA reporting obligations unrelated to small business lending, and the Bureau believes a later deadline for reporting data collected under this final rule remains appropriate. Financial institutions with quarterly HMDA filing deadlines generally handle a high volume of mortgage loan originations and are more likely to have sufficient resources to cope with a June 1 deadline for this rule (and, indeed, any filing deadline set by the Bureau would be within 60 days of a quarterly HMDA filing deadline).

Final § 1002.109(a)(1)(ii) specifies that an authorized representative of the covered financial institution with knowledge of the data shall certify to the accuracy and completeness of the data reported pursuant to § 1002.109(a)(1)(i). The Bureau has modified final § 1002.109(a)(1)(iii) for clarity; it now provides that when June 1 falls on a Saturday or Sunday, a submission shall be considered timely if it is submitted on the next succeeding Monday.

109(a)(2) Reporting by Subsidiaries

Proposed Rule

ECOA section 704B(f)(1) states that ''any'' financial institution obligated to report data to the Bureau must do so annually; the statute does not expressly address financial institutions that are themselves subsidiaries of other financial institutions.

Proposed § 1002.109(a)(2) would have stated that a covered financial institution that is a subsidiary of another covered financial institution shall complete a separate small business lending application register. The proposal would have provided that a subsidiary shall submit its small business lending application register, directly or through its parent, to the Bureau. Proposed comment 109(a)(2)–1 would have explained that a covered financial institution is considered a subsidiary of another covered financial institution for purposes of reporting data pursuant to proposed § 1002.109 if more than 50 percent of the ownership or control of the first covered financial institution is held by the second covered financial institution. This proposed provision would have mirrored one that exists for HMDA reporting under Regulation C in § 1003.5(a)(2). The Bureau believed that the proposed provision would facilitate compliance by permitting parent financial institutions to coordinate the reporting of all their subsidiaries' small business lending data together.

The Bureau sought comment on this aspect of its proposal. Additionally, the Bureau sought comment on proposed § 1002.109(a)(2) in light of proposed § 1002.105(b), which would have defined a covered financial institution as a financial institution that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. The Bureau sought comment on whether this provision may risk creating ambiguity with respect to compliance and whether additional safeguards may be required to dissuade financial institutions from creating subsidiaries for the sole purpose of avoiding the collection and reporting of 1071 data. The Bureau also sought comment on all other aspects of this proposal.

Comments Received

The Bureau received comments from a bank, a trade association, and a community group on the proposed provision regarding reporting by subsidiaries. The community group had no objections to the Bureau's proposal. The bank recommended that the Bureau define subsidiary in subpart B, stating that the term was used extensively in this proposed provision and to dissuade financial institutions from creating subsidiaries in order to avoid reporting data. The community group recommended that the Bureau create safeguards against the possibility that a lender will develop an ownership structure that will evade reporting requirements, specifically that originations be counted at the parent or holding company level for the purposes of determining institutional coverage under § 1002.105(b).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(2) and associated commentary as proposed. The Bureau believes that this provision will help facilitate compliance through consistency with an existing provision in a separate regulation (Regulation C) familiar to many financial institutions and by also permitting financial institutions to coordinate the reporting of all their subsidiaries' small business lending data. The final rule provides a definition of subsidiary in comment 109(a)(2)–1.

The Bureau does not believe it is necessary to add to the rule a requirement to count originations at the parent or holding company level for the purposes of determining whether a financial institution has met the institutional coverage threshold. Final § 1002.105(b) defines a covered financial institution as a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. The Bureau believes that the process and costs of establishing a new charter to avoid reporting data, along with other associated obligations in forming a new legal entity, will generally dissuade lenders from creating subsidiaries through whom to make small business loans specifically for the purpose of avoiding coverage under this final rule.

[789] Regarding concerns that a January 1 collection date would be too soon after the publication of the rule, the Bureau addresses all concerns about the amount of time lenders have to comply with this rule in the section-by-section analysis of § 1002.114(b).

109(a)(3) Reporting Obligations Where Multiple Financial Institutions Are Involved in a Covered Credit Transaction

Background

Section 1071's requirement to collect and report data for any ''application to a financial institution for credit'' could be read as applying to more than one financial institution when an intermediary provides an application to another institution that takes final action on the application. It might also apply in cases where one application is simultaneously sent to multiple financial institutions for review. This broad reading may serve a useful function, such as comprehensive reporting by all financial institutions involved in a small business lending transaction, but could also generate duplicative compliance costs for financial institutions and potentially detract from the quality of reported data, increasing the risk that certain applications are reported multiple times with potential inconsistencies.

During the SBREFA process, several small entity representatives voiced support for aligning reporting requirements for financial institutions that are not the lender of record with the approach taken for HMDA reporting in the Bureau's Regulation C. Other small entity representatives expressed concern in adopting the Bureau's approach in Regulation C, noting the differences between small business and residential mortgage loan products, and advocated for simpler approaches.

SBREFA feedback from other stakeholders included support for a HMDA-like approach when multiple lenders are involved in a transaction, praising the Bureau's consistent approach and interest in limiting duplicative information. However, several stakeholders advocated against the HMDA approach, generally by proffering other ideas rather than criticizing the rules or outcomes of the HMDA approach. Alternative suggestions varied, but included suggesting that data collection and reporting should be required only for the company most closely interacting with the loan applicant; if a financial institution receives a covered application, then the application should be subject to reporting, regardless of outcome; the financial institution that funded (or would have funded) the loan should be required to collect and report; and the financial institution that conducts the underwriting and determines whether the small business credit applicant qualifies for credit using its underwriting criteria should be required to report and collect.

Proposed Rule

Proposed § 1002.109(a)(3) would have provided that only one covered financial institution shall report each covered credit transaction as an origination, and that if more than one financial institution was involved in an origination, the financial institution that made the final credit decision approving the application shall report the loan as an origination, if the financial institution is a covered financial institution.

Proposed § 1002.109(a)(3) would have further provided that if there was no origination, then any covered financial institution that made a credit decision shall report the application. The Bureau explained that under certain lending models, financial institutions may not always be aware of whether another financial institution originated a credit transaction. The Bureau believed that information on whether there was an origination should generally be available, or that lending models can be adjusted to provide this information at low cost.

Proposed comment 109(a)(3)–1 would have provided general guidance on how to report originations and applications involving more than one institution. In short, if more than one financial institution was involved in the origination of a covered credit transaction, the financial institution that made the final credit decision approving the application would report the covered credit transaction as an origination. Proposed comment 109(a)(3)–2 would have offered examples illustrating how a financial institution should report a particular application or originated covered credit transaction. Proposed comment 109(a)(3)–3 would have explained that if a covered financial institution made a credit decision on a covered application through the actions of an agent, the financial institution reports the application, and provided an example. State law determines whether one party is the agent of another. While these proposed comments assumed that all of the parties are covered financial institutions, the same principles and examples would apply if any of the parties were not a covered financial institution.

The Bureau sought comment on this aspect of its proposal. In particular, the Bureau sought comment with respect to proposed § 1002.109(a)(3) on whether, particularly in the case of applications that a financial institution is treating as withdrawn or denied, the financial institution can ascertain if a covered credit transaction was originated by another financial institution without logistical difficulty or significant compliance cost.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of stakeholders, including lenders, trade associations, and community groups.

Several commenters, including trade associations and a community group, expressed general support for the Bureau's proposed approach, stating that it would help avoid duplicative reporting, the originating lender is best positioned to obtain the necessary information from the borrower, and the approach will increase the accuracy of the reported data, especially in an increasingly complex lending market. In addition, two credit union trade associations said that the proposal takes the correct approach for loan participation arrangements. Another trade association said that, to ensure simplicity, the Bureau should make the rule identical to Regulation C.

Conversely, several other industry commenters asserted that the proposal may be too complex or not feasible. A bank requested that the Bureau consider different reporting rules in cases where coordination among financial institutions is not feasible. A trade association stated that financial institutions are not aware of credit extensions made by competitors and are prohibited from sharing nonpublic personally identifiable information, including the existence of an account, with other financial institutions. This commenter pointed out that in indirect financing, the loan might be offered to multiple parties, so several financial institutions might be in this position.

Similarly, a joint letter from several insurance premium finance trade associations stated that insurance premium lenders generally do not know whether an application was originated by another financial institution, and it would be difficult, if not impossible to find out. These commenters suggested a new exception where insurance premium finance lenders are permitted to report data regarding any signed premium finance agreement they receive and take action upon (without requiring them to determine whether another lender originated the rare premium finance loan that is not approved and funded).

A joint letter from community and business advocacy groups argued that the proposal does not address the complexity of modern online lending. These commenters stated that online

lenders often ''rent a charter'' to evade the limitations of State lending laws, the terms of these partnerships are often unknown, but under the proposal only one party would report the data without it being clear which one. They further noted that the final credit decision might be made by a digital algorithm but then approved by the depository institution. In addition, two credit union trade associations expressed uncertainty regarding who is responsible for errors or noncompliance—that is, credit union service organizations or the member credit union.

A joint letter from two motor vehicle dealer trade associations requested clarification on the rule's application, stating their belief that for indirect auto lending, the responsible party would typically be the indirect lender that advances funds, not the motor vehicle dealer. They further asserted that the dealer typically is identified on the credit contract as the seller-creditor even though the indirect lender as assignee-creditor performs the underwriting, funding, and servicing functions and determines whether, and on what terms, it will agree to take assignment of the credit contract. They argued that when an origination occurs, the lender taking assignment of the credit contract should be the entity responsible for compliance with section 1071, and that when an origination does not occur, then reporting responsibility should rest with the lender that conducted underwriting and determined that they would not take assignment of the credit contract.

A financial services trade association characterized the transaction differently, explaining that indirect vehicle finance transactions involve two separate, but related transactions. The commenter stated that a customer purchases a car from a motor vehicle dealer and executes a retail installment sales contract that finances the purchase price and any other products the customer elects to purchase. The dealer is the original creditor and negotiates the financing terms with the customer. Separately, the dealer communicates with one or more other financial institutions to determine which one will purchase the completed contract and at what terms. As purchaser of the credit contract, the financial institution takes assignment of the contract and begins servicing the contract until it is paid in full.

In addition, two trade associations pointed to Board regulations implementing ECOA and argued that the dealer would be prohibited under the law from asking the business owner for protected demographic information.

Some commenters expressed uncertainty regarding the Bureau's use of the term ''final credit decision'' in the proposal. Two commenters asserted that it was unclear which lender makes the final credit decision in situations where two lenders are required to make a credit decision to approve an application. A number of certified development companies, their trade association, and other lenders provided the example of the SBA's 504 Development Company Loan Program, which requires loans to be financed by both a certified development company and a private lender, asking who reports in such cases.

Several farm credit institutions and a trade association requested that the Bureau clarify that its rule does not apply to credit decisions made after loan approval. The commenters explained that farm credit institutions are required to make an independent judgment on the creditworthiness of the borrower, even in secondary market transactions, so it would be helpful to make clear that those judgments are not subject to data collection and reporting obligations. In addition, a group of trade associations requested that the rule text should more closely match the text in proposed comment 109(a)(3)–1.ii, saying that otherwise it could be misinterpreted to mean that as long as one institution reports its decision, then others need not do so.

A law firm commented that the Bureau should clarify that third-party review, even if for the purposes of telling the creditor that the third party will only purchase the post-origination loan under certain conditions, does not mean that the third party/potential purchaser made the final credit decision. The commenter explained that in these types of ''forward flow'' transactions, the third party does not originate the credit nor does it have any particular interest in whether the creditor approves and originates the transaction.

A group of trade associations stated that in the case of withdrawn applications, it would be impractical and burdensome for a financial institution to determine whether an applicant received credit elsewhere.

Commenters offered some alternative suggestions. Two industry commenters stated that if a loan is originated, only the creditor to whom the obligation is initially payable should be required to collect and report data. When there is no origination, only the institution that initially received the application should be required to collect and report data. These commenters asserted that this was a simpler approach, and the originating creditor is in the best position to collect and report all of the required data points.

A joint letter from community and business advocacy groups stated that the Bureau should assign reporting responsibility to the financial institution that has the predominant economic interest in and bears the predominant risk of a loan (or that would have had such an interest had the loan been consummated). These groups further asserted that it is important in online lenders' ''rent a charter'' arrangements for the Bureau to collect data on both the identity of the online lender and the depository institution because they are both ECOA creditors, but at a minimum the Bureau should collect data on the party that bears the bulk of the risk.

Another commenter stated that the Bureau should consider adding a non-unique (*i.e.,* shared across institutions) loan identifier that would allow matching of loans reported by multiple institutions (*e.g.,* a new data point). The commenter asserted that this would allow data users to match loans reported by multiple financial institutions and obviate the need to have such reporting rules.

Comments addressing partial interests and participation loans are discussed in the section-by-section analysis of § 1002.104(b). Moreover, several farm credit institutions urged the Bureau to clarify that in the syndicated loan context, the administrative agent is the sole lender with responsibility under the rule. Commenters explained that syndicated loans differ from participations in that multiple lenders enter into a contractual relationship with the borrower, but there is typically an administrative agent, which is primarily responsible for interacting with the applicant or borrower. A farm credit institution noted that the proposal's ambiguity with respect to syndicated loan reporting would create inaccuracies in reported information.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(3) with modifications. Final § 1002.109(a)(3) states the general rule that each covered financial institution shall report the action that it takes on a covered application. Where it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction, however, only the last covered financial institution with authority to set the material terms of the covered credit transaction shall report

the application. In addition, financial institutions report the actions of their agents.

Final comment 109(a)(3)–1 provides general guidance on how to report applications involving more than one institution. Final comment 109(a)(3)–2 provides a variety of examples to illustrate which financial institution reports a particular application when multiple financial institutions are involved in a covered credit transaction and how such applications are reported.

The Bureau has revised language in proposed § 1002.109(a)(3) that discussed outcomes ''if more than one financial institution was involved in an origination'' both for clarity, and to avoid complexity, logistical challenges, and potential data accuracy issues. Initially, final § 1002.109(a)(3) provides that each covered financial institution shall report the action that it takes on a covered application. Final comment 109(a)(3)–1.ii sets forth the various actions that a financial institution may take on a covered application. Certain of the examples in final comment § 1002.109(a)(3)–2 illustrate credit transactions that involve a single financial institution with responsibility for making a credit decision on a covered application. Those examples make clear that where a financial institution is only passively involved in a covered credit transaction or is only involved after the time of origination (for example, to purchase the loan), it has not taken action on the covered application and so does not report. For example, the Bureau understands that a non-originating financial institution may be ''involved'' with a covered credit transaction *after* closing (for example, if it purchases the covered credit transaction); however, such post-closing transactions (with the exception of applications for line increases) are generally not covered by the final rule. The Bureau further notes that whether an entity meets the definition of ''creditor'' under ECOA and Regulation B is not determinative of who reports under this rule.

Despite the general rule that all financial institutions shall report action taken on a covered application, final § 1002.9(a)(3) and final comment 109(a)(3)–1.i provide that where it is *necessary* for more than one financial institution to make a credit decision in order to approve the covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to report. Setting the material terms of the covered credit transaction includes, for example, selecting among competing offers or modifying pricing information, amount approved or originated, or repayment duration. The fact that it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction does not mean that there was an actual approval or origination of the covered application. Rather, and in contrast to the passive conduit scenario described above, this provision applies when a financial institution would not originate a covered credit transaction unless it was approved by at least one other financial institution prior to closing.

The changes to § 1002.109(a)(3) are intended to address commenters' concerns that the NPRM approach was too complex or infeasible. Many of these commenters stated that it would be difficult for a financial institution to know if a loan was originated by another financial institution. Unlike the NPRM approach, final § 1002.109(a)(3) is not limited to requiring only one financial institution to report an *origination.* Final § 1002.109(a)(3) states that where it is necessary for more than one financial institution to make a credit decision to approve the covered credit transaction, only the last covered financial institution with authority to set the material terms of the covered credit transaction is required to report the application (*i.e.,* whether or not it was originated). In making this change, the Bureau seeks to avoid duplicative reporting in more than just cases of originated transactions; it seeks to clarify that only one financial institution is required to report on the application, no matter the action taken.

While the Bureau recognizes there may be some benefit in having multiple financial institutions reporting the same application, there are logistical challenges and potential data accuracy issues that could result from reporting by multiple financial institutions. For example, the Bureau understands that in some typical indirect lending situations, one application may be transmitted to several financial institutions to determine interest in purchasing an originated transaction, and requiring reporting from each of these financial institutions (even if the small business applicant is not aware of their involvement or the action taken by these institutions) would significantly increase reporting volumes for these types of transactions. Moreover, in this example, while this approach means a lack of visibility into purchase offers and an inability to compare them to the resulting credit contract, the Bureau believes that reporting of such data could undermine data quality and would provide only limited additional benefits where the purchase decisions are later accepted, declined, or altered by a different financial institution that ultimately presents (or does not present) a credit offer to the applicant. Thus, the Bureau believes data quality, along with the purposes of section 1071, will be better served if the financial institution with the last authority for setting the material terms of the covered transaction is the reporter.[790]

Final comment 109(a)(3)–1.i emphasizes that the determinative factor is not which financial institution actually made the last-in-time credit decision, but rather which financial institution had last authority for setting the material terms of the covered credit transaction, even if it did not actually exercise this authority in a particular case. For example, a financial institution that has the authority to modify the total loan amount prior to origination has the last authority for setting the terms of the covered credit transaction, even if it makes no changes to the total loan amount. The Bureau is adopting a categorical, rather than a case-by-case rule, to enable financial institutions to identify a reporting party at the outset of a transaction. The Bureau believes that this will help eliminate uncertainty and logistical challenges concerning which institution reports, and thus provide a more straightforward and administrable bright line.

This approach will also address requests for clarification from commenters. For example, one commenter suggested that the Bureau clarify that third-party review, even if for the purposes of telling the creditor that the third party will only purchase the post-origination loan under certain conditions, does not mean that third party/potential purchaser made the final credit decision. The Bureau believes that final comment 109(a)(3)–2.vii addresses this scenario, illustrating that where another financial institution has ultimate authority for setting the material terms of the covered credit transaction, the third party/potential purchaser does not report. In finalizing this approach, the Bureau is also removing the phrase ''final credit decision'' from § 1002.109(a)(3) because the phrase appears to have caused confusion and is not necessary to convey the Bureau's intentions regarding which financial institution is

[790] If the financial institution with last authority for setting the material terms of the covered credit transaction is not a covered financial institution, whether due to a statutory exemption (such as the one for motor vehicle dealers in section 1029) or other reasons, then the application is not reported under this rule.

required to report under various circumstances.

In addition, final comment 109(a)(3)–1.iii clarifies reporting obligations in circumstances where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction and where more than one financial institution denies the application or otherwise does not approve the application. In this circumstance, the reporting financial institution (the last financial institution with authority to set the material terms of the covered credit transaction) shall have a consistent procedure for determining how it reports inconsistent or differing data points for purposes of subpart B, such as reporting the denial reason(s) from the first financial institution that denied the covered application.

The Bureau believes that the revisions to § 1002.109(a)(3) and associated commentary will help ensure clarity and consistency from the outset regarding which entity has reporting responsibility in a variety of fact patterns involving multiple financial institutions. In addition, the Bureau believes that this approach advances section 1071's purposes by reducing logistical challenges and potential data accuracy issues resulting from reporting by multiple financial institutions on the same application.

In response to commenters who urged consistency with HMDA, the Bureau notes that it initially sought alignment with Regulation C given its understanding of how well the approach has worked in the residential mortgage context and the similarities that exist with various indirect lending scenarios in the small business lending context. While the Bureau's approach in final § 1002.109(a)(3) in many situations is consistent with Regulation C outcomes, it deviates in some ways because, unlike Regulation C, this final rule does not cover purchase transactions. In addition, the Bureau believes that commenters' concerns about alignment with HMDA are mitigated by the Bureau's decision to exclude reporting of all HMDA-reportable transactions, as set forth in final § 1002.104(b)(2).

Unlike section 1071, HMDA expressly contemplates data collection for loan purchases, and Regulation C thus requires financial institutions to report purchases of covered loans.[791] Moreover, Regulation C commentary clarifies that if more than one institution approved an application prior to closing or account opening and one of those institutions purchased the loan after closing, the institution that purchased the loan after closing reports the loan as an origination.[792] The preamble to the 2015 final HMDA rule explained that requiring that only one institution report the origination of a covered loan eliminates duplicative data.[793] Identical language was included in proposed comment 109(a)(3)–1.i.

Upon further consideration, the Bureau believes that Regulation C's approach involving a purchasing institution is incongruous with section 1071 requirements and thus the final rule adopts a different approach. As described in the section-by-section analysis of § 1002.104(b) above, purchases of covered credit transactions are not, in themselves, covered by the rule. Thus, the Bureau is removing language from proposed comment 109(a)(3)–1.i that would have required reporting by a purchasing financial institution that also approved an application prior to closing or account opening, and is instead placing the reporting obligation on the last covered financial institution with authority to set the material terms of the covered credit transaction. The Bureau believes that this approach is more broadly applicable to the small business financing context (particularly since the Bureau is excluding HMDA-reportable transactions) where there are some salient differences to the mortgage lending context.

For example, while there may also be intermediaries in a mortgage loan transaction, an intermediary typically does not have the discretion and authority to materially deviate from the terms expected by a secondary-market purchaser. In some small business lending contexts, even where a subsequent bona fide purchaser and holder in due course of a covered credit transaction has been identified, an intermediary may have the authority to sort through different purchase offers, select one, and present it to the applicant. Such an intermediary may also have the authority to change material terms of the covered credit transaction prior to closing, such as modifying the pricing terms, loan amount, or repayment duration. As the only party to interact with the applicant prior to closing, the intermediary can be the party with the most fair lending risk. The Bureau believes, given section 1071's statutory purposes, this last financial institution with the authority to set the terms of the small business's credit obligation should be the one to report on an application.

Indirect auto lending transactions are a common example of situations involving multiple financial institutions. It is common for motor vehicle dealers to assess specific credit information about the applicant, negotiate and set credit terms (such as the duration of the transaction), negotiate and charge for add-on products, and include loan pricing markups. Likewise, the dealer is typically the original creditor, executing and setting the terms of a retail installment sales contract with the customer, and then selling it to another financial institution. Even if the motor vehicle dealer interacts with several financial institutions to make a credit decision and originate a credit transaction, the dealer is typically the last entity with authority to set the material credit terms of the covered credit transaction. Final comments 109(a)(3)–2.vii and viii provide examples of such scenarios.

In some cases, a financial institution's purchase of the retail installment sales contract may not even occur until well after the contract has been signed and the vehicle has been driven off the lot. The fact that a contract may be conditioned on a financial institution's purchase of the contract at a later time does not alter the analysis. In these situations, often known as ''spot delivery,'' the applicant has met the underwriting and creditworthiness conditions used by the motor vehicle dealer and has been approved. The fact that a motor vehicle dealer has imposed other conditions on the execution of the contract (*i.e.,* a financial institution purchasing the contract) that are outside of the applicant's control does not change the conclusion. Once the contract has been signed and the terms of credit set, there is no credit decision on a covered *application* by a subsequent purchaser.

The Bureau recognizes that its rules generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[794] This provision is codified in final § 1002.101(a). The Dodd-Frank Act also specifies that in general, ''nothing

[791] *See* 12 U.S.C. 2803(a)(1) (stating that institutions ''shall compile and make available . . . the number and total dollar amount of mortgage loans which were (A) originated (or for which the institution received completed applications), or (B) purchased by that institution''); Regulation C § 1003.4(a) (stating that a financial institution ''shall collect data regarding . . . covered loans that it purchases for each calendar year'').

[792] Regulation C comment 4(a)–2.i.

[793] 80 FR 66128, 66173 (Oct. 28, 2015).

[794] 12 U.S.C. 5519.

in this title . . . shall be construed as modifying, limiting, or superseding the operation of any provision of Federal law, or otherwise affecting the authority of the Board of Governors . . . with respect to a [motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both].'' [795] Thus, consistent with this provision, if the motor vehicle dealer is the last financial institution with authority to set the material credit terms of the covered credit transaction, that application will not be reported under subpart B.

Relatedly, several commenters asserted that motor vehicle dealers are prohibited by the Board's Regulation B from asking for protected demographic information in order to furnish it to another financial institution for reporting under the Bureau's rule. As noted above, the Bureau believes that dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting 1071 data on behalf of other reporting financial institutions. But even in situations where the dealer is acting as a mere conduit, and thus may be collecting information on behalf of another financial institution, comment 5(a)(2)–3 to the Board's Regulation B states that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection.[796]

The Bureau appreciates the range of potential alternatives raised by commenters as to the entity that should be required to report data when a covered credit transaction involves multiple financial institutions, but is not implementing these alternative suggestions. For the reasons described above, the Bureau believes that the last financial institution with the authority to set the material terms of the covered credit transaction should be the one to report.

The Bureau believes that the final rule is also consistent with arrangements where an online lender partners with a bank and provides further clarity regarding who reports when multiple financial institutions are involved.

Commenters' concerns regarding reporting of insurance premium financing transactions are rendered moot by the Bureau's exclusion of such transactions from coverage under the rule. See the section-by-section analysis of § 1002.104(b)(3) for additional details.

Regarding farm credit institutions' request that the Bureau clarify that the rule does not apply to credit decisions made after loan approval, the Bureau has made clear in final § 1002.109(a)(3) and associated commentary that only the action taken on the *application* is reportable.

Regarding partial purchase interests and participation loans, as explained in the section-by-section analysis of § 1002.104(b), the Bureau has added commentary to clarify that a partial purchase of a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data. The Bureau believes that applications for covered credit transactions will generally be reported by one covered financial institution, *i.e.,* the financial institution that sold portions of the loan to other participants. The examples provided in final comments 109(a)(3)–2.ix and .x speak to such scenarios.

The Bureau further believes that the rule is consistent with loan syndication arrangements where multiple lenders come together to fund a large loan for a single borrower. Syndication is distinguishable from loan participations. In participations, the contractual relationship runs from the borrower to the lead bank and from the lead bank to the participants. In syndications, the borrower signs a loan agreement with multiple creditors, each of whom has a direct contractual relationship with the borrower. Usually, each creditor in a syndicated loan transaction receives its own promissory note from the borrower. In fact, the Farm Credit Administration legally distinguishes between the Farm Credit System's loan-making authority (which includes syndication transactions) and its participation authority.[797] The Bureau believes that syndication is typically used for large commercial projects and a limited number of reportable applications are likely to involve syndicated loans. The Bureau also understands that typical syndication arrangements have a syndicate agent/lead bank. If the lead bank has the last authority to set the material terms of the covered credit transaction, it has the reporting obligation.

The Bureau also believes that the rule is consistent with lending through Certified Development Companies (CDCs) for SBA loans. CDCs are nonprofit organizations that are certified by, but independent of, the SBA. SBA 504 loans involve two applications—one to a CDC and one to another participating SBA lender. Generally, the transaction begins with the applicant submitting an application to the CDC to obtain approval for up to 40 percent of a project's costs. Once the application is approved by the CDC, the applicant works with another lender—typically a bank—to apply for the other portion of the financing. The other lender's loan typically covers 50 percent of a project's cost and is secured by a first lien, while the CDC's loan covers up to 40 percent of the project's cost and is secured by a second lien. The CDC loan is backed by a 100 percent SBA-guaranteed debenture. The bank earns interest from the debenture, which it receives semi-annually. The borrower contributes equity of at least 10 percent, sometimes up to 20 percent, of the project cost. The CDC and the other lender separately underwrite the loan, and the terms and conditions on the CDC and bank loans may differ. Because both the CDC and the other lender make their own credit decisions on separate covered applications, they are each responsible for reporting the application covering their portion of the financing.

109(b) Financial Institution Identifying Information

As explained in the NPRM, beginning in 1989, Regulation C required financial institutions reporting HMDA data to use a discrete transmittal sheet to provide information on themselves separate from the loan/application registers used to submit HMDA data.[798] The 2015 HMDA final rule incorporated information previously submitted on the transmittal sheet into the regulatory reporting requirements.[799] The FFIEC publishes information on financial institutions that report HMDA data in

[795] 12 U.S.C. 5519(c).

[796] This language aligns with comment 5(a)(2)–3 in the Bureau's Regulation B, to which the Bureau is adding a reference to subpart B for additional clarity.

[797] *See* 69 FR 8407 (Feb. 24, 2004).

[798] *See* 54 FR 51356, 51361 (Dec. 15, 1989) (requiring financial institutions to use the transmittal sheet and loan/application register in appendix A).

[799] 80 FR 66128, 66526 (Oct. 28, 2015) (deleting appendix A and relocating its substantive requirements to § 1003.5(a)(3)). The information now required by Regulation C includes: (i) the financial institution's name; (ii) the calendar year the data submission covers; (iii) the name and contact information of a person who may be contacted with questions about the institution's submission; (iv) its appropriate Federal agency; (v) the total number of entries contained in the submission; (vi) its Federal taxpayer identification number; and (vii) its Legal Entity Identifier (LEI).

the HMDA Reporter Panel, which includes the required submission information provided by financial institutions under § 1003.5(a)(3), as well as other data derived from this information.[800]

The Bureau proposed to collect similar information regarding financial institutions that report small business lending data. Specifically, proposed § 1002.109(b) would have required that a financial institution provide the following information about itself as part of its submission: (1) its name; (2) its headquarters address; (3) the name and business contact information of a person who may be contacted with questions about the financial institution's submission; (4) its Federal prudential regulator, if applicable; (5) its Federal taxpayer identification number; (6) its LEI; (7) its Research, Statistics, Supervision, and Discount identification (RSSD ID) number, if applicable; (8) its parent institution information, if applicable (including the name, LEI, and RSSD ID number of its immediate parent entity and top-holding parent entity, if applicable); (9) the type of financial institution, chosen from a list provided; and (10) whether the financial institution is voluntarily reporting data.

The Bureau sought comment on its approach to collecting information on financial institutions, including each of the items listed in proposed § 1002.109(b)(1) through (10) as well as whether the Bureau should require the reporting of any other information on financial institutions. The Bureau did not receive any comments on the requirement to provide financial institution identifying information generally, although comments received regarding each of the items listed in proposed § 1002.109(b)(1) through (10), are discussed in turn below. The Bureau also received comments discussing the benefits and privacy risks of financial institution identifying information, which are discussed in part VIII below.

For the reasons set forth herein, the Bureau is finalizing § 1002.109(b) with modifications to move examples regarding when to report changed financial institution identifying information to new comment 109(b)–1 to streamline and ensure uniformity in the guidance, with revisions to § 1002.109(b)(3) to clarify which contact person's information must be provided, and to adjust the list provided in comment 109(b)(9)–1 based on comments received.

The Bureau believes it is appropriate to require each of these pieces of information regarding financial institutions reporting small business lending data. As a practical matter, the Bureau anticipates that this information will be provided by a financial institution when it initially sets up an account with the Bureau's small business lending data submission platform to allow it to file data as required by the rule. Thus, this information will exist in the Bureau's data submission system and will be updated by the financial institution as needed.

The Bureau believes that collecting a financial institution's name (as well as all the other identifying information in proposed § 1002.109(b)) is necessary to carry out, enforce, and compile data under section 1071, and will aid in fulfilling the purposes of section 1071. For both of section 1071's statutory purposes, the identity of the financial institution taking covered applications and originating covered credit transactions is critical as it will (1) make fair lending enforcement possible, and (2) make analyzing business and community development needs of small businesses more effective.

With the possible exception of the LEI (in final § 1002.109(b)(6) and (8)(ii) and (v)) in certain circumstances, the Bureau believes that financial institutions already have all the information that is required of them under final § 1002.109(b), and that being required to provide this information to the Bureau should not pose any particular difficulties or costs on financial institutions.

Paragraph 109(b)(1)

Proposed § 1002.109(b)(1) would have required a financial institution to provide its name. Regulation C (§ 1003.5(a)(3)(i)) requires financial institutions to provide their names when filing HMDA data, and the Bureau believed that a similar requirement would have been appropriate here.

The Bureau detailed several practical considerations for proposing to require a financial institution to provide its name, including identification for examination purposes and administration of the Bureau's website for data submissions. Additionally, the Bureau noted that it proposed in § 1002.110(c) that financial institutions' statutory obligation to make data available to any member of the public, upon request, pursuant to ECOA section 704B(f)(2)(B) would have been satisfied by the institutions' directing the public to the Bureau's website for this information. Without the financial institution's name (and other relevant identifying information), proposed § 1002.110(c) would not have satisfied this statutory requirement.

The Bureau received two comments on this aspect of the proposal from community groups, both of which supported § 1002.109(b)(1) as proposed. For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(1) as proposed.

Paragraph 109(b)(2)

Proposed § 1002.109(b)(2) would have required a financial institution to provide the physical address of its headquarters location. The headquarters address of a financial institution would provide geographic information that would aid in fulfilling the statutory purposes of section 1071, including, for instance, analyses of the connection between a financial institution's location and the business and community development needs where it operated. It would also help identify and differentiate financial institutions, particularly nondepository financial institutions, that have similar names.

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(2) as proposed.

Paragraph 109(b)(3)

Proposed § 1002.109(b)(3) would have required a financial institution to provide the name and business contact information of a person who may have been contacted with questions about the financial institution's data submission. The Bureau noted that Regulation C includes a similar requirement in § 1003.5(a)(3)(iii), and the Bureau believed it would have been appropriate to require such information here. In general, the Bureau found, from its experience with HMDA and Regulation C, that requiring the name and business contact information of a person who may have been contacted with questions generally facilitated communication in the event that follow-up on a submission is required.

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is generally finalizing § 1002.109(b)(3) as proposed. However, the Bureau is revising final § 1002.109(b)(3) to make clear that the contact reported is a person responsible for responding to Bureau or other regulator inquiries about the submission, rather than inquiries from the general public.

[800] *See, e.g.,* Fed. Fin. Insts. Examination Council, *HMDA Public Panel, https://ffiec.cfpb.gov/documentation/2017/panel-data-fields/* (last visited Mar. 20, 2023).

Paragraph 109(b)(4)

Proposed § 1002.109(b)(4) would have required a financial institution that is a depository institution to provide the name of its Federal prudential regulator, if applicable. Proposed comment 109(b)(4)–1 would have explained how to determine which Federal prudential regulator (*i.e.,* the OCC, the FDIC, the Board, or the NCUA) a financial institution should report. Proposed comment 109(b)(4)–2 would have provided guidance on when a financial institution would be required to report a new Federal prudential regulator, for instance, in the event of a merger or a change of charter.

The Bureau noted that Regulation C includes a similar provision in § 1003.5(a)(3)(iv), requiring financial institutions to identify the appropriate Federal agency. In the Regulation C context, the purpose of this requirement is to identify the agency to which a financial institution must report its HMDA data—often the financial institution's Federal prudential regulator for depository institutions.[801] For small business lending data, the Bureau believed a requirement to report a financial institution's Federal prudential regulator would be appropriate for different reasons. The reporting of a financial institution's Federal prudential regulator would enable analysts to more easily identify other information about a financial institution that its Federal prudential regulator makes publicly available, such as Call Report data; further, such additional data may be used by regulators to perform analyses of the characteristics of financial institution's data. Nondepository institutions generally do not have Federal prudential regulators and would not have reported one under this requirement.[802]

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(4) as proposed, but has moved the example in proposed comment 109(b)(4)–2 to new comment 109(b)–1.

Paragraph 109(b)(5)

Proposed § 1002.109(b)(5) would have required a financial institution to provide its Federal taxpayer identification number (TIN). Proposed comment 109(b)(5)–1 would have explained when a financial institution should report a new Federal TIN in the event that it obtained a new Federal TIN (for instance, because the financial institution merged with another financial institution and adopted the Federal TIN of the other financial institution). The Bureau noted that Regulation C § 1003.5(a)(3)(vi) requires financial institutions to report Federal TIN with their HMDA submissions, and the Bureau believed such a requirement would be appropriate here as well. A financial institution's Federal TIN may be used to identify other publicly available information on a financial institution, and combined with a financial institution's small business lending application register to enhance the types of analysis that can be conducted to further the two statutory purposes of section 1071.

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(2) as proposed, but has moved the example in proposed comment 109(b)(5)–1 to new comment 109(b)–1.

Paragraph 109(b)(6)

Proposed § 1002.109(b)(6) would have required a financial institution to provide its LEI. Proposed comment 109(b)(6)–1 would have explained what an LEI is and would have made clear that financial institutions that do not currently have an LEI must obtain one, and that financial institutions would have an ongoing obligation to maintain an LEI in order to satisfy proposed § 1002.109(b)(6).

The Bureau explained that an LEI is a unique, 20-digit identifier issued by an entity endorsed or otherwise governed by the Global LEI Foundation. Regulation C requires financial institutions to obtain and use an LEI, which facilitates the analysis of HMDA data and aids in the recognition of patterns by more precisely identifying financial institutions and affiliated companies.[803] The LEI also helps financial institutions that report HMDA data generate the universal loan identifier used to identify application or application-level records in Regulation C. Similarly, in the section 1071 context, a financial institution's LEI would also likely facilitate data analyses,[804] by helping the Bureau and other stakeholders better understand a financial institution's corporate structure. Proposed § 1002.107(a)(1) would have also required that financial institutions use their LEIs in creating unique identifiers for covered applications. The Bureau believed this, in turn, would result in more sophisticated and useful analyses of the financial institution's data.

The Bureau received a few comments on this aspect of the proposal. These commenters were supportive of proposed § 1002.109(b)(6), agreeing with the Bureau's assertion that an LEI would help facilitate analyses. One commenter stated that the Bureau needed to ensure data users could identify parent and affiliate connections. The comments also supported requiring financial institutions to provide LEI information, stating that it would be consistent with HMDA, as discussed in the proposal.

For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(6) as proposed. Regarding the comment requesting the Bureau make identification of parent and affiliate connections easier, the Bureau notes that it is requiring LEI information in part for this reason, as discussed in the proposal. As explained in comment 109(b)(6)–1, financial institutions are required to report the current LEI number, and if the financial institution does not currently possess one, to obtain one. Financial institutions also have an ongoing obligation to maintain their LEI number. As part of maintaining an LEI number, a financial institution must make sure the LEI number and associated information are current, including any relationship data. The Bureau believes that publication of a financial institution's LEI, as well as any parent and top parent LEIs, as applicable, will allow data users to identify these relationship connections.

Paragraph 109(b)(7)

Proposed § 1002.109(b)(7) would have required a financial institution to report its RSSD ID number, if applicable. The Bureau explained that an RSSD ID is a unique identifying number assigned to institutions, including main offices and branches, by the Federal Reserve System. All depository institutions know and regularly report their RSSD ID numbers on FFIEC regulatory forms. The Bureau believed that an RSSD ID would help data users link the data for

[801] 12 U.S.C. 2803(h).

[802] Additionally, while some nondepository institutions have Federal regulators, those Federal regulators may not meet the definition of Federal prudential regulator provided in comment 109(b)(4)–1 and this data point still may not be applicable. For example, while Farm Credit System institutions are regulated and supervised by the Farm Credit Administration, the Farm Credit Administration is not a Federal prudential regulator as defined in comment 109(b)(4)–1.

[803] 80 FR 66128, 66248 (Oct. 28, 2015) (noting that, despite the cost, the Bureau believed that the benefit of all HMDA reporters using an LEI justified the associated costs by improving the ability to identify the financial institution reporting the data and link it to its corporate family).

[804] *Id.* (''By facilitating identification, this requirement will help data users achieve HMDA's objectives of identifying whether financial institutions are serving the housing needs of their communities, as well as identifying possible discriminatory lending patterns.'').

a particular financial institution to other regulatory data, including the connections between a particular financial institution with other financial institutions. The Bureau believed that this additional information would result in more sophisticated and useful analyses of the financial institution's small business lending data.

Proposed comment 109(b)(7)–1 would have explained what an RSSD ID number is and how financial institutions that have one might find it. Financial institutions that do not have RSSD IDs, typically nondepository institutions, would not have been required to obtain them, and would report ''not applicable'' in that field.

The Bureau received one comment from a community group supporting this aspect of the proposal. For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(7) as proposed.

Paragraph 109(b)(8)

Proposed § 1002.109(b)(8) would have required a financial institution to provide certain information on its parent entities, if applicable. This information would have included the name, the LEI (if available), and the RSSD ID (if available) of the financial institution's immediate parent entity and the financial institution's top-holding parent entity.

Proposed comments 109(b)(8)–1 and –2 would have provided guidance on how to identify a financial institution's immediate parent entity and a financial institution's top-holding parent entity. Proposed comment 109(b)(8)–3 would have explained that a financial institution would have reported its parent entities' LEIs if they have them, but that no parent entity would be required to obtain an LEI if it did not already have one. Proposed comment 109(b)(8)–4 would likewise have explained that a financial institution would report its parent entities' RSSD ID numbers if they had them.

In the NPRM, the Bureau explained that it believed that the collection of information on a financial institution's structure would further both of the statutory purposes of section 1071. Data on a financial institution's organizational structure that is self-reported would be more accurate than would be the case if the Bureau attempted to generate such information from publicly available sources.[805]

The Bureau further explained that better structural information would, for instance, improve the accuracy of peer analyses, which would facilitate fair lending enforcement. The Bureau stated that analyzing trends over time would be useful for identifying institutions that may give rise to fair lending risk. Given structural changes to institutions over time, information that enables the identification of institutions consistently and accurately over time is important to this trend analysis.

In addition, the Bureau believed that information on a financial institution's structure would advance the business and community development purpose of section 1071 by facilitating the analysis of whether and how corporate structure impacts how a financial institution provides access to credit to small businesses. In particular, this structural information could be used to understand how regulation in one part of a corporate structure impacts unregulated entities within the same corporate group.

Proposed § 1002.109(b)(8) would have resulted in more accurate and comprehensive corporate structure information by requiring financial institutions to provide not only the name of one parent entity, but the immediate parent entity of the financial institution as well as the top-holding parent of the financial institution (for some financial institutions, this would be a bank holding company). For the reasons set out above in the section-by-section analyses of § 1002.109(b)(6) and (7), the reporting of LEI and RSSD ID of parent entities would improve the ability of regulators and other stakeholders to map out more precisely and fully the often-complex networks of a financial institution's corporate structure. This more detailed and accurate structural data, in turn, might be used to perform more sophisticated and useful analyses of the financial institution's small business lending data. In addition, this information would have helped the Bureau confirm whether data were appropriately being reported by financial institutions on behalf of their subsidiaries pursuant to proposed § 1002.109(a)(2).

With respect to proposed § 1002.109(b)(8), the Bureau sought comment on whether it should require any other parent entity information to be provided by financial institutions reporting data.

The Bureau received comments on this aspect of the proposal from a community group and a trade association. These commenters were supportive of proposed § 1002.109(b)(8). One commenter supported identifying the parent and top holder parent entities under proposed § 1002.109(b)(8)(i) and (iv). Both commenters supported the inclusion of LEI information for both the parent and top holder parent entities under proposed § 1002.109(b)(8)(ii) and (v). For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(8) as proposed.

Paragraph 109(b)(9)

Proposed § 1002.109(b)(9) would have required a financial institution to report the type of financial institution it is, selecting the applicable type or types of institution from a list in proposed comment 109(b)(9)–1. The comment would also have explained that a financial institution would select all applicable types. The list provided in the proposed comment included: (i) bank or savings association, (ii) minority depository institution, (iii) credit union, (iv) nondepository institution, (v) CDFI, (vi) other nonprofit financial institution, (vii) Farm Credit System institution, (viii) government lender, (ix) commercial finance company, (x) equipment finance company, (xi)

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[805] With respect to HMDA, the Bureau, on behalf of the FFIEC and HUD, does currently attempt to generate and publish information on filers, including parent company and top holder information obtained from the LEI provided. *See* Fed. Fin. Insts. Examination Council, *Public Panel—Data Fields with Values and Definitions, https://ffiec.cfpb.gov/documentation/2021/panel-data-fields/* (last visited Mar. 20, 2023). But the Bureau has encountered difficulties in using the LEI to obtain parent company and top holder information, and thus proposed for this rulemaking to require that it be provided directly by financial institutions.

From 1989 to 1998, Regulation C required financial institutions to report their parent entity information on transmittal sheets. 54 FR 51356, 51361, 51368 (Dec. 15, 1989) (adding the transmittal sheet requirement, including parent institution information, to appendix A to Regulation C); 63 FR 52140, 52141 (Sept. 30, 1998) (stating that the Board believed that the availability of information from the FFIEC website makes the continuation of the requirement for parent company information on the transmittal sheet unnecessary). In 2002, Regulation C again required financial institutions to report parent information on transmittal sheets on the grounds that data users asserted the importance of having the parent institution information associated with the HMDA data itself, rather than in a separate database provided by the National Information Center. 67 FR 7221, 7232 (Feb. 15, 2002).

In the 2014 HMDA NPRM, the Bureau proposed to continue requiring that financial institutions identify their parent companies. The Bureau stated that because information about parent companies was not yet available through the LEI, the Bureau believed it was necessary to maintain this requirement to ensure that financial institutions' submissions can be linked with those of their corporate parents. 79 FR 51731, 51861 (Aug. 29, 2014). However, required reporting of parent company information stopped under the 2015 HMDA final rule on the grounds that once the LEI is fully implemented, parent entity information was expected to become available. 80 FR 66128, 66248 (Oct. 28, 2015) (citing Fin. Stability Bd., LEI Implementation Grp., *Fourth Progress Notes on the Global LEI Initiative,* at 4 (Dec. 11, 2012), *http://www.financialstabilityboard.org/wp-content/uploads/r_121211.pdf?page_moved=1*) (noting that the LEI Implementation Group is developing proposals for additional reference data on the direct and ultimate parent(s) of legal entities and on relationship data more generally).

industrial loan company, (xii) fintech, and (xiii) other. Proposed comment 109(b)(9)–2 would have explained that a financial institution reports the type of financial institution as ''other'' where none of the enumerated types of financial institution appropriately describe the applicable type of financial institution, and the institution reports the type of financial institution as free-form text.

The Bureau believed that information regarding the type of financial institution reporting small business lending data would greatly assist in the analysis conducted by the Bureau and other data users. Information providing further details on types of financial institutions would help advance the statutory purposes of section 1071; fair lending analysts might use this information on the financial institution type (for instance, depository institutions compared to nondepository institutions) as a control variable for their analyses. The inclusion of this information may also assist in an assessment of the business and community development needs of an area as it may provide analysts a means of determining what types of financial institutions serve certain geographic areas.

In addition, the Bureau believed that this information, combined with the parent entity information required by proposed § 1002.109(b)(8), would offer more accurate and granular data on nondepository institutions within the same corporate group as depository institutions. The Bureau noted that, at the time of the NPRM, the National Information Center database, which contains information on the structure of corporate groups that contain banks and other financial institutions, provided little information on nondepository institutions. In connection with proposed § 1002.109(b)(8), information on corporate structure that financial institutions self-report could fill in reporting gaps, including more specific information on financial institution types.

With respect to proposed § 1002.109(b)(9), the Bureau sought comment on whether it should consider removing, modifying, or adding any types of financial institutions to the list in proposed comment 109(b)(9)–1, including in order to manage unique privacy interests (such as, for example, whether a category for captive finance companies that lend to applicants that share the same branding should be included on the list). The Bureau also sought comment on whether it should consider defining any of the types of financial institutions in the proposed list, in particular whether and how to define the term ''fintech.''

The Bureau received comments on this aspect of the proposal from several community groups and a software vendor. Generally, these commenters were supportive of proposed § 1002.109(b)(9), though some requested certain modifications. Two commenters stated that the use of ''fintech'' in the list of financial institution types in proposed comment 109(b)(9)–1 was not a clear descriptor, and that ''online lender'' would be a better term. One commenter also requested the Bureau make clear that selection of ''other'' as a type of financial institution does not qualify the financial institution for exemption from coverage of this rule. Additionally, the commenter requested the Bureau make clear that selection of multiple financial institution types from the list provided in proposed comment 109(b)(9)–1 is permitted. Finally, a commenter requested the Bureau require financial institutions to identify the types of products they offer, in addition to the type of financial institution.

For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(9) with a revision in comment 109(b)(9)–1 to replace the financial institution type ''fintech'' with ''online lender'' and to add commentary about how the Bureau may add additional financial institution types in the future. The Bureau agrees with commenters that using ''online lender'' as a financial institution type will help better identify the type of financial institution that is being described rather than ''fintech.'' As commenters noted, ''fintech'' has a wide variety of uses over different industries. That variety may make it difficult to determine what ''fintech'' means as a financial institution type and under what circumstances a financial institution must report ''fintech'' as one of their types. Using ''online lender'' as the financial institution type helps make clear the financial institution's business model is to conduct business primarily online. For example, an online lender would include a platform or peer-to-peer lender that generally only receives applications and originates loans through a website and that does not have in-person encounters with small businesses, such as accepting applications or having meetings with loan officers, at a physical office. In such a case, the financial institution would select ''online lender'' as the type of financial institution (in addition to any other applicable financial institution types listed in final comment 109(b)(9)–1).

For similar reasons as those discussed in the section-by-section analysis of § 1002.107(a) regarding the addition of comment 107(a)–4, the Bureau is also adding a comment in § 1002.109(b)(9) to facilitate flexibility and account for the evolution of small business lending market, identifying how the Bureau may add additional financial institution types in the future. Comment 109(b)(9)–3 provides that the Bureau may add additional types of financial institutions via the Filing Instructions Guide and related materials. Comment 109(b)(9)–3 refers financial institutions to the Filing Instructions Guide for any updates for each reporting year.

Regarding commenters' requests for clarity regarding selection of multiple financial institution types, and that selecting ''other'' does not exempt an institution from coverage under the rule, final comment 109(b)(9)–1 states a financial institution shall select *all* applicable types, confirming that multiple financial institution types should be selected if more than one type applies to the financial institution. Additionally, the Bureau notes that final § 1002.105 addresses institutional coverage under this rule. Financial institution type is not a determinative factor for coverage; in fact, an exempt institution (unless voluntarily reporting data pursuant to §§ 1002.107 through 1002.109 as discussed in comment 105(b)–6) would not be submitting information pursuant to § 1002.109 in the first instance. Final comment 109(b)(9)–2 explains the circumstances for which a financial institution is required, or permitted, to report ''other.''

Finally, the Bureau does not believe it is necessary to add a requirement for financial institutions to provide their product types as part of the financial institution identifying information, as suggested by one commenter. Section 1002.107(a)(5), as finalized, requires a financial institution to identify the credit type for each application or origination reported. This information, together with the other financial institution identifying information required pursuant to § 1002.109(b), will allow data users to identify the product types offered by each financial institution in the dataset.

Paragraph 109(b)(10)

Proposed § 1002.109(b)(10) would have required a financial institution to indicate whether it was not a covered financial institution under proposed § 1002.105(a) and was thus voluntarily reporting covered applications.

The Bureau believed it was important to be able to specifically identify these

institutions' transactions in the dataset. If reporting were restricted to only financial institutions required to report, the data would accurately reflect the overall population of financial institutions subject to the final rule. However, institutions that do not meet the rule's loan-volume threshold in proposed § 1002.105(b) could choose to voluntarily report small business lending data pursuant to proposed § 1002.5(a)(4)(vii) through (ix). Those institutions that voluntarily reported data might not be representative of all potential voluntary reporters and might differ from required reporters. Without a specific designation, it might not be possible to distinguish an institution voluntarily reporting data after a single year of exceeding the loan-volume threshold from an institution reporting because it had already exceeded the loan-volume threshold in two consecutive years. The Bureau believed that data users would benefit from being able to use this information as a control variable, resulting in better fair lending as well as business and community development analyses, to account for certain differences that might exist as between required and voluntary reporters.

The Bureau received one comment on this aspect of the proposal from a community group. The commenter supported inclusion of § 1002.109(b)(10), agreeing with the Bureau's assertion that data users will need to identify voluntary reporters. For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(10) as proposed.

109(c) Procedures for the Submission of Data to the Bureau

Proposed Rule

Proposed § 1002.109(c) and comment 109(c)–1 would have directed financial institutions to a publicly available website containing the Bureau's Filing Instructions Guide, which would have set out technical instructions for the submission of data to the Bureau pursuant to proposed § 1002.109. Regulation C § 1003.5(a)(5) contains a comparable provision, which directs users to a Bureau website that sets out instructions for the submission of HMDA data, and the Bureau believed a similar approach would be appropriate here.

The Bureau sought comment on this aspect of the proposal, including the provision of technical instructions for data submission via a Bureau website and how best to implement the provisions of this section in a manner that minimizes cost and burden particularly to small financial institutions while implementing all statutory obligations. The Bureau also sought comment on ways it could streamline reporting for small financial institutions.

Comments Received

The Bureau received comments from two lenders, several trade associations, and a community group concerning the Bureau's publication of a Filing Instructions Guide to assist lenders in their submission of small business lending data to the Bureau. A CDFI lender and two trade associations supported the publication of technical instructions for data submission in the Filing Instructions Guide, stating that it would greatly aid in complying with the rule. One of these commenters requested that the Bureau dedicate staff to provide answers that can be relied on, such that community banks could not be criticized or penalized during subsequent examinations.

A bank and several trade associations expressed concern about the possible timing for the Bureau's publication of its Filing Instructions Guide, noting the importance of receiving such instructions well in advance such that lenders could comply with the rule and provide accurate and reliable data. Two of these commenters requested that the Bureau release the Filing Instructions Guide at least six months before any required data collection begins.

A trade association inquired whether the Filing Instructions Guide for this regulation would be similar to the one for HMDA and Regulation C, and whether the Bureau would make the Filing Instructions Guide available for comment. A joint letter from community and business advocacy groups suggested that certain data categories for race and ethnicity be contained in the Filing Instructions Guide, so they could be adjusted from time to time to align any changes in the OMB's Federal Data Standards on Race and Ethnicity, rather than being codified in the commentary to this regulation.

Final Rule

The Bureau is finalizing § 1002.109(c) as proposed. The Bureau is developing a system to receive, process, and publish the data collected pursuant to this final rule. In doing so, the Bureau has benefitted from what it learned in its multiyear effort in developing the HMDA Platform, through which entities file data as required under HMDA and Regulation C. As it did in developing the HMDA Platform, the Bureau's ongoing work in developing the small business lending data submission system focuses on satisfying all legal requirements, promoting data accuracy, and reducing burden. The Bureau is publishing, concurrently with this final rule, a Filing Instructions Guide and related materials for financial institutions.[806] The Bureau does not believe proposed comment 109(c)–1 is necessary as it is duplicative of the regulatory text, and thus has removed it from the final rule.

ECOA section 704B(g)(1) authorizes the Bureau to prescribe rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. Section 704B(g)(3) provides for the Bureau to issue guidance to facilitate compliance with the requirements of section 1071. Here, final § 1002.109(c) is justified under both ECOA provisions because the issuance of the means of submitting data to the Bureau are both necessary to compile data pursuant to section 1071 and to facilitate compliance with section 1071.

The Bureau agrees with commenters that the Filing Instructions Guide will significantly facilitate compliance with section 1071. Regarding the request that the Bureau provide staff to answer questions about complying with the rule before the rule's compliance date, Bureau staff will be available after the publication of this final rule to provide guidance to lenders in complying with the rule. The Bureau will make other compliance and technical resources available as well, as described at the end of part I above.

The Bureau notes, in response to the question of whether the Filing Instructions Guide would be similar to the one for HMDA, that many aspects of the Filing Instructions Guide for this regulation are based on the HMDA guide. The Bureau does not believe it is necessary to request public comment on the Filing Instructions Guide, as it is a technical document that reflects the regulatory requirements of § 1002.107 and § 1002.109(b) such that data can be submitted to the Bureau's small business lending data submission platform. However, as with HMDA, various iterations of the Filing Instructions Guide will be published over time with changes based in part on feedback from financial institutions and third-party providers. Regarding the comment that certain data categories for race and ethnicity contained in the Filing Instructions Guide be adjusted from time to time to align any changes in the OMB's Federal Data Standards on

[806] *See https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/.*

Race and Ethnicity, the Bureau recognizes that it may need to adjust some data categories over time, but that the statute may not permit exact alignment with all future developments by another agency that is not itself implementing section 1071.

Other Reporting Issues

With respect to HMDA data, Regulation C § 1003.5(a)(1)(i) provides that a financial institution shall submit its annual loan/application register in electronic format to the appropriate Federal agency. Regulation C does not provide for the submission of HMDA data by unaffiliated third parties directly on behalf of financial institutions in the way that a parent institution may submit HMDA data on behalf of its subsidiary under § 1003.5(a)(2) and comment 5(a)–3. The Bureau understands from financial institutions that report HMDA data to the Bureau that most institutions use third-party software vendors in some way to help them prepare or submit their loan/application registers to the Bureau. The Bureau sought comment on whether it should permit third parties (such as financial software vendors) to submit to the Bureau a small business lending application register on behalf of a financial institution, including whether financial institutions should be required to designate third parties authorized to submit registers on their behalf.

Commenters did not directly address the topic of third-party submissions of small business lending application registers on behalf of financial institutions. One trade association, in the context of proposed § 1002.109, noted that its members rely on third-party vendors for many important business processes, and the contributions of such vendors to support financial institution innovation is important. Industry commenters, including trade associations and lenders, widely noted their reliance on third-party vendors for many important business processes in commenting on other sections of the proposed rule, as is noted, for instance, in the section-by-section analysis of § 1002.114(b). The commenter asked that the Bureau encourage vendors to develop solutions to help financial institution clients comply with section 1071.

The Bureau is finalizing § 1002.109 as proposed. While there is no explicit provision addressing financial institution use of service providers in connection with submission of applicant registers, informed by its HMDA experience, the Bureau is open to such submission, so long as it complies with all applicable provisions of the final rule, including the restrictions on disclosure of protected demographic data contained in final § 1002.110(e). In addition, the Bureau will continue to engage with vendors and industry to assess future demand for service provider use in this area. Regarding the comment asking the Bureau to encourage third-party solutions to help covered financial institutions comply with section 1071, the Bureau agrees and has engaged in outreach to third-party vendors, as discussed in part III above, since the issuance of the NPRM to facilitate their development of solutions to assist financial institutions in complying with this rule.

Section 1002.110 Publication of Data

Final § 1002.110 addresses several issues surrounding publication of small business lending data. First, final § 1002.110(a) addresses annual publication of application-level data on the Bureau's website, subject to modification and deletion decisions by the Bureau based on consideration of privacy interests. Second, final § 1002.110(b) states that the Bureau may compile and aggregate data submitted by financial institutions and may publish such compilations or aggregations as the Bureau deems appropriate. Third, final § 1002.110(c) requires a covered financial institution to publish on its website a statement that its small business lending data, as modified by the CFPB, are or will be available on the CFPB's website. Finally, final § 1002.110(d) provides when a covered financial institution shall make the notice required by final § 1002.110(c) available to the public and how long it shall maintain the notice on its website.

The Bureau is finalizing § 1002.110 to implement ECOA section 704B(f)(2)(B) and (C), which require the Bureau to adopt regulations addressing the form and manner that data are made available to the public, and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.110(b) pursuant to 704B(f)(3), which permits the Bureau to compile and aggregate small business lending data, and to publish such aggregate data.

110(a) Publication of Small Business Lending Application Registers and Associated Financial Institution Information

ECOA section 704B(f)(2)(C) requires the Bureau to annually make the small business lending data it receives from financial institutions available to the public in such form and in such manner as the Bureau determines by regulation.

Proposed Rule

Proposed § 1002.110(a) would have provided that the Bureau shall make available to the public generally the data reported to it by financial institutions pursuant to proposed § 1002.109, subject to deletions or modifications made by the Bureau if the Bureau determines that, based on the proposed balancing test, the deletion or modification of the data would advance a privacy interest.[807] The Bureau proposed to make such data available on an annual basis, by publishing it on the Bureau's website. The Bureau sought comment on its proposed approach to implementing ECOA section 704B(f)(2)(C).

Comments Received

In response to proposed § 1002.110(a), the Bureau received comments from a range of lenders, trade associations, community groups, individual commenters, and others. Many commenters supported the Bureau's proposal to make data available on an annual basis by publishing it on the Bureau's website. Some noted that publication of disaggregated data is critical to achieving the statutory purposes of section 1071. Some commenters indicated the Bureau should make clear that the Bureau *must* publish data annually, citing their concern that any discretion in data publication could allow for inconsistent data publication in the future. A commenter further supported publication on the Bureau's website, stating that it preferred the Bureau as the singular source for published data because it would ensure the data was uniform and consistent in data and publication formats, which would help to prevent obfuscation efforts by bad actors. The commenter noted that, based on their historical experience with HMDA data, without publication on the website, the public would need to request data from each financial institution individually and the data

[807] As discussed in part VIII below, the Bureau is not announcing how it will consider different factors when implementing its discretion to delete or modify application-level data before publication. The Bureau will continue to engage with stakeholders on publication and it intends to make final decisions only after that continued engagement and receipt of a full year of application data. Part VIII lays out the CFPB's preliminary views, in light of comments received on the balancing test articulated in the NPRM, on how to assess and protect privacy interests through modifications and deletion.

provided may not be in the same file format, may not be in an accessible file format, and the data may have variations in formatting, which could hide data anomalies or patterns of discrimination.

Some commenters opposed publication of disaggregated data entirely, citing various privacy risks, or otherwise preferred the Bureau publish small business lending data only in aggregate form.[808] Some commenters supported publication of disaggregated data publication, but also supported modifications in light of privacy risk.

Commenters also discussed timing of data publication. Some supported annual publication, as proposed. Others requested publication as soon as possible but did not suggest a specific schedule. Two requested quarterly data publication, and one suggested publication every six months. A few commenters requested the Bureau also establish a deadline by which it would annually publish data; some did not suggest a specific deadline while others requested a fall publication deadline, shortly after data are submitted to the Bureau, in order to maximize the data's currency and usefulness.

Many commenters requested the Bureau ensure that published data are accessible to the general public. These commenters noted that the data should be easily searchable or filterable so that anyone with an interest in fair lending can use and understand the data. Some of these commenters noted that data can sometimes be inaccessible if provided in a very technical manner, such that only those with expertise in data analysis can understand and use the data. One commenter suggested that this concern was of particular concern for ethnicity and race data. Additionally, a few commenters pointed to previous Bureau data releases as examples of publication that worked well, such as the consumer complaint database, and those that they would prefer the Bureau not follow, including the current data tool used to publish HMDA data.

Some commenters requested the Bureau add disclaimers or explanations to data fields when the data is published to aid in user understanding about the data, such as data limits, caveats, or exceptions. For example, several commenters requested the Bureau add a disclaimer to data submitted by Farm Credit System lenders identifying their unique statutory coverage limitations and dividend structures. Other commenters requested a disclaimer that identifies when ethnicity, race, and sex data was collected on the basis of visual observation pursuant to proposed § 1002.107(a)(20). One commenter requested a publication disclaimer for amount of credit applied for and amount of credit approved or originated, that would explain that applicant-provided information can be arbitrary and may not match the amount of credit approved or originated. Another commenter requested that the Bureau include a disclaimer for private label credit because, they said, private label credit should not be compared to other small business credit products because it is based on the availability of the financial institution's retail partners and those partners' geographic locations. Conversely, one commenter requested the Bureau not add any disclaimers to pricing data points on the grounds that they would cause further misunderstanding of the data.

Two commenters suggested the CFPB establish an advisory group to offer advice or it should seek public feedback on ways to improve publication and enhance data accuracy. One commenter asked that it establish an authorization program to certify as ''CFPB-approved'' particular data products and programs created from 1071 data. Another commenter stated that when publishing the data, the Bureau should ensure that the data are organized by institution and credit product type as a default setting, rather than only by institution, to ensure proper comparison by data users.

Final Rule

For these reasons set forth herein, the Bureau is finalizing § 1002.110(a) largely as proposed. As finalized, subject to modification or deletion decisions made by the Bureau to advance privacy interests as discussed in part VIII below, the Bureau has committed itself in § 1002.110(a) to making application-level data available to the public via annual publication. Because publication is subject to any modification or deletion decisions made by the Bureau pursuant to its privacy analysis, the Bureau concludes that § 1002.110(a) itself adequately addresses commenter concerns about privacy risks. As discussed in part VIII, the CFPB is also of the view that application-level data have significant disclosure benefits that will facilitate the fair lending and business and community development purposes of section 1071. This determination strongly supports disclosure of the data in a disaggregated format to the extent consistent with the privacy interests. As a result, the Bureau does not intend to publish only aggregate data compilations pursuant to § 1002.110(b).

Publication of application-level data on an annual basis is appropriate. While a few commenters proposed shorter cycles, the Bureau would not have new data to publish more frequently because, as discussed in the section-by-section analysis of § 1002.109(a), the Bureau is requiring financial institutions to report annually. Further, the Bureau concludes that until it obtains a full year of reported data and performs a full privacy analysis, as discussed in part VIII below, it cannot know with certainty the amount of time it will take to analyze the privacy risks, and make modifications or deletions as needed, particularly for the first publication of application-level data. Accordingly, the final rule does not set a publication deadline.

Because the Bureau is still creating its data publication platform, it takes under advisement commenter concerns about accessibility and ease of use, and will make efforts to be responsive to those comments as the platform and user tools are built. The Bureau is also taking under advisement suggestions on how to organize and display data.

Similarly, the Bureau is taking under advisement requests to make data limitations, such as related to credit or financial institution type, clear to data users. But it does not intend to state that the amount of credit applied for and amount of credit approved or originated may have discrepancies because the applicant underestimated their credit limitations. As discussed in the section-by-section analyses of § 1002.107(a)(7) and (8) above and in the NPRM, there are several other reasons for discrepancy between the amount an applicant applies for and the amount for which they are approved. A disclaimer asserting the discrepancy may be attributable to applicant overconfidence would minimize the serious risk of fair lending concerns that these data points may otherwise identify. For similar reasons, the Bureau does not intend to add disclaimers to pricing data.

Finally, the Bureau notes that while it does not have an advisory group dedicated to small business lending data publication, there are several avenues through which it expects to receive feedback from the public on small business lending data in the future, including the Bureau's Advisory Committees, as well as any regulatory or technical assistance function created for data submitters. The Bureau also intends to pursue continued public engagement, including with respect to its intended privacy assessment and associated modification and deletion decisions, as discussed in part VIII below. Further, the Bureau will not

[808] *See also* part VIII below.

approve or endorse any particular entity's use of or republication of data, although entities may use and republish the data once it is made available in the public domain pursuant to this rule. Because the statutory purposes and noted benefits of data publication (as discussed herein) include providing information to the public to identify and address fair lending issues in the small business lending market, the Bureau encourages data users to analyze the data to address the statutory purposes. It also encourages technologists to develop tools to assist in this analysis.

110(b) Publication of Aggregate Data

ECOA section 704B(f)(3) provides that the Bureau may ''compile and aggregate data collected under this section for its own use'' and ''make public such compilations of aggregate data.''

Proposed § 1002.110(b) would have provided that the Bureau may compile and aggregate data submitted by financial institutions pursuant to proposed § 1002.109, and make any compilations or aggregations of such data publicly available as the Bureau deems appropriate. The proposal explained that publication of certain such compilations and aggregations would provide useful data to the public to supplement the Bureau's publication of application-level data. In particular, the Bureau noted the importance of providing aggregations for the application-level data fields that may be modified or deleted before publication to protect privacy interests.

The Bureau received comments on this aspect of the proposal from several community groups, business advocacy groups, and a software provider. These commenters were supportive of proposed § 1002.110(b), though some requested modifications. Several commenters requested the Bureau make specific aggregations available, based on their experience with HMDA or for specific user purposes. Additionally, two commenters requested that the Bureau commit to annual publication of aggregate data.

For the reasons set forth herein, the Bureau is finalizing § 1002.110(b) as proposed. It is unnecessary for the rule to commit to specific timing for publication of aggregate data or to identify the specific aggregations that it will make available. ECOA section 704B(f)(3) provides the Bureau discretion to compile and aggregate data collected, and to make those aggregations publicly available. Any aggregations compiled using the data collected will be dependent on multiple factors, including privacy considerations, the volume of data, and the trends in the data received. For these reasons, the Bureau believes it is important to preserve flexibility as to both the content and timing of any aggregate data publications, although it anticipates publishing aggregate data before releasing application-level data.

110(c) Statement of Financial Institution's Small Business Lending Data Available on the Bureau's Website and 110(d) Availability of Statements

Proposed Rule

ECOA section 704B(f)(2)(B) requires that the data compiled and maintained by financial institutions shall be ''made available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau.''

Proposed § 1002.110(c) would have required that a covered financial institution make available to the public on its website, or otherwise upon request, a statement that the covered financial institution's small business lending application register, as modified by the Bureau pursuant to proposed § 1002.110(a), is or will be available on the Bureau's website.

Proposed § 1002.110(c) would have also stated that a financial institution shall use language provided by the Bureau, or substantially similar language, to satisfy this requirement to provide a statement. Proposed comment 110(c)–1 would have provided model language that a financial institution could use to comply with proposed § 1002.110(c). Proposed comment 110(c)–2 would have provided guidance to financial institutions that do not have websites.

Proposed § 1002.110(d) would have provided that a covered financial institution shall make the notice required by proposed § 1002.110(c) available to the public on its website when submitting its small business lending application register to the Bureau pursuant to proposed § 1002.109(a)(1), and shall maintain the notice for as long as it has an obligation to retain its small business lending application registers pursuant to proposed § 1002.111(a).

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(f)(3), including how best to implement proposed § 1002.110(c) and (d) in a manner that minimizes cost and burden particularly on small financial institutions while implementing all statutory obligations.

Comments Received

In response to proposed § 1002.110(c) and (d), the Bureau received comments from a number of lenders, trade associations, and community groups, along with one individual commenter. A majority of those commenters supported the proposed approach to making financial institutions' data available to the general public on the Bureau's website, citing reasons including reduction of compliance burden, cost, and redundant data. However, a few commenters argued that covered financial institutions should be required to make their data available on their own websites. One such commenter asserted that financial institutions (particularly large banks) should be required to make their data available within 30 days of a request to do so, which they stated has worked well for HMDA.[809] This commenter also stated that if the Bureau were to adopt proposed § 1002.110(c), it should require quarterly public data reporting. An individual commenter suggested that without a requirement that financial institutions release their own data, the public would have no way to confirm the ''legitimacy'' of data released by the Bureau.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.110(c) with a minor modification and § 1002.110(d) as proposed, to implement ECOA section 704B(f)(2)(B). The Bureau's revision to § 1002.110(c) removes the specific URL at which the Bureau will publish 1071 data on its website. The Bureau has made several small revisions to the notice language set forth in comment 110(c)–1 for clarity. The Bureau is also adopting new comment 110(c)–3 to explain that the Bureau may modify the location specified in the notice language provided in comment 110(c)–1, at which small business lending data are available, via the Filing Instructions Guide and related materials.

The approach set forth in final § 1002.110(c) and (d) will reduce potential burdens on financial institutions associated with publishing modified data. It will also reduce privacy risks resulting from errors by individual financial institutions implementing any modifications or deletions required by the Bureau, and would be more efficient overall. Regulation C (§ 1003.5(c)(1)) implements a similar statutory requirement regarding the form of data reporting and requires financial institutions to direct any public requests

[809] The Bureau's approach to § 1002.110(c) aligns with Regulation C § 1003.5(c)(1). However, prior to the 2015 HMDA Amendments, covered financial institutions were required to make their HMDA data available upon request.

for HMDA data they receive to the Bureau. A similar provision is appropriate here to maintain continuity across reporting regimes, and because this centralized approach will help ensure consistent implementation of any modifications or deletions made to protect privacy interests. Commenters' concerns regarding the timing of financial institutions making their own data available are thus rendered moot.

The Bureau does not believe that financial institutions should be required to make their data available within 30 days of a request to do so. Such requests can be fulfilled as easily by accessing small business lending application registers on the Bureau's website, after modifications or deletions are made to protect privacy interests. Nor does the Bureau believe that quarterly public data reporting is appropriate, as discussed in the section-by-section analysis of § 1002.110(a) above. Further, the Bureau does not believe that a requirement that financial institutions release their own data is necessary to confirm the ''legitimacy'' of data released by the Bureau. The Bureau will conduct examinations of unredacted small business lending data, and will make application-level data (subject to privacy modifications and deletions) available for review and analysis by members of the public.

110(e) Further Disclosure Prohibited

ECOA section 704B(e) and (f) require financial institutions to compile and maintain records of information provided by applicants and to submit such data annually to the Bureau. However, the statute does not expressly address what a financial institution may do with data collected pursuant to section 1071 for purposes other than reporting such data to the Bureau, nor did the proposal specify restrictions on a financial institution's use or disclosure of data collected pursuant to this rulemaking for purposes other than collecting, maintaining, and reporting such data to the Bureau.

The Bureau received comments from individuals and industry that raised concerns about potential misuse of protected demographic data provided pursuant the small business lending rulemaking. For example, one commenter expressed concern that LGBTQ community members are at risk that their data may be used for unintended and harmful purposes outside of 1071 data collection. Commenters further noted that applicants may be hesitant to provide certain information if the data can be inappropriately used. The Bureau also received comments from industry commenters urging that protected demographic data be reported directly to the Bureau, stating, in part, that such a regime would likely increase response rates because applicants would not be concerned that financial institutions would improperly use the data.

In order to safeguard protected demographic data against possible misuse and encourage applicant responses, and in response to comments, the Bureau is adding new § 1002.110(e) pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. New § 1002.110(e) prevents misuse of applicants' protected demographic information in two ways.

First, § 1002.110(e)(1) prohibits a financial institution from disclosing or providing to a third party the protected demographic information it collects under subpart B except in limited circumstances. First, a financial institution may disclose such information to a third party to further compliance with ECOA or Regulation B. This exception permits disclosure, for example, to a third-party service provider that is assisting the financial institution in auditing or submitting small business lending data to the Bureau. This exception also permits disclosure to a third party for uses consistent with how such protected demographic information may currently be used under ECOA and Regulation B, such as to conduct internal fair lending testing or to extend special purpose credit programs. Section 1002.110(e)(1) further states that a financial institution may disclose or provide protected demographic information collected pursuant to this rule as required by law.

Second, § 1002.110(e)(2) prohibits further redisclosure of protected demographic information by a third party that initially obtains such information for the purposes of furthering compliance with the ECOA and Regulation B. In such situations, the third party is prohibited from disclosing the protected demographic information except to further compliance with ECOA and Regulation B or as required by law.

Section 1002.111 Recordkeeping

Final § 1002.111 addresses several aspects of the recordkeeping requirements for small business lending data. First, final § 1002.111(a) requires a covered financial institution to retain evidence of its compliance with subpart B, which includes a copy of its small business lending application register, for at least three years after the register is required to be submitted to the Bureau pursuant to final § 1002.109. Second, final § 1002.111(b) requires a financial institution to maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under final § 1002.107(18) and regarding the ethnicity, race, and sex of the applicant's principal owners under final § 1002.107(19). Finally, final § 1002.111(c) requires that, in compiling, maintaining, and reporting data pursuant to final § 1002.109 or § 1002.111(a) or (b), a financial institution shall not include personally identifiable information concerning any individual who is, or is connected with, an applicant.

The Bureau is finalizing § 1002.111 to implement ECOA section 704B(f)(2)(A), which requires financial institutions to compile and maintain data for at least three years; 704B(b)(2), which requires financial institutions to maintain a record of the responses to the inquiry required by 704B(b)(1), separate from the application and accompanying information; and 704B(e)(3), which provides that in compiling and maintaining data, a financial institution may not include personally identifiable information concerning an individual who is, or is connected with, an applicant. The Bureau is also finalizing § 1002.111 pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071.

111(a) Record Retention

Proposed Rule

ECOA section 704B(f)(2)(A) requires that information compiled and maintained under section 1071 be retained for not less than three years after the date of preparation. Proposed § 1002.111(a) would have required that a financial institution retain a copy of its small business lending application register for three years after the register is submitted to the Bureau pursuant to proposed § 1002.109. By way of comparison, under Regulation C, financial institutions must retain the loan/application registers that they submit to the Bureau for three years.[810] This reflects the requirement in HMDA itself that a loan/application register be

[810] Regulation C § 1003.5(a)(1).

retained for three years after it is made available.[811]

Proposed comment 111(a)–1 would have provided examples of what evidence of compliance with the proposed provision is likely to include. Proposed comment 111(a)–2 would have required that a creditor that is voluntarily, under proposed § 1002.5(a)(4)(vii) and (viii), collecting information pursuant to subpart B but is not required to report that data to the Bureau, complies with proposed § 1002.111(a) by retaining evidence of compliance with subpart B for at least three years after June 1 of the year following the year that data was collected.

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(f)(2)(A), including how best to implement proposed § 1002.111(a) in a manner that minimizes cost and burden particularly on small financial institutions while implementing all statutory obligations.

Comments Received

The Bureau received comments from several lenders, trade associations, and others on this aspect of its proposal. One trade association supported the proposed requirement that financial institutions retain their data for at least three years after submission to the Bureau, noting that this retention period is congruent with the five-year period that banks must maintain data under the Bank Secrecy Act. A CDFI lender agreed the proposal was reasonable and stated that it did not foresee issues with compiling and maintaining data for three years.

A trade association, a business advocacy group and a software vendor recommended that the Bureau instead align the recordkeeping requirement with ECOA's 25-month retention period rather than HMDA's three-year retention period. The software vendor asserted that the proposed provision appeared to be in conflict with ECOA's 12-month record retention period for commercial loans under $1 million. The trade association recommended avoiding requirements that would necessitate the acquisition of costly record retention systems. Another industry commenter said that the proposed provision would unnecessarily burden community banks.

A joint letter from two trade associations recommended that the Bureau expressly state that financial institutions without a reporting obligation under the rule, in particular motor vehicle dealers, are not required to comply with the other obligations in the rule, including the recordkeeping requirements of the rule.

Final Rule

The Bureau is finalizing § 1002.111(a) as proposed. The Bureau is also finalizing the associated commentary with an adjustment as discussed below. The Bureau is finalizing this provision to implement section 1071's recordkeeping requirement as set forth in ECOA section 704B(f)(2)(A).

Regarding commenters' requests that the Bureau should adopt either existing Regulation B's 25-month retention period for consumer credit or its 12-month retention period for business credit, rather than a three-year period, ECOA section 704B(f)(2)(A) mandates that the Bureau adopt a three-year recordkeeping requirement for applications for small business loans. In any case, the Bureau notes that, in contrast to these commenters, at least one lender suggested that § 1002.111(a) was congruent with other recordkeeping requirements applicable to certain extensions of credit.[812] The Bureau is finalizing comment 111(a)–1 (regarding evidence of compliance) with an additional sentence to reiterate that final § 1002.111(a)'s three-year record retention requirement applies to any records covered by § 1002.111(a), notwithstanding the more general 12-month retention period for records related to business credit specified in existing § 1002.12(b). The Bureau is finalizing comment 111(a)–2 (regarding record retention for creditors that voluntarily collect data under § 1002.5(a)(4)(vii) and (viii)) as proposed.

The Bureau acknowledges commenters' concerns that this provision would necessitate the acquisition of costly record retention systems or about its impact on community banks, but does not believe that further adjustments would be appropriate. While financial institutions may incur added expenses in complying with final § 1002.111(a), the provision does not itself suggest or mandate that lenders must acquire new record systems; the provision simply requires that financial institutions adjust their procedures if they do not already retain certain records for the period specified in § 1002.111(a). In any case, as noted above, final § 1002.111(a) implements the record retention period set forth in the statute.

Regarding the comment concerning the obligations of financial institutions that are not required to report data under the rule, the Bureau agrees that a financial institution that is not covered by the rule is not subject to its provisions, including the recordkeeping provisions. However, a covered financial institution must keep records in accordance with § 1002.111(a). In order to satisfy its own recordkeeping obligations, a covered financial institution must ensure that it has obtained the necessary records from third parties through which it receives applications or ensure that those third parties keep adequate records on its behalf.

111(b) Certain Information Kept Separate From the Rest of the Application

Proposed Rule

ECOA section 704B(b)(2) requires financial institutions to maintain a record of the ''responses to [the] inquiry'' required by 704B(b)(1) separate from the application and accompanying information. Consistent with the approach the Bureau is finalizing as set forth in E.2 of the *Overview* to this part V, the Bureau proposed to interpret the term ''responses to such inquiry'' in 704B(b)(2) to be the applicant's responses to inquiries regarding protected demographic information—that is, whether the applicant was a minority-owned business or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners.

Proposed § 1002.111(b) would have stated that a financial institution shall maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries to collect data pursuant to proposed subpart B regarding whether an applicant for a covered credit transaction is a minority-owned business under proposed § 1002.107(a)(18) or a women-owned business under proposed § 1002.107(a)(19), and regarding the ethnicity, race, and sex of the applicant's principal owners under proposed § 1002.107(a)(20).

Proposed comment 111(b)–1 would have explained that a financial institution may satisfy this requirement by keeping an applicant's responses to the financial institution's request pursuant to proposed § 1002.107(a)(18) through (20) in a file or document that is discrete or distinct from the application and its accompanying information. For example, such information could be collected on a piece of paper that is separate from the rest of the application form. In order to satisfy the requirement in proposed

[811] 12 U.S.C. 2803(j)(6).

[812] *See, e.g.,* 31 CFR 1010.410(a) and 1010.430(d).

§ 1002.111(b), proposed comment 111(b)–1 would have clarified that an applicant's responses to the financial institution's request pursuant to proposed § 1002.107(a)(18) through (20) need not be maintained in a separate electronic system, nor need they be removed from the physical files containing the application. However, the financial institution may nonetheless need to keep this information in a different electronic or physical file in order to satisfy the requirements of proposed § 1002.108.

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(b)(2), including how best to implement proposed § 1002.111(b) in a manner that minimizes cost and burden, particularly on small financial institutions, while implementing all statutory obligations. The Bureau also sought comment on whether, for financial institutions that determine that underwriters or other persons should have access to applicants' demographic information pursuant to proposed § 1002.108(b), it should likewise waive the requirement in proposed § 1002.111(b) to keep that information separate from the application and accompanying information.

Comments Received

A number of lenders and trade associations commented on the proposed requirement that protected demographic information be kept separate from application or loan files. A CDFI lender said the proposal was reasonable and did not foresee issues with maintaining demographic information separate from applications. A trade association, while claiming proposed § 1002.111(b) would be difficult to comply with, acknowledged that the provision was mandated by section 1071. Another trade association agreed with the Bureau that ECOA section 704B(b)(2) should be interpreted as referring to applicants' responses to the inquiries regarding minority-owned and women-owned business status in proposed § 1002.107(a)(18) and (19), as well as the ethnicity, race, and sex of applicant's principal owners in proposed § 1002.107(a)(20). A joint letter from two trade associations supported the limitation on accessing protected demographic information but expressed concern about the effort and cost it would take to segregate and limit this information and ensure the accuracy of reports and files that must be maintained. These trade associations suggested that all regulations and guidance related to record retention be consistent with the FTC's newly amended Gramm-Leach-Bliley Safeguards Rule and Privacy Rule.

A trade association and a business advocacy group requested clarifications to improve feasibility and reduce technical challenges, expressing concern that compliance with proposed § 1002.111(b) could require expensive technical solutions to separate protected demographic information from applications in different electronic or physical files. One sought clarity as to what proposed comment 111(b)–1 meant, stating that, to satisfy § 1002.108, some financial institutions may need to keep protected demographic information in a different electronic or physical file.

Some industry commenters opposed the proposal on the grounds of cost, complexity and practicality. A few of these commenters argued that proposed § 1002.111(b) would add unnecessary cost and complexity to compliance and would make audits of data more difficult. Others asserted the provision would be difficult to implement or unworkable. One commenter stated that this requirement would impact small lenders in particular and would increase ongoing costs.

Several industry commenters requested that the Bureau exercise exemption authority to exempt all lenders from having to comply with this provision on the grounds that it would make examinations and audits more cumbersome and costly because demographic information would need to be retrieved from separate files. Commenters also requested that, to remain consistent with proposed § 1002.108(b), the Bureau waive this requirement for financial institutions that determine that underwriters or other persons should have access to applicants' demographic information. They also stated that both provisions were operationally burdensome without any benefit, and that if a firewall was infeasible, so was the proposed recordkeeping provision.

Several industry commenters requested that the Bureau not prohibit the collection of demographic information on the same form as the rest of the application, explaining that such a prohibition would disrupt SBA's 7(a) loan process, and because section 1071 itself does not prohibit including demographic questions on an application form; rather, it requires "recording" the information separately. A bank also that such a prohibition would disrupt loan processes and data integrity audits. Another bank requested that the Bureau not specify that protected demographic information be kept in a separate file, which it said would be costly and burdensome for financial institutions, but rather that the Bureau leave to lenders how to comply with this provision.

A bank and a trade association asserted that proposed § 1002.111(b) was not feasible or necessary, and noted that Regulation C does not require lenders to keep demographic information separate from mortgage loan files. They also asserted that there was no evidence of violations of Regulation B because demographic information was not kept separate from loan files. Another bank requested that the Bureau align the requirements of HMDA and section 1071 by waiving § 1002.111(b) for applications reportable under both regimes.

Final Rule

The Bureau is finalizing § 1002.111(b) with adjustments to reflect updated cross-references to other portions of the final rule and to refer to LGBTQI+-owned businesses along with women- and minority-owned businesses, as per final § 1002.107(a)(18). The Bureau is also finalizing the comment 111(b)–1 with one adjustment as discussed below, and the Bureau is adding a new comment 111(b)–2.

As discussed in detail above in part V.E.2, the Bureau believes the best reading of the statutory provisions that mention the inquiry made under ECOA section 704B(b)(1)—in 704B(b)(2) as well as in 704B(c) regarding the right to refuse and 704B(d) regarding the firewall—is that they refer to applicants' responses to the inquiries regarding protected demographic information: minority-owned, women-owned, and LGBTQI+-owned business statuses in final § 1002.107(a)(18) and the ethnicity, race, and sex of applicants' principal owners in final § 1002.107(a)(19). Each of these data points require financial institutions to request demographic information that has no bearing on the creditworthiness of the applicant. Moreover, a financial institution generally could not inquire about this demographic information absent section 1071's mandate to collect and report the information, and ECOA prohibits a creditor from discriminating against an applicant on the basis of the information. The Bureau accordingly believes that the best effectuation of congressional intent is to apply section 1071's special-protection provisions to this demographic information, regardless of whether the statutory authority to collect it originates in 704B(b)(1) (women-owned business status and minority-owned business status), 704B(e)(2)(G) (race, sex, and ethnicity of principal owners), or

704B(e)(2)(H) (LGBTQI+-owned business status, which is additional data that the Bureau has determined would aid in fulfilling the purposes of section 1071). The Bureau similarly believes that Congress did not intend these special protections to apply to any of the other applicant-provided data points in final § 1002.107(a), which the financial institution is permitted to request whether or not it is covered under section 1071, which are not the subject of Federal antidiscrimination laws, and many of which financial institutions already collect and use for underwriting purposes.

The Bureau does not believe it would be appropriate to modify the statutory requirements implemented in final § 1002.111(b) (or elsewhere in § 1002.111), as requested by some commenters, for consistency with the FTC's newly amended Gramm-Leach-Bliley Safeguards Rule[813] and Privacy Rule.[814] Commenters did not identify any inconsistency between § 1002.111 and the requirements of the Gramm-Leach-Bliley Act.[815] The Bureau notes that the privacy and data security provisions of these rules apply to consumer information, and the Gramm-Leach-Bliley Act defines consumer to mean an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes. The Bureau is finalizing comment 111(b)–1 with updated cross-references to other portions of the final rule and additional text explaining that while § 1002.111(b) does not always require that a financial institution maintain certain information in separate physical or digital files, a financial institution may nonetheless as a practical matter need to keep this information in a different electronic or physical file in order to satisfy the requirements of § 1002.108(b) to establish and maintain a firewall. Final comment 111(b)–1, as revised, is intended to clarify, and facilitate compliance with, the statutory directive that financial institutions must keep certain information separate from the credit application. The Bureau is also adding comment 111(b)–2 to the final rule, which states that a financial institution is permitted to maintain information regarding the applicant's number of principal owners pursuant to final § 1002.107(a)(20) with an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19). The Bureau believes that as a practical matter, the demographic information that financial institutions would have to maintain separately would inherently and necessarily include the applicant's number of principal owners. For example, if an applicant had three principal owners, the separately maintained demographic information would necessarily contain three sets of responses to questions about principal owners' race, sex and ethnicity, even if no part of the separately maintained information explicitly listed ''3'' as the information responsive to § 1002.107(a)(20).

Regarding comments seeking further clarification of § 1002.111(b) and comment 111(b)–1, the Bureau intended in these provisions to provide financial institutions with flexibility in complying with § 1002.111(b), which some industry commenters favored. The Bureau believes that some commenters overstate the complexity of § 1002.111(b); several appeared to interpret this provision as requiring financial institutions to create separate physical or digital files in all instances. This is contrary to proposed comment 111(b)–1, which explicitly states that the demographic information need not be maintained in a separate electronic system, nor removed from the physical files containing the application. The Bureau's intent was to acknowledge that different lenders may implement § 1002.111(b) in varying ways, depending on how they choose to comply with the firewall requirement. For instance, a lender that complies with § 1002.108(b) may determine that to keep demographic information from underwriters and other employees, it must maintain such information in a separate file from the application, rather than on a separate piece of paper in the same file as the application. However, for those financial institutions that, pursuant to § 1002.108(c), determine it is not feasible to limit access to an applicant's protected demographic information, the Bureau believes that compliance with ECOA section 704B(b)(2), as implemented in § 1002.111(b), does not necessitate maintaining such information in separate files.

Regarding several commenters' request that the Bureau use its exemption authority generally to exempt all lenders from having to comply with § 1002.111(b) and should, in any case, waive the requirement for lenders where the firewall under § 1002.108(b) is infeasible, the Bureau does not believe it would be appropriate to do so. The request for a general exemption appears to be based on the premise that proposed § 1002.111(b) would have required demographic information be stored in separate files. As explained above, final § 1002.111(b) and final comment 111(b)–1 make clear that there is not a mandate for all financial institutions to maintain protected demographic information in separate files, and the commenters do not explain why financial institutions would choose to maintain separate files for protected demographic information when they have determined that one or more officers or employees should have access to that information.

Regarding the various comments opposing § 1002.111(b) on the grounds of cost, complexity, and feasibility of compliance, the Bureau acknowledges that the provision adds effort and expense to complying with this rule. However, the Bureau believes that comments overstate the magnitude of the costs, complexity, and purported infeasibility of complying with § 1002.111(b). Comment 111(b)–1 provides for flexibility in complying with § 1002.111(b) in retaining records containing demographic information required by section 1071. The commenters addressing the cost, complexity, and feasibility did not identify any less costly, complex, and more feasible methods of compliance, especially for those financial institutions that found it infeasible to maintain a firewall pursuant to § 1002.108(b). In any case, several other commenters, including a lender, agreed with the Bureau that compliance with § 1002.111(b) is feasible.

The Bureau does not believe that § 1002.111(b) would be counterproductive in the conduct of examinations or audits, as suggested by some commenters. As with the comments concerning cost, complexity and feasibility, these comments—assuming the necessity of separate electronic or physical files in all cases—overstate the complexity of § 1002.111(b). As final comment 111(b)–1 establishes, in many instances, simpler means of separating protected demographic information from other information within an application file would suffice, and, the Bureau believes, would not impede audits or examinations. Further, the Bureau believes that for purposes of complying with ECOA and subpart A of Regulation B, many financial institutions already maintain certain documents in files separate from the application, such as copies of drivers' licenses, that may reveal protected demographic

[813] Fed. Trade Comm'n, *Standards for Safeguarding Customer Information,* Final Rule, 86 FR 70272 (Dec. 9, 2021).

[814] Fed. Trade Comm'n, *Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act,* 86 FR 70020 (Dec. 9, 2021).

[815] 15 U.S.C. 6801 through 6809.

information about business applicants' owners, such as race and sex.

The Bureau likewise disagrees with the assertion that § 1002.111(b) is not necessary; this provision implements a statutory requirement in ECOA section 704B(b)(2). In addition, in its interpretation of 704B(b)(2), the Bureau has endeavored to minimize cost and complexity by reading the provision narrowly. Regarding the comment that § 1002.111(b) would impact small lenders in particular and increase ongoing costs, the Bureau does not believe the cost and complexity of small lenders' compliance efforts will necessarily be greater than for other institutions, as discussed in part IX below.

Regarding comments that the Bureau should not prohibit the collection of demographic information on the same form as the rest of the application, the Bureau disagrees. The Bureau interprets ECOA section 704B(b)(2), which § 1002.111(b) implements, to suggest that collection of protected demographic information on separate forms may be a practical necessity. That is, it would be difficult, if not impossible, to determine whether a financial institution had complied with § 1002.111(b), or the firewall provision, if demographic information is collected with the information from which it must be kept separate. This is also illustrated in final comment 107(a)(18)–5.

The Bureau does not believe that § 1002.111(b) would disrupt the SBA's 7(a) loan process, as a commenter suggested—neither § 1002.111(b) nor § 1002.107(a)(18) and (19) affect how demographic information gathered for purposes other than compliance with this final rule are to be collected or retained.

Regarding the request that the final rule mirror HMDA's approach to the collection of demographic information, the Bureau notes that HMDA does not include a requirement comparable to the one in ECOA section 704B(b)(2) mandating the separation of certain information from the application; Regulation C thus permits demographic information required under HMDA to be retained as part of the application.[816] Regarding the claim that no evidence exists of fair lending violations from a failure to separate demographic information separate mortgage files, the Bureau reiterates that § 1002.111(b) implements a statutory requirement in ECOA. Regarding the request to exempt HMDA-reportable loans from complying with § 1002.111(b), the request is mooted by the Bureau's adoption of new § 1002.104(b)(2), which excludes HMDA-reportable transactions from the requirements of this final rule.

111(c) Limitation on Personally Identifiable Information Retained in Certain Records Under This Section

Proposed Rule

ECOA section 704B(e)(3) provides that in compiling and maintaining any record of information under section 1071, a financial institution may not include in such record the name, specific address (other than the census tract), telephone number, electronic mail address, or any other personally identifiable information (PII) concerning any individual who is, or is connected with, an applicant.

The Bureau proposed in § 1002.111(c) that in compiling and maintaining any records under proposed § 1002.107 or § 1002.111(b), or reporting data pursuant to proposed § 1002.109, a financial institution shall not include any name, specific address, telephone number, email address, or any PII concerning any individual who is, or is connected with, an applicant, other than as required pursuant to proposed § 1002.107 or § 1002.111(b). The prohibition on the inclusion of PII in ECOA section 704B(e)(3), which covers the ''compiling and maintaining [of] any record of information,'' implicates proposed §§ 1002.107, 1002.109, and 1002.111, which together would address the compilation, maintenance, and reporting of data by financial institutions.

Proposed comment 111(c)–1 would have clarified that the prohibition in proposed § 1002.111(c) applies to data compiled and maintained pursuant to § 1002.107, data in the small business lending application register submitted by the financial institution to the Bureau under proposed § 1002.109, the version of the register that the financial institution maintains under proposed § 1002.111(a), and the separate record of certain information created pursuant to proposed § 1002.111(b).

Proposed comment 111(c)–2 would have addressed the types of information (including PII) that a financial institution is prohibited from including in the data it compiles and maintains pursuant to proposed § 1002.107, in its records under proposed § 1002.111(b), or in data reported to the Bureau under proposed § 1002.109.

Proposed comment 111(c)–3 would have clarified that the prohibition in proposed § 1002.111(c) does not extend to the application or any other records that the financial institution maintains. This comment was intended to address the request by stakeholders in the SBREFA process that the Bureau clarify that this prohibition does not extend more broadly to a financial institution's application or loan-related files.

Proposed comment 111(c)–4 would have clarified that the prohibition in proposed § 1002.111(c) does not bar financial institutions from providing to the Bureau, pursuant to proposed § 1002.109(b)(3), the name and business contact information of the person who may be contacted with questions about the financial institution's submission.

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(e)(3), including how best to implement this requirement in a manner that minimizes cost and burden, particularly on small financial institutions, while implementing all statutory obligations. Regarding comments by stakeholders in the SBREFA process that reporting small business lending data to the Bureau could give rise to a potential conflict with the data protection and privacy laws prohibiting the disclosure of nonpublic personal information to unaffiliated third parties, the Bureau noted that such laws typically provide an exemption for disclosures made pursuant to Federal and State law.[817]

The Bureau sought comment on whether the requirements in this proposed rule could conflict with other data privacy or data protection laws, and whether the Bureau might need to use its preemption authority under ECOA,[818] Regulation B,[819] and/or section 1041(a)(1) of the Dodd-Frank Act to ensure that financial institutions do not violate State law in reporting 1071 data to the Bureau. The Bureau also sought comment on whether it should include a provision to preempt any State data privacy or data protection laws that would prohibit the collection, maintenance, and reporting to the Bureau of 1071 data. In the SBREFA process before the publication of the proposed rule, some industry

[816] *See* 80 FR 66128, 66192–93 (Oct. 28, 2015).

[817] *See, e.g.,* California Consumer Privacy Act, Cal. Civ. Code 1798.145(a)(1) (noting that the obligations imposed on businesses by CCPA ''shall not restrict a business' ability to . . . comply with federal, state, or local laws''). Some other laws on this topic may apply only to consumers acting primarily for personal, family, or household purposes, but they also provide an exemption for disclosures made pursuant to Federal and State law. *See* Gramm-Leach-Bliley Act section 502(e)(8), 15 U.S.C. 6802(e)(8), and Regulation P § 1016.15(a)(7)(i) (stating that the limitations on disclosing nonpublic personal information to unaffiliated third parties do not apply if the information is disclosed to comply with Federal, State, or local laws, rules and other applicable legal requirements).

[818] 15 U.S.C. 1691d(f).

[819] Existing § 1002.11.

stakeholders expressed concern regarding a different issue related to data privacy, specifically that reporting 1071 data to the Bureau may cause them to violate other data privacy laws, including State data privacy laws.

Comments Received

The Bureau received comments on this aspect of the proposal from several lenders and trade associations. A CDFI lender said the proposed provision was reasonable and that it did not foresee an issue with ensuring that the enumerated PII is not connected to the applicant. A trade association stated the Bureau, in proposing this provision, identified a consistent and correct approach to protecting PII. Another trade association said that the Bureau should issue a provision clarifying when PII must be excluded in the compiling and maintaining of any record of information at the different stages in the process.

A bank opposed the proposal, observing that most small community banks correlate documents to a specific borrower and application using PII, and that if the rule prohibited the inclusion of such information on the collection form, there would be no way to tie demographic information to the specific application in order to aggregate and accurately report the data.

A credit union trade association stated that the proposed visual observation and surname data collection requirement for principal owners' ethnicity and race (pursuant to proposed § 1002.107(a)(20)) may expose covered financial institutions to compliance costs related to an evolving patchwork of State personal data privacy laws, including in California, which provides financial institutions only an information-level exemption from its data privacy law.[820]

Final Rule

The Bureau is finalizing § 1002.111(c) and associated commentary with revisions for clarity. Final § 1002.111(c), and the associated commentary, is intended to implement ECOA section 704B(e)(3), which provides that in compiling and maintaining any record of information under section 1071, a financial institution may not include in such record the name, specific address (other than the census tract), telephone number, electronic mail address, or any other PII concerning any individual who is, or is connected with, an applicant. The Bureau further clarifies in final § 1002.111(c) that it does not interpret ECOA section 704B(e)(3) as prohibiting a financial institution from including PII in its application or other files, but only the small business lending application register submitted by the financial institution to the Bureau, the copy of the submitted register that is retained for inspection, and the separately maintained record of protected demographic information kept pursuant to § 1002.111(b).

Final § 1002.111(c), along with corresponding passages in the commentary, now states that in reporting a small business lending application register pursuant to § 1002.109, maintaining the register pursuant to § 1002.111(a), and maintaining a separate record of information pursuant to § 1002.111(b), a financial institution shall not include any name, specific address, telephone number, email address, or any other PII concerning any individual who is, or is connected with, an applicant, other than as required pursuant to § 1002.107 or § 1002.111(b). Final § 1002.111(c) and final comment 111(c)–2 now refer to ''any *other* personally identifiable information'' for the sake of clarity and to better conform with ECOA section 704B(e)(3). Final § 1002.111(c) and associated commentary incorporate several revisions compared to the proposal. First, to address a potential misunderstanding regarding the first cross-reference to § 1002.107 in proposed § 1002.111(c)—as some comments reflected—as to whether a financial institution is prohibited from maintaining PII with not only the small business lending application register but also any other records related to the collection and maintenance of data points specified in § 1002.107, including an application for a covered credit transaction. The Bureau acknowledges the comment that, as drafted, the reference to ''compiling and maintaining any records under § 1002.107'' in proposed § 1002.111(c) made it unclear exactly what documents, beyond the small business lending application register and the separately maintained demographic information of applicants, are subject to the prohibition on the inclusion of PII.

The Bureau understands that the initial collection of records relevant to the data points specified in § 1002.107 will commence in the normal course of business for financial institutions when they receive a covered application from a small business. At that phase, and during the underwriting of the application, it would be impractical to expect that financial institutions could keep the PII of the individuals associated with an application separate from all of the other information in the application from which the various data points in § 1002.107(a) would be derived. The Bureau acknowledges comments suggesting that a prohibition on including PII on forms—such as the applicant's name—to tie an application for credit to the separately kept demographic information would likely impede the accurate compiling and reporting of data.

As a result, the Bureau has revised § 1002.111(c) to clarify that financial institutions are prohibited from maintaining certain types of PII in reporting data pursuant to § 1002.109, the provision concerning the creation and maintenance of the small business lending application register. Likewise, final comments 111(c)–1 and 111(c)–2 now refer to the reporting of data pursuant to § 1002.109, rather than the compilation and maintenance of any records pursuant to § 1002.107, to focus on PII associated with the small business lending application register, rather than any records, even those loosely associated with, the data points under § 1002.107.

Second, the Bureau is finalizing § 1002.111(c) and comment 111(c)–2 to refer explicitly to § 1002.111(a) for clarity. Proposed comment 111(c)–1 referred to § 1002.111(a) in prohibiting PII in the copy of the small business lending application register maintained by the financial institution, but proposed § 1002.111(c) and proposed comment 111(c)–2 did not explicitly mention § 1002.111(a). Final § 1002.111(c) and final comment 111(c)–2 have been modified to remedy this omission. If financial institutions are prohibited from including PII not only in the small business lending application register they submit to the Bureau pursuant to § 1002.109, logically they must also be prohibited from including PII in the copy of the register they retain pursuant to § 1002.111(a). The Bureau clarifies in final § 1002.111(c) that it is the Bureau's interpretation that ECOA section 704B(e)(3) should be read as prohibiting lenders from including PII in the small business lending application register submitted to the Bureau pursuant to § 1002.109, and, logically, as requiring lenders to also exclude PII from the copy of this register that a financial institution is required to retain pursuant to § 1002.111(a).

Third, the Bureau is finalizing § 1002.111(c) and comment 111(c)–2 to refer explicitly to § 1002.111(b) earlier in both provisions. Section 1002.111(b) is mentioned towards the end of both proposed § 1002.111(c) and proposed comment 111(c)–2; however, in neither provision is it abundantly clear that the

[820] 4 Cal. Civ. Code 1798.145(c).

protected demographic information that lenders must maintain separately from the application pursuant to § 1002.111(b) must itself be free of PII. This lack of clarity is remedied in final § 1002.111(c) and final comment 111(c)–2.

Fourth, the Bureau is finalizing § 1002.111(c) and comment 111(c)–2 to clarify that financial institutions are prohibited from including in the enumerated records certain enumerated types of PII specified in the statute, as well as any other PII. The proposed § 1002.111(c) referred simply to ''any'' PII (rather than ''any other''), which the Bureau believes could have been misinterpreted to suggest that the list of specific items preceding ''any'' (name, specific address, telephone number, email address) were not themselves forms of PII. As a result, to avoid any potential confusion, in both final § 1002.111(c) and final comment 111(c)–2, the Bureau refers to ''any other'' PII, which also better conforms with the text of ECOA section 704B(e)(3).

Finally, the Bureau is finalizing comment 111(c)–3 to specify that the prohibition in § 1002.111(c) does not extend to an application for credit, or any other records that the financial institution maintains that are not specifically enumerated in final § 1002.111(c). Proposed comment 111(c)–3 simply noted that § 1002.111(c) did not apply to an application for credit or any other records that the financial institution maintains. The addition of the phrase ''that are not specifically enumerated in § 1002.111(c)'' is intended to eliminate any uncertainty about the scope of application of § 1002.111(c).

Regarding the comment requesting clarification on whether the prohibition on PII includes different stages in the process of compiling and maintaining any record of information, the Bureau addresses these concerns in final § 1002.111(c), and comments 111(c)–1 and 111(c)–2, as revised, as well as comment 111(c)–3, which is finalized as proposed. Final comment 111(c)–1 specifies the categories of information that § 1002.111(c) applies to, and final comment 111(c)–3 makes clear that the prohibition on PII does not extend to the application or other records that the financial institution maintains beyond the small business lending application register.

Regarding the comment that a prohibition on the inclusion of PII on forms—such as the applicant's name—to tie an application for credit to the separately kept demographic information would impede the accurate aggregation and reporting of data, the Bureau believes that for this specific purpose, other identifiers not involving PII may be used. For instance, the unique identifier data point in § 1002.107(a)(1) is specific to a particular applicant and can be used to tie an application to the separately maintained demographic information for that applicant. By definition and according to comment 107(a)(1)–3, the unique loan identifier may not include PII prohibited by § 1002.111(c).

The concern that the visual observation and surname provision of the proposal would expose covered lenders to compliance costs related to State personal data privacy laws, such as California's, is rendered moot by the Bureau's decision not to finalize its proposal for financial institutions to use visual observation and surname analysis to determine principal owners' ethnicity and race in certain circumstances.

Section 1002.112 Enforcement

Final § 1002.112 addresses several issues related to the enforcement of violations of the requirements of proposed subpart B. First, § 1002.112(a) states that a violation of section 1071 or subpart B of Regulation B is subject to administrative sanctions and civil liability as provided in sections 704 and 706 of ECOA. Second, § 1002.112(b) provides that a bona fide error in compiling, maintaining, or reporting data with respect to a covered application is an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. This provision also addresses the maintenance of procedures reasonably adapted to avoid such errors. Third, § 1002.112(c) identifies four safe harbors under which certain errors—namely, certain types of incorrect entries for the census tract, NAICS code, and application date data points, or incorrect determination of small business status, covered credit transaction, or covered application—do not constitute violations of ECOA or Regulation B.

The Bureau is finalizing § 1002.112 to implement sections 704 and 706 of ECOA, pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071 and pursuant to its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

112(a) Administrative Enforcement and Civil Liability

Proposed Rule

A violation of section 1071 is subject to the enforcement provisions of ECOA, of which section 1071 is a part. ECOA contains administrative enforcement provisions in section 704,[821] and it provides for civil liability in section 706.[822] The enforcement provisions in existing Regulation B (§ 1002.16(a)(1) and (2)) cross-reference and paraphrase these administrative enforcement and civil liability provisions of ECOA. Proposed § 1002.112(a) would have provided that a violation of section 1071 or subpart B of Regulation B is subject to administrative sanctions and civil liability as provided in sections 704 and 706 of ECOA, where applicable. The Bureau sought comment on its proposed approach to administrative enforcement and civil liability.

Comments Received

Several lenders and several trade associations commented on the proposed administrative and civil enforcement provisions of the rule. A CDFI lender and two trade associations supported the proposed provision as appropriate and in line with other regulations. Several commenters observed that, with respect to Farm Credit lenders, the Farm Credit Administration examines and enforces compliance with fair lending laws, including compliance with any rule implementing section 1071. A trade association observed that for banks with $10 billion or less in assets, this regulation will be enforced under section 8 of the Federal Deposit Insurance Act by the appropriate Federal banking agency.

One community group asked that the final rule provide for the recording and enforcement of whistleblower complaints in the event that rural farm lenders retaliate against farmers for the good faith exercise of their rights under various Federal consumer protection laws, as protected by ECOA and subpart A of Regulation B. The community group had cited farm loan servicing in particular as an area where minority famers faced the most discriminatory terms and conditions.

One bank opposed the proposed administrative enforcement and civil liability provisions in general. A trade association requested that the Bureau prohibit private causes of action based

[821] 15 U.S.C. 1691c.

[822] 15 U.S.C. 1691e.

on 1071 data, including discovery in private proceedings. The commenter claimed that the Bureau had overemphasized the use of these data by non-governmental entities such as researchers, economists, industry, and community groups, and that only governmental agencies should have the power to use such data for supervision and enforcement because only they were capable of providing appropriate governance to covered institutions. The same commenter opposed the Bureau's use of such data in its own enforcement and supervision actions because the right of applicants to refuse to provide demographic information would render the data incomplete, unreliable, and inherently inaccurate. The commenter also claimed that the Bureau had not explained how it would acquire data on the broader business credit market, without which accurate decisions on potential violations of fair lending or other laws could not be made.

One trade association requested that the Bureau, and any regulators responsible for implementing section 1071, train examiners well and assign senior staff to examine CDFI banks. The commenter further observed that the small business lending market is mostly unregulated, and requested that the Bureau develop examination capacity to cover currently unregulated lenders such that it should delay implementation until it has the capacity to enforce compliance with section 1071 across all covered lenders. A women's business advocacy group indicated support for auditing by the Bureau to ensure that financial institutions do not alter information to manipulate the data to their benefit. Another trade association asked what underwriting imbalance threshold would cause the Bureau to initiate investigation and enforcement, and how such a process would allow for the mitigation of data anomalies and errors. Finally, one trade association supported and deferred to the views of covered lenders, and other trade associations, and their opinions on the proposed administrative and civil enforcement provisions of the rule.

A trade association said that because small business loans vary widely in design and purpose, use of the same analytical techniques and examination approaches applicable to HMDA's enforcement may yield erroneous results, and that the Bureau must coordinate with other FFIEC agencies, including NCUA, to develop model examination procedures in advance of a final rule. A bank asked that the Bureau limit the use of data by regulators to conduct fair lending exams only, and not to subject financial institutions to technical audit and compliance requirements, based on its experience with HMDA.

Final Rule

The Bureau is finalizing § 1002.112(a) as proposed. Final § 1002.112(a) is necessary to implement the administrative and civil enforcement provisions of ECOA. A violation of section 1071 is subject to the enforcement provisions of ECOA, of which section 1071 is a part. ECOA contains administrative enforcement provisions in section 704, and it provides for civil liability in section 706. The enforcement provisions in existing Regulation B (§ 1002.16(a)(1) and (2)) cross-reference and paraphrase these administrative enforcement and civil liability provisions of ECOA. The Bureau notes that several commenters, including trade associations to industry, agreed with the Bureau's proposed implementation of the administrative and civil enforcement provisions of ECOA. Regarding the comments noting the role of other statutory regimes in the enforcement of section 1071, the Bureau agrees and notes that the administrative enforcement provisions of ECOA cross-reference the enforcement authority of other Federal regulators, including the agencies mentioned by the commenters.

Regarding the request to record and enforce whistleblower complaints against farm lenders, the Bureau notes that this would be outside of the scope of this regulation, although the commenter correctly notes that retaliation for the good faith exercise of rights under various Federal consumer protection laws could violate ECOA and subpart A of Regulation B.

Regarding the comment opposing § 1002.112(a) in its entirety, the Bureau notes that § 1002.112(a) simply implements, by cross-reference, the existing administrative enforcement and civil liability provisions of ECOA. Regarding a commenter's request that the Bureau prohibit private causes of action, including discovery proceedings, the Bureau is not making such a change as § 1002.112(a) implements, by cross-reference, the existing administrative enforcement and civil liability provisions of ECOA, of which section 1071 is a part. Further, as specified in the preamble to the proposed rule, the Bureau expressed its belief in response to stakeholders' comments on the SBREFA Outline that the administrative enforcement mechanisms under ECOA would be appropriate to address most instances of non-compliance by financial institutions that report small business lending data to the Bureau, based on its experience with Regulation C and HMDA.[823] Further, other provisions would serve to limit private liability, especially for unintentional errors, including the bona fide error provision of § 1002.112(b) and the various safe harbors in § 1002.112(c).

The same commenter claimed that the proposal overemphasized the use of data by non-governmental entities such as researchers, economists, industry, and community groups, and that only government agencies should have access to these data. However, ECOA section 704B(a) explicitly states that one of the purposes of the statute is to enable communities and creditors to identify business and community needs and opportunities; researchers and economists work at community groups and within industry to assist their analyses in identifying business and community needs. Moreover, the Bureau does not believe the statute's other purpose—facilitating enforcement of fair lending laws—was intended to be limited to enforcement by only governmental entities. Regarding the commenter's claim that only governmental agencies should have the power to use such data for supervision and enforcement because only they are capable of providing appropriate governance to covered institutions, the commenter undercuts this claim by, in the same comment letter, also opposing the Bureau's use of small business lending data in its own enforcement and supervision actions on the grounds that applicants' right to refuse to answer demographic information would render the data incomplete, unreliable, and inherently inaccurate. The Bureau recognizes that the applicant's right to refuse pursuant to 704B(c) may result in a less complete dataset, but compared to the status quo, this rule will result in a vastly expanded dataset on the market for small business credit.

Regarding the varied supervision-related requests for ensuring sufficient examiner training, assigning senior staff to CDFI banks, training for examiners to supervise currently unregulated lenders, and conducting audits to check for the manipulation of data, the Bureau notes that such requests are outside of the scope of this rulemaking; the Bureau establishes supervisory and examination procedures only after a regulation has been finalized, and such procedures will be consistent with the Bureau's existing policies regarding supervision and examinations. The Bureau does not believe it would be appropriate to state, at this time, what would cause the Bureau to initiate investigation and enforcement, and how it would allow

[823] 86 FR 56356, 56503 (Oct. 8, 2021).

for the mitigation of data errors. The Bureau notes, however, that § 1002.112(b) and appendix F establish thresholds for errors in the reporting of data.

Regarding the comment concerning how the Bureau should conduct examinations, the Bureau observes that such comments are outside of the scope of this regulation. In any case, the Bureau agrees that the analytical techniques and examination approaches for HMDA may differ somewhat from the small business credit context, in part because small business credit products differ widely in design and purpose, and the Bureau's supervision and enforcement will reflect this. However, because HMDA as implemented by Regulation C is a data collection regime that shares similar structures and goals as section 1071 and this regulation, including the manner in which HMDA data facilitates fair lending enforcement, the Bureau believes that its experience with HMDA/Regulation C is instructive for this rulemaking and will inform its enforcement and supervisory work. Regarding the comment that the Bureau must coordinate with other FFIEC agencies, including NCUA, to develop examination procedures in advance of a final rule, the Bureau notes that examination procedures normally follow after the publication of a new rule. Regarding the comment that the Bureau should only use the data it receives to conduct fair lending examinations, and not technical compliance examinations, the Bureau does not believe that such a limitation would be appropriate and notes that fair lending examinations are less effective if the underlying data are not accurate; technical compliance examinations help ensure the accuracy of data.

112(b) Bona Fide Errors

Background

During the SBREFA process, small entity representatives and other industry stakeholders expressed concern about private litigants suing them for non-compliance with the rule.[824] In addition, several small entity representatives requested that the Bureau not assess penalties for the first year of data collection and reporting, as it did following the 2015 HMDA final rule; prior to the compliance date for that rule, the Bureau issued a policy statement announcing it would not seek penalties for errors for the first calendar year (2018) of data collected under the amended Regulation C.[825] Stakeholders asked the Bureau to emulate that approach for this rulemaking. Other stakeholders expressed concern about the potential consequences of committing what they viewed as technical or inadvertent errors in collecting or reporting data. One financial institution stakeholder suggested that the rule adopt or emulate the good faith error provisions set out in Regulation C, including § 1003.6(b)(1), which provides that an error in compiling or recording data for a covered loan or application is not a violation of HMDA or Regulation C if the error was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. Stakeholders also referred to the existing error-related exemptions in ECOA and Regulation B.[826] ECOA's civil liability provision states that creditors will not be liable for acts done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau.[827]

Proposed Rule

Proposed § 1002.112(b) would have provided that a bona fide error in compiling, maintaining, or reporting data with respect to a covered application is an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. A bona fide error is not a violation of ECOA or subpart B. A financial institution would be presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of the financial institution's submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose in proposed appendix H. However, an error would not be a bona fide error if either there is a reasonable basis to believe the error was intentional or there is other evidence that the financial institution did not maintain procedures reasonably adapted to avoid such errors.

The Bureau believed that a similar approach to Regulation C, modified and combined with the approach taken by Federal agencies in HMDA examinations, would be appropriate here. Regulation C § 1003.6(b)(1) provides that an error in compiling or recording data for a covered loan or application is not a violation of HMDA or Regulation C if the error was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. In an examination of a financial institution for compliance with Regulation C, a financial institution may make a certain number of unintentional errors in a testing sample of applications for a given data field in the institution's loan/application register, the HMDA analog to the small business lending application register, before it must resubmit its loan/application register. These tolerance thresholds are based on the number of loans or applications in a loan/application register as set out in the HMDA tolerances table in the FFIEC's Interagency HMDA examination procedures.[828]

The Bureau provided a table of thresholds in proposed appendix H and incorporated it in the bona fide error provision in proposed § 1002.112(b). Under this proposed provision and the table of thresholds in proposed appendix H, financial institutions that report a number of errors equal to or below the applicable thresholds would have been presumed to have in place procedures reasonably adapted to avoid errors; those that report a number of errors above the applicable thresholds would not be presumed to have in place procedures reasonably adapted to avoid errors.

Proposed comment 112(b)–1 would have explained that a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of the financial institution's submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose. Proposed comment 112(b)–1 would also have explained that the Bureau's thresholds appear in column C of the table in proposed appendix H, and that the size of the random sample shall depend on the size of the financial institution's small business lending application register, as shown in column A of the table in appendix H.

Proposed comment 112(b)–2 would have provided that, for purposes of determining bona fide errors under § 1002.112(b), the term ''data field''

[824] The small entity representative feedback discussed in this section-by-section analysis can be found in the SBREFA Panel Report at 34–36.

[825] CFPB, *CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance* (Dec. 21, 2017), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/* (noting that the Bureau did not intend to require data resubmission unless data errors were material, or assess penalties with respect to errors for HMDA data collected in 2018 and reported in 2019).

[826] *See, e.g.,* § 1002.16(c).

[827] 15 U.S.C. 1691e(e).

[828] Fed. Fin. Insts. Examination Council, *Interagency Examination Procedures: HMDA* (Apr. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_hmda-exam-procedures_2019-04.pdf.*

generally refers to individual fields, but that, with respect to information on the ethnicity or race of an applicant or borrower, or co-applicant or co-borrower, a data field group may consist of more than one field. Proposed comment 112(b)–2 would have provided that if one or more of the fields within an ethnicity or race field group have errors, they count as one (and only one) error for that data field group.

Proposed comment 112(b)–3 would have provided that an error that meets the criteria for one of the four safe harbor provisions in proposed § 1002.112(c) would not be counted as an error for purposes of determining whether a financial institution has exceeded the error threshold for a given data field.

The Bureau sought comment on its proposed approach to bona fide errors, including whether the tolerance levels in proposed appendix H were appropriate.

Comments Received

The Bureau received comments on this aspect of the proposal from lenders, trade associations, a community group, a women's business advocacy group, and a third-party service provider. Several lenders and trade associations expressed support for the proposed provision on bona fide errors. One trade association also noted that the provision, with a table of thresholds, was broadly consistent with HMDA.

A women's business advocacy group and a community group expressed some concerns about the provision. The trade association understood that the proposal would hold financial institutions harmless for bona fide errors, and encouraged a limit to the number of safe harbors. The community group expressed the concern that the tolerances must not be overly generous because if the rule was too lax, data quality would suffer and the statutory purposes of the rule would be imperiled.

A community group asked the Bureau to clarify that certain types of errors might still prompt an examination or enforcement action even if the number of errors in a sample did not exceed the threshold, citing the example provided by the Bureau in proposed comment 112(b)–1 in which a lender coded withdrawn applications as denials to conceal a potential fair lending deficiency. The commenter asked that the Bureau further spell out these examples so as not to completely overrule the proposed table of tolerances, noting that perhaps extra scrutiny should apply mainly to the action taken categories, revenue size, and ethnicity, race, and sex data points and fields.

A CDFI lender observed that, as a lender focused on women and minority-owned small businesses, it had noticed discrepancies in self-reporting ethnicity and race, where a minority self-reported as non-minority, and vice versa. The commenter said that this could have serious consequences for non-profit lenders focused on minorities, and that it used software and other relevant information to reconcile ethnicity and race information when possible. The commenter asked if the Bureau recognized this as an issue, and if the Bureau would have an issue with lenders correcting or overriding inaccurate self-reported ethnicity and racial data.

A group of trade associations asked that any errors associated with special lending programs, such as the SBA's Paycheck Protection Program, that would require financial institutions to quickly provide credit to their communities and that involved changing guidance, should not be counted toward the tolerances.

A service provider requested clarification of the ''good faith'' compliance provision of ECOA, especially what would fall outside of the definition of ''good faith'' under ECOA's civil liability provision, which provides that ''creditors will not be liable for acts done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the CFPB.'' The commenter also suggested that clarity on this provision would reduce compliance friction, and lenders would feel secure in providing information to the Bureau if they had certainty that the data would not be used against them.

A community group suggested that an example identified in proposed comment 112(b)–2 should constitute two errors, not one, for purposes of the thresholds. The commenter stated that the example involved the Bureau examining a lender's data finding an error in the ethnicity and race fields of the applicant and co-applicant in the same data record, and counting the two errors in the applicant and co-applicant field as only one error.

Final Rule

The Bureau is finalizing § 1002.112(b), associated commentary, as well as appendix F (renumbered from appendix H in the proposal), with minor revisions. The Bureau has revised comment 112(b)–2 slightly by changing references from ''data field groups'' to ''data fields,'' because the Bureau will not use data field groups as it does in the HMDA data collection. The Bureau has also revised an example in comment 112(b)–2 to clarify that, regarding the example provided in the comment, one error rather than two would be reported for purposes of the tolerance thresholds.

The Bureau believes that a similar approach to Regulation C, modified and combined with the approach taken by Federal agencies in HMDA examinations, is appropriate here. These tolerance thresholds are based on the number of applications in a register. as set out in the HMDA tolerances table.[829] Accordingly, the Bureau believes that the approach set out in § 1002.112(b), including the accompanying comments and appendix F, is broadly consistent with the approach it has taken for HMDA.[830] The Bureau also believes that this approach addresses the concerns first expressed by stakeholders in the SBREFA process regarding liability for some data reporting errors, especially in the earlier years of reporting, as processes are first being implemented. Moreover, the Bureau believes that this provision will help to ensure the accuracy of the data submitted by requiring the maintenance of appropriate procedures; at the same time, this provision will prevent financial institutions from being subjected to liability for some difficult-to-avoid errors that could drive those institutions from the small-business lending market. Therefore, the Bureau believes this provision is necessary to carry out, enforce, and compile data pursuant to section 1071, as well as necessary or appropriate to carrying out section 1071's purposes.

The Bureau notes that while a handful of commenters expressed concern about this provision, the vast majority approved of the inclusion of the bona fide error provision, even if most criticized the tolerance thresholds, as further described in the section-by-section analysis of appendix F. The Bureau agrees with the comment that expressed its strong support on the grounds that the bona fide error approach was consistent with HMDA.

Regarding the concern that the bona fide error provision might make it harder to hold lenders accountable for data errors, the Bureau acknowledges the potential trade-offs between

[829] For HMDA, similar error tolerance thresholds are set forth in the FFIEC's Interagency HMDA examination procedures, rather than in Regulation C itself. Fed. Fin. Insts. Examination Council, *Interagency Examination Procedures: HMDA* (Apr. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_hmda-exam-procedures_201904.pdf.*

[830] *Home Mortgage Disclosure (Regulation C),* 80 FR 66128, 66269 (Oct. 28, 2015).

maximizing data quality and practicability of implementation for lenders, and believes that the tolerances in appendix F strike a reasonable balance between these factors based on the experience of the tolerance thresholds in HMDA. Regarding the request to clarify the types of errors that might prompt regulatory action even if the number of errors in a sample did not exceed the tolerance threshold, the Bureau notes that the example of denials coded as withdrawals in comment 112(b)–1 was merely illustrative; the bona fide error provision is a general standard. Regarding the concerns of erroneous self-reporting of ethnicity or race, the Bureau notes that for purposes of reporting data under this regulation, as specified in § 1002.112(b) and comment 107(a)(19)–1, a financial institution relies on an applicant's self-reporting of ethnicity and race.

The final rule does not include a provision that errors associated with applications and loans associated with emergency or special lending programs such as the Paycheck Protection Program not be counted towards the tolerances, as requested by some commenters. The Bureau appreciates the logistical difficulties that might have been encountered by financial institutions in compiling accurate data associated with the Paycheck Protection Program and the Economic Impact Disaster Loan Program, but believes it is more appropriate to consider guidance in the future tailored to emergency programs as they arise.

Regarding the request to clarify ''good faith'' in the ECOA provision absolving creditors of liability for ''acts done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the CFPB,'' the Bureau notes that the provision speaks for itself and applies generally to any ECOA violation, not only violations of this regulation. The Bureau does not believe it would be appropriate to state that data collected under this rule would not be used in supervisory or enforcement actions against covered financial institutions, given that one of the statutory purposes of this regulation is the facilitation of fair lending enforcement.

Regarding the comment stating that the example in comment 112(b)–2 should have constituted two errors, not one, for purposes of the thresholds, the commenter referenced the ethnicity and race fields of the applicant and co-applicant in the same data record, but the example did not mention these. In any case, the example in comment 112(b)–2 expresses how the Bureau intends to treat certain types of errors within data fields.

112(c) Safe Harbors

Proposed Rule

Proposed § 1002.112(c) would have established four safe harbor provisions, providing that certain types of errors would not constitute violations of ECOA or Regulation B. Proposed § 1002.112(c)(1) would have provided a safe harbor for an incorrect entry for census tract obtained by correct use of a geocoding tool provided by the FFIEC or the Bureau. Proposed § 1002.112(c)(2) would have provided a safe harbor for an incorrect NAICS code determined by a financial institution under certain circumstances. Proposed § 1002.112(c)(3) would have provide a safe harbor for the collection of applicants' protected demographic information pursuant to proposed § 1002.107(a)(18) through (20) after an initially erroneous determination that an applicant is a small business. Proposed § 1002.112(c)(4) would have provided a safe harbor for the reporting of an application date that is within three calendar days of the actual application date.

Comments Received

The Bureau received a number of comments from banks, trade associations, banks concerning the safe harbor provision generally or not addressing the specific safe harbors in (c)(1) to (c)(4). A women's business advocacy group encouraged the Bureau to generally limit the number of safe harbors. Two banks encouraged the general expansion of safe harbors.

Several banks and trade associations requested a general safe harbor from liability applying to data if the financial institution reports what the applicant submitted in the application process, even if that data are incorrect or inaccurate. One bank further asserted that it is burdensome for a financial institution to review each data point for accuracy, and the ability to rely on applicant provided data would limit the corrections needed. A trade association pointed out that under the proposal, lenders may rely on some but not all data provided by applicants, and recommended that the Bureau permit lenders to rely on all data, without verification, in all circumstances.

Two industry commenters suggested that the Bureau adopt a general safe harbor for any data that is reasonably documented, and the financial institution can demonstrate that it has policies and procedures in place to capture the data. Another commenter recommended a safe harbor setting a reasonableness standard for data collection and/or relying on self-reporting, where lenders are not held liable for the accuracy of the applicant's responses because they are in jeopardy of violating other laws.

A number of commenters suggested more specific safe harbors. Two suggested that the Bureau provide an express safe harbor for applicant-provided data on the applicant's number of workers, § 1002.107(a)(16), and the applicant's time in business, § 1002.107(a)(17). Another suggested that the Bureau provide an express safe harbor for gross annual revenue, § 1002.107(a)(14), asserting that ensuring precision in the data is difficult, often requiring manual review, that the precision of the data does not affect interpretation of data. The bank stated that, for instance, an applicant might report an initial estimate (*e.g.,* $900,000), but that during underwriting, preliminary financials may show a different amount (*e.g.,* $915,000), and audited financials yet another (*e.g.,* $912,000), making it likely that the final number may not be the one reported to the Bureau. To penalize such errors, which the commenter described as immaterial, would, according to the commenter, burden lenders and regulators as well. The bank suggested that the Bureau should institute a 10 percent tolerance for errors made in reporting gross annual revenue. A trade association suggested a safe harbor for when an applicant misidentifies itself as a women- or minority-owned business, which would then cause the lender to ask questions about ethnicity, race, and sex that may be in violation of ECOA. Another trade association asked the Bureau to consider adding a safe harbor related to the feasibility of the firewall, allowing for variations in determining feasibility.

Final Rule

As described in further detail below, the Bureau is finalizing four safe harbors established in final § 1002.112(c) with modifications. In addition, the Bureau has renumbered the four subsections to be more aligned with the order in the data points these safe harbors address.

The Bureau is finalizing these safe harbors pursuant to its authority under ECOA and as amended by section 1071. ECOA section 703 provides the Bureau the authority to prescribe regulations to carry out the purposes of ECOA, including such adjustments and exceptions for any class of transactions that in the judgment of the Bureau are necessary or proper to effectuate the purposes of ECOA, to prevent

circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. Section 704B(g)(1) provides that the Bureau shall prescribe such rules as may be necessary to carry out, enforce, and compile data pursuant to section 1071. Section 704B(g)(2) authorizes the Bureau to adopt exceptions to any requirement of section 1071 and to exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

The Bureau is not further modifying the safe harbor provisions in response to commenters' requests that the Bureau either generally limit or expand the number of safe harbors. Regarding the request for a safe harbor from liability when a financial institution submits applicant-provided data, the Bureau does not believe a safe harbor is necessary because pursuant to § 1002.107(b) and comment 107(b)–1, financial institutions are already permitted to rely upon applicant-provided data in accord with those provisions. Regarding the comment that it is burdensome for financial institutions to review each data point for accuracy, the Bureau again notes that financial institutions may rely upon applicant-provided data and need not verify such data, subject to the requirements of § 1002.107(b) and comment 107(b)–1. Regarding the comment that the Bureau should permit lenders to report and rely solely on applicant-provided data even when they have verified some of that data for their own business purposes, the Bureau believes that such a safe harbor would result in a reduction of data quality. The Bureau believes that final § 1002.107(b) and comment 107(b)–1 strikes a reasonable balance between data quality and cost and effort incurred by lenders.

Regarding the comment that the Bureau adopt a general safe harbor for any data that is reasonably documented by financial institutions with policies and procedures in place, the Bureau does not believe such a safe harbor would be consistent with the statutory purposes of section 1071. Such a safe harbor would appear to shield a lender from liability even if the data submitted to the Bureau were not accurate, *i.e.,* did not reflect the underlying documentation. Regarding the comment requesting that the Bureau adopt a safe harbor establishing a general reasonableness standard for errors in data reporting, the Bureau does not believe it consistent with the statutory purposes of section 1071 to adopt such an apparently open-ended safe harbor without further consideration of what the limits to this provision would be. The Bureau believes the bona fide error provision in this final rule will serve the function requested by the commenter's suggested safe harbor in a manner consistent with the statutory purposes of section 1071, for the reasons set out in the section-by-section analysis of § 1002.112(b).

The Bureau does not believe any of the more specific safe harbors suggested by commenters are needed. The Bureau believes that a safe harbor for the number of workers data point is not necessary because final § 1002.107(a)(16) does not require the reporting of a precise numbers of workers, but rather permits the selection of ranges of numbers. Similarly, the Bureau believes that a safe harbor for the time in business data point is not necessary because final § 1002.107(a)(17) does not require the reporting of exact years in business for this data point unless the financial institution already obtains that information for its own purposes.

The Bureau also does not believe that a safe harbor for gross annual revenue is needed, as § 1002.107(a)(14), and comments 107(a)(14)–1 and –2, permit financial institutions to report gross annual revenue in the manner they collect it. The Bureau disagrees, however, with the comment that the precision of the data would not materially affect data analysis. The commenter offered a specific example of discrepancies between different estimates of gross annual revenue that were minor and might not be material; the commenter did not suggest that in practice that the differences between self-reported and verified measures of revenue would consistently be as small as in the example presented. In any case, the commenter did not address whether the time between when an application was submitted and when the financial institution would have to submit the data related to the application to the Bureau was insufficient to arrive at a final gross annual revenue number. Neither does the Bureau agree with the comment offering examples of errors in reporting gross annual revenue would not really impact the overall integrity of the data; based on its experience with other data reporting regimes such as HMDA, the 10 percent error range suggested by the commenter in the reporting of gross annual revenue could be material and impact the integrity of the data the Bureau received.

A safe harbor for when an applicant misidentifies itself as a women-owned or minority-owned business is likewise not necessary, as financial institutions are required to report business statuses as provided by the applicant, without verification, pursuant to final § 1002.107(a)(18) and comment 107(a)(18)–8. Regarding the request to add a safe harbor related to the feasibility of the firewall, allowing for variations in determining feasibility, the Bureau notes that its implementation of the statutory firewall provision, in § 1002.108, provides financial institutions substantial leeway; as specified in comment 108(c)–1, a financial institution is not required to perform a separate analysis of the feasibility of maintaining a firewall beyond determining whether an employee or officer should have access to an applicant's protected demographic information.

112(c)(1) Incorrect Entry for Application Date

Final § 1002.107(a)(2) requires financial institutions to report application date. In the NPRM, the Bureau proposed § 1002.112(c)(4), which would have provided that a financial institution does not violate proposed subpart B if it reports on its small business lending application register an application date that is within three calendar days of the actual application date pursuant to proposed § 1002.107(a)(2). The Bureau sought comment on its proposed approach to this safe harbor.

The Bureau received comments on proposed application date safe harbor from a handful of lenders and trade associations. Most of these commenters generally supported the safe harbor, with one commenter stating that it would reduce the compliance burden of pinpointing an exact application date. A trade association supporting the safe harbor further stated that the application process is fluid and that it should be sufficient for the financial institution to reasonably document the data point and have policies and procedures in place to capture the data. Another trade association stated that the proposed safe harbor is appropriate, but questioned its utility. The commenter noted that it was unclear who or how the ''actual'' application date would be determined and the proposed definition of a covered application was already flexible and subjective.

Two banks urged the Bureau to change ''calendar'' days to ''business'' days in the safe harbor. These commenters stated that they often operate their business seven days a week or may approve requests for credit on non-business days. They argued that business days would allow for

consistent application of the safe harbor regardless of the date a business applied for credit, retaining only calendar days would mean financial institutions would lose the flexibility afforded by a safe harbor when it is most needed, and that failure to make the change could preempt the ability of financial institutions to provide ''off-hour'' services. Finally, a couple commenters urged the Bureau to provide additional clarifications, such as examples of how to calculate the safe harbor date range or illustrations in the commentary on how the safe harbor would operate.

The Bureau is finalizing § 1002.112(c)(1) (proposed as § 1002.112(c)(4)) with modifications to provide that a financial institution does not violate ECOA or subpart B if it reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to final § 1002.107(a)(2). The Bureau believes this provision will both ensure the level of accuracy needed for the resulting data to be useful in carrying out section 1071's purposes and minimize the risk that financial institutions will be held liable for difficult-to-avoid errors, which might otherwise affect their participation in the small business lending market. The Bureau therefore believes final § 1002.112(c)(1) is necessary or appropriate to carry out section 1071's purposes pursuant to ECOA section 704B(g)(1) and (2).

In response to commenters' concerns that ''calendar'' days would disadvantage a financial institution that receives applications on non-traditional business days, the Bureau is revising ''calendar'' days to ''business'' days. A business day means any day the financial institution is open for business.[831] The Bureau agrees with commenters that the safe harbor should apply equally regardless of which day of the week an application is received. In response to commenters' request for illustrations as to how the safe harbor would work, the Bureau believes the text of final § 1002.112(c)(1) provides sufficient guidance on how to calculate whether a reported date falls within the safe harbor. For example, in accordance with final § 1002.112(c)(1), if a covered application is received by a financial institution on Saturday, January 5, and the financial institution is closed for business on Sunday, January 6, the safe harbor would apply so long as the financial institution reports an application date that falls between Wednesday, January 2 (three business days preceding the actual date of a covered application) and Wednesday, January 9 (three business days following the actual date of a covered application). Sunday, January 6 does not count as one of the three business days because it was not a business day for the financial institution.

[831] If a financial institution accepts covered applications online at any time, but under its procedures does not actually receive or review the application until the next business day, the mere willingness to accept applications online does not mean the financial institution is open for business seven days a week.

112(c)(2) Incorrect Entry for Census Tract

Proposed Rule

Proposed § 1002.112(c)(1) would have provided that an incorrect entry for census tract is not a violation of ECOA or this subpart if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. Regulation C § 1003.6(b)(2) contains a similar provision, and the Bureau believed a similar approach would be appropriate here.

Proposed comment 112(c)(1)–1 would have explained that the safe harbor provision under proposed § 1002.112(c)(1) would not extend to a financial institution's failure to provide the correct census tract number for a covered application on its small business lending application register, as would have been required by proposed § 1002.107(a)(13), because the FFIEC or Bureau geocoding tool did not return a census tract for the address provided by the financial institution. In addition, proposed comment 112(c)(1)–1 would have explained that this safe harbor provision would not extend to a census tract error that results from a financial institution entering an inaccurate address into the FFIEC or Bureau geocoding tool.

The Bureau sought comment on its proposed approach to this safe harbor.

Comments Received

Several lenders and trade associations commented on the proposed safe harbor for incorrect census tract. Some commenters supported the safe harbor as proposed; several further requested that the safe harbor also protect the use of reasonable processes to identify and report census tract data where the FFIEC and Bureau tools did not return a census tract. Two commenters requested that the Bureau create an exclusion from census tract reporting when the applicant only provides a P.O. Box or other mailbox that is not connected to a physical address. Another requested, because the Bureau census tract tool is not yet available and because the FFIEC tool does not permit batch geocoding, that the Bureau extend the safe harbor to include commercially available batch geocoders often found within HMDA and CRA reporting software. One commenter supported the safe harbor but asserted that the safe harbor's usefulness was limited because of the difficulty in proving that a geocoding tool was used correctly. Two commenters requested additional latitude if a census tract is reported for a business where the business has a physical location, even if it is not the business's main address or where loan funds are spent.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.112(c)(2) (proposed as § 1002.112(c)(1)) and comment 112(c)(2)–1 (proposed as 112(c)(1)–1) as proposed. As noted above, Regulation C § 1003.6(b)(2) contains a similar provision, and the Bureau believes a similar approach is appropriate here. Given the number of years that financial institutions have been relying on the FFIEC geocoding tool in the HMDA context, the Bureau believes it is reasonable to similarly permit financial institutions to rely on information provided by a geocoding tool offered by the FFIEC or the Bureau, subject to the caveats in comment 112(c)(2)–1. Additionally, the Bureau believes that this safe harbor will ultimately improve the accuracy of the data submitted by encouraging the use of reliable FFIEC geocoding tools, and preventing financial institutions from being subject to liability for difficult-to-avoid errors that some commenters said could drive those institutions to eschew these useful tools. The Bureau thus believes this provision is necessary to carry out, enforce, or compile data pursuant to section 1071, and necessary or appropriate to carry out section 1071's purposes pursuant to ECOA section 704B(g)(1) and (2).

Regarding commenters' request that the safe harbor be adjusted to protect the use of reasonable processes to identify and report census tract data where the FFIEC and Bureau geocoding tools did not return a census tract, or that the Bureau expand the safe harbor to include commercially available batch geocoding tools, the Bureau does not believe that such changes are warranted. Both Regulation C § 1003.6(b)(2) and final § 1002.112(c)(2) permit financial institutions to rely on the accuracy of tools provided by the Federal government when they are able to return a census tract. Where such tools return no census tract at all, financial institutions must rely on other tools,

such as geocoding tools provided by third parties, or must use other means to determine census tract. The Federal government does not review, and therefore cannot verify or take responsibility for, the accuracy of commercially available geocoders.

Similarly, the Bureau is not adopting an exception for situations in which the applicant only provides a P.O. Box or other mailbox that is not connected to a physical address. The ''waterfall'' reporting method for the census tract data point implements the statutory term ''principal place of business.'' Pursuant to final § 1002.107(c), a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes an address or location for purposes of determining census tract. Because a P.O. or other mailbox address is generally unrelated to the location of the principal place of business or another location associated with the business, the Bureau expects that in most instances (for its own purposes or as needed to comply with other regulations) a financial institution will attempt to collect an address more suitable for determining the census tract. If the financial institution is unable to do so, it may use a P.O. or other mailbox address for reporting census tract.

Despite the assertion that this safe harbor is limited because of the difficulty in proving that a geocoding tool was used correctly, the Bureau does not believe that changes to the safe harbor would be appropriate. The safe harbor, which the Bureau notes is broader than the one in Regulation C (this safe harbor extends to the Bureau geocoding tool; the one in Regulation C does not), is intended to be narrowly applicable to government-provided geocoding tools. Financial institutions have relied for years on existing geocoding tools, including the FFIEC tool in the HMDA context. The use of the FFIEC tool, and the manner that the Bureau has dealt with any errors derived from the use of the tool, are well established. Thus, the Bureau does not anticipate difficulties identifying whether an error is caused by user error (which would not be protected by the safe harbor) or by the geocoding tool itself (which would be protected). The Bureau does not believe that, as requested by the same commenter, any further latitude is required in the reporting of census tract (*i.e.,* if the census tract is reported for a physical location, even if it is not the business's main address or where the proceeds of the credit applied for or originated will be or would have been principally applied) for the reasons set out here and in the section-by-section analysis of § 1002.107(a)(13) above.

112(c)(3) Incorrect Entry for NAICS Code

Proposed Rule

The Bureau proposed to require financial institutions to collect and report an applicant's 6-digit NAICS code in proposed § 1002.107(a)(15). A financial institution would have been permitted to rely on statements of or information provided by the applicant in collecting and reporting the NAICS code as described in proposed comments 107(a)(15)–3 and –4. The Bureau also proposed a safe harbor, in § 1002.112(c)(2), to address situations where a financial institution does not rely on such information, but instead identifies the NAICS code for an applicant itself and the identified NAICS code is incorrect. Specifically, proposed § 1002.112(c)(2) would have provided that the incorrect entry for that institution-identified NAICS code is not a violation of ECOA or subpart B, provided that the first two digits of the NAICS code are correct and the financial institution maintains procedures reasonably adapted to correctly identify the subsequent four digits.

The Bureau sought comment on its proposed approach to this safe harbor. The Bureau also sought comment on whether requiring a 3-digit NAICS code with no safe harbor would be a better alternative.

Comments Received

The Bureau received a number of comments on its proposal to require collection and reporting of a 6-digit NAICS code, as discussed in the section-by-section analysis of § 1002.107(a)(15) above. The Bureau received comments from some lenders and trade associations specifically regarding the related safe harbor in proposed § 1002.112(c)(2). Several industry commenters reiterated their general opposition to the proposed NAICS code data point but asserted that they supported the safe harbor if the Bureau were to require financial institutions to collect and report NAICS code. A trade association stated that as long as the data point reported is reasonably documented and the financial institution can demonstrate it has policies and procedures in place to capture the data, the Bureau should recognize that it is sufficient. A bank and a trade association for online lenders stated that where an institution in good faith reports a NAICS code, believed to be accurate based on the attestation and information provided by the applicant, but was provided with inaccurate information, a reporting financial institution should not be deemed to be in noncompliance with the regulation. A few commenters asserted that if the Bureau requires NAICS code to be collected, then the Bureau should permit lenders to rely upon applicant statements or codes obtained through the use of business information products as proposed in comments 107(a)(15)–3 and –4.

A few trade associations and a business advocacy group expressed the belief that the safe harbor was insufficient and should be broader. In particular, these commenters asserted that the safe harbor would not apply when the institution relied on the applicant's statement for the NAICS code. A group of trade associations concluded that financial institutions that want to use the safe harbor would be required to try to determine the NAICS code themselves and said that this process would be burdensome and fraught with the risk of inaccuracies.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.112(c)(3) (proposed as § 1002.112(c)(2)) with certain adjustments. As discussed in the section-by-section analysis of § 1002.107(a)(15) above, the Bureau is requiring that financial institutions collect and report a 3-digit NAICS code for the applicant. The Bureau is revising the safe harbor to account for this modification for the required number of digits and to clarify what information the financial institution may rely on in reporting NAICS codes. In addition, while the bona fide error provision in final § 1002.112(b) continues to apply (provided its requirements are met), the Bureau is deleting that language from comment 112(c)–2 for consistency across the safe harbor provisions and because comment 112(b)–3 addresses the issue.

Specifically, final § 1002.112(c)(3) makes clear that an incorrect entry for a 3-digit NAICS code is not a violation of ECOA or subpart B, provided that the financial institution obtained the 3-digit NAICS code by: (i) Relying on an applicant's representations or on an appropriate third-party source, in accordance with § 1002.107(b), regarding the NAICS code; or (ii) identifying the NAICS code itself, provided that the financial institution maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code.

As discussed above, some commenters believed that the proposed safe harbor would not apply when the institution relied on the applicant's statement for the NAICS code, and as a result financial institutions could be penalized for reporting erroneous NAICS codes provided by applicants and thus may have to re-check such NAICS codes themselves in order to qualify for the safe harbor. Given the provisions in proposed § 1002.107(a)(15) and (b) (finalized in § 1002.107(b) with additional detail) that expressly permitted a financial institution to rely on applicant-provided information in reporting NAICS code, the Bureau did not believe that such a safe harbor was necessary. However, to address commenters' concerns, the Bureau is expressly including NAICS codes provided by applicants or obtained from an appropriate third-party source, in accordance with § 1002.107(b), within the scope of final § 1002.112(c)(3).

The Bureau is adopting this safe harbor pursuant to its statutory authority under section 704B(g)(1) and (2). The Bureau believes that this safe harbor, as revised, is responsive to commenters' concerns about the difficulties in correctly classifying an applicant's NAICS code (whether because the business may change over time, codes may have overlapping definitions, small businesses may not know their NAICS code, or because classifications may otherwise be prone to human error). The Bureau also believes that the safe harbor will help to ensure the accuracy of the data submitted by requiring the maintenance of appropriate procedures when the financial institution is determining an applicant's NAICS code itself; at the same time, the safe harbor prevents financial institutions from being subjected to liability for some difficult-to-avoid errors. Therefore, the Bureau believes final § 1002.112(c)(3) is necessary or appropriate to carry out section 1071 purposes pursuant to ECOA section 704B(g)(1) and (2).

112(c)(4) Incorrect Determination of Small Business Status, Covered Credit Transaction, or Covered Application

Proposed Rule

Proposed § 1002.112(c)(3) would have provided that a financial institution that initially determines that an applicant for a covered credit transaction is a small business, as defined in proposed § 1002.106(b), but later concludes the applicant is not a small business, does not violate ECOA or Regulation B if it collected information pursuant to subpart B regarding whether an applicant for a covered credit transaction is a minority-owned business or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners. Proposed § 1002.112(c)(3) would further have provided that a financial institution seeking to avail itself of this safe harbor would have to comply with the requirements of subpart B as otherwise required pursuant to proposed §§ 1002.107, 1002.108, and 1002.111 with respect to the collected information.

The Bureau proposed this safe harbor to address situations where a financial institution may otherwise be uncertain about whether it ''may obtain information required by a regulation'' under existing § 1002.5(a)(2), which could deter financial institutions from complying with the rule implementing section 1071. The Bureau believed that this safe harbor would facilitate compliance with ECOA by eliminating a situation in which a financial institution might be deterred from appropriately collecting applicants' protected demographic information due to the possibility that their understanding of an applicant's small business status might change during the course of the application process.

Proposed § 1002.112(c)(3) would have made it clear that a financial institution seeking to avail itself of this safe harbor must comply with the requirements of subpart B as otherwise required pursuant to proposed §§ 1002.107, 1002.108, and 1002.111 with respect to the collected information. Relatedly, proposed comment 106(b)–1 would have clarified that, in such a situation, the financial institution does not report the application on its small business lending application register pursuant to § 1002.109.

The Bureau sought comment on its proposed approach to this safe harbor.

Comments Received

As set out above in the section-by-section analysis of § 1002.112(c), the Bureau received comments generally supporting all four of the proposed safe harbors, including proposed § 1002.112(c)(3), as well as comments suggesting that the proposed safe harbors were too narrow. With respect to proposed § 1002.112(c)(3) specifically, a CDFI lender and two trade associations supported this safe harbor generally. The trade association further urged the Bureau to allow banks to rely on applicant-provided revenue data in determining whether to collect data pursuant to this regulation. Several other industry commenters, apparently unaware of proposed § 1002.112(c)(3), requested that the Bureau adopt a safe harbor, in substance, identical to proposed § 1002.112(c)(3). A bank and a business advocacy group suggested that the Bureau adopt a new safe harbor applying to an application for a covered credit transaction where the applicant ultimately accepts a product that is not reportable; the trade association suggested that the collection of data for such applications would not advance the statutory purposes of section 1071.

Final Rule

For the reasons set forth herein, the Bureau is finalizing this safe harbor, renumbered as § 1002.112(c)(4), with revisions. The Bureau has expanded the safe harbor for the reasonable, yet erroneous, collection of demographic data beyond an initial determination that an applicant is a small business, to also cover an initial determination that the application is for a covered credit transaction and that there is a covered application.

Specifically, final § 1002.112(c)(4) provides that a financial institution that initially collects protected demographic data—regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or a LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners pursuant to final § 1002.107(a)(18) and (19)—but later concludes that it should not have collected such data does not violate ECOA or Regulation B if the financial institution, at the time it collected these data, had a reasonable basis for believing that the application was a covered application from a small business for a covered credit transaction pursuant to §§ 1002.103, 1002.104 and 1002.106. Consistent with the proposal, final § 1002.112(c)(4) further states that a financial institution seeking to avail itself of this safe harbor shall comply with the requirements of subpart B as otherwise required pursuant to §§ 1002.107, 1002.108, and 1002.111 with respect to the collected data. The Bureau is also adopting new comment 112(c)–3 to provide an example of the kinds of errors covered by the safe harbor in final § 1002.112(c)(4).

The Bureau is adopting this safe harbor pursuant to its authority under ECOA sections 703(a), 704B(g)(1), and 704B(g)(2). The Bureau has determined it is appropriate to expand the safe harbor to address other situations which could pose the same challenges to financial institutions as the one addressed by proposed § 1002.112(c)(3). Specifically, the safe harbor as revised addresses several determinations a

financial institution must make as a threshold matter in order to collect applicants' protected demographic data pursuant to the rule: whether an application is reportable pursuant to § 1002.103, for a covered credit transaction under § 1002.104, and from a small business applicant pursuant to § 1002.106.

Comments the Bureau received on the safe harbor in proposed § 1002.112(c)(3), and on the underlying substantive provisions including proposed §§ 1002.103, 1002.104 and 1002.106, suggested that financial institutions need additional leeway in making threshold determinations, particularly when those determinations are based on applicant-provided data that may later change or otherwise turn out to be incorrect. Under existing § 1002.5(a)(2), a creditor may only obtain otherwise protected information if ''required by a regulation,'' or some other express exception applies. Absent this expanded safe harbor, financial institutions may be deterred from appropriately collecting applicants' protected demographic information for fear of running afoul of existing § 1002.5(b) due to the possibility that their understanding of an application—whether the application is for a covered credit transaction, and is from a small business applicant—may change during the course of the application process and so collection of demographic data will no longer be ''required by a regulation.'' The Bureau thus believes that the safe harbor in § 1002.112(c)(3), as revised from the proposal, will facilitate compliance with ECOA and the rule.

The Bureau agrees, as suggested by several commenters, that the safe harbor in proposed § 1002.112(c)(3) may have been too narrow, focused as it was on errors in determining the small business status of an applicant. For the reasons explained herein, the Bureau believes it is appropriate to extend the safe harbor to other threshold determinations: whether an application is reportable at all under § 1002.103 and whether the application in question is for a covered credit transaction under § 1002.104.

Regarding a commenter's request that banks should be allowed to rely on applicant-provided revenue information in deciding to collect demographic data, the Bureau notes that, pursuant to final § 1002.107(b), financial institutions may rely on unverified applicant-provided gross annual revenue (although if the financial institution verifies that information, it must use the verified information instead).

Regarding the same commenter's request to expand the safe harbor to include any application for a covered credit transaction where the applicant accepts an offer for a financing product that is not reportable, the Bureau does not believe any further expansion of final § 1002.112(c)(4) is warranted. Final § 1002.112(c)(4) addresses the collection of demographic data from a small business that initially applies for a covered credit transaction but, before final action is taken, instead seeks a non-covered transaction, such as a lease.[832] The safe harbor suggested by the commenter, on the other hand, would be unnecessarily broad, reaching a covered application from a small business that accepted a non-covered product after final action has been taken on the covered application for a covered credit product. In such circumstances, the initial decision of the financial institution to collect demographic data on such applications for covered credit transactions was not erroneous and would not have violated ECOA or Regulation B, and thus a safe harbor is not necessary. Further, the commenter did not explain why a safe harbor covering the situations it described would be consistent with the statutory purposes of section 1071, which requires the collection of ''*any* application to a financial institution for credit'' (emphasis added).

Section 1002.113 Severability

Proposed § 1002.113 would have provided that the provisions of subpart B are separate and severable from one another, and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

One trade association said that it had no comments on proposed § 1002.113.

The Bureau is finalizing § 1002.113 with revisions to clarify that applications of provisions are also severable. This is a standard severability clause of the kind that is included in many regulations to clearly express agency intent about the course that is preferred if such events were to occur.

Section 1002.114 Effective Date, Compliance Date, and Special Transitional Rules

Final § 1002.114 addresses when the final rule becomes effective and when financial institutions will be required to comply with the rule, as well as how financial institutions can choose to comply with the rule during this transitional period. Final § 1002.114(a) states that this small business lending data collection rule will become effective 90 days after the final rule is published in the **Federal Register**. Final § 1002.114(b) provides a tiered approach to compliance dates. Specifically, the dates by which covered financial institutions are initially required to comply with the requirements of this rule are specified in four provisions based on the number of covered originations. Compliance with the rule beginning October 1, 2024 is required for financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026.

Final § 1002.114(c)(1) permits covered financial institutions to begin collecting information pursuant to final § 1002.107(a)(18) through (19) beginning 12 months prior to the compliance date. Final § 1002.114(c)(2) permits a financial institutions that do not have ready access to sufficient information to determine their compliance tier (or whether they are covered by the rule at all) to use reasonable methods to estimate their volume of originations to small businesses for this purpose.

114(a) Effective Date and 114(b) Compliance Date

Background

Section 1071 does not specify an implementation period, though pursuant to ECOA section 704B(f)(1) financial institutions must report data to the Bureau on an annual basis. In the SBREFA Outline, the Bureau noted that it sought to ensure that financial institutions have sufficient time to implement the rule, and stated that it was considering proposing that financial institutions have approximately two calendar years for implementation.[833]

Small entity representative and stakeholder feedback regarding the two-year period for implementation under consideration during the SBREFA process was mixed.[834] Some found the two-year period to be adequate, some requested more time, and a few urged for less. Some provided related feedback about adopting a grace period for data errors in the first year(s) after the rule becomes effective. A fuller discussion of the feedback from small entity representatives and stakeholders on implementation period is included in

[832] See also comment 103(a)–9, which discusses reporting where there is a change in whether there is a covered credit transaction.

[833] SBREFA Outline at 42.

[834] The small entity representative feedback discussed in this section-by-section analysis can be found in the SBREFA Panel Report at 36–37.

the NPRM and in the SBREFA Panel Report.

Proposed Rule

The Bureau proposed in § 1002.114(a) that its small business lending data collection rule become effective 90 days after the final rule is published in the **Federal Register**. At that time, the rule would become part of the Code of Federal Regulations; this would permit financial institutions to avail themselves of the special transitional rule in proposed § 1002.114(c)(2), discussed below. However, pursuant to proposed § 1002.114(b), compliance with the final rule would not have been required until approximately 18 months after the final rule is published in the **Federal Register**.

The Bureau's proposed approach was a compromise between the two-year implementation period under consideration at SBREFA that a slight majority of stakeholders found acceptable and the shorter one-year implementation period requested by certain stakeholders. The Bureau believed that the statutory purposes of section 1071 are better served by an earlier compliance date that would, in turn, result in earlier publication of data by the Bureau. The Bureau acknowledged the preference of various small entity representatives and other stakeholders for a compliance period of two or more years to comply. The Bureau noted, however, that some small entity representatives and other industry stakeholders said that they could be ready in less than two years. The Bureau agreed with the stakeholders that asserted that a shorter implementation period is preferable given the length of time that has elapsed since the passage of section 1071 of the Dodd-Frank Act.

The Bureau believed that permitting or requiring a partial year collection in the initial year of compliance would further the purposes of section 1071 by expediting the collection and, potentially, the publication of data to be used to further the fair lending and community development purposes of the statute.

The Bureau sought comment on its proposed effective date of 90 days following publication of an eventual final rule and its proposed compliance date of approximately 18 months after the publication of its final rule to implement section 1071. In particular, the Bureau sought comment on which aspects of the Bureau's proposed rule might require more or less time to implement, and ways in which the Bureau could facilitate implementation for small financial institutions, especially those that have had no experience with other Federal data reporting regimes. The Bureau further sought comment on two alternatives: (a) whether the Bureau should adopt a compliance date of two years after the publication of the final rule; and (b) whether the Bureau should adopt different compliance dates based on the size of a financial institution (*e.g.,* one year for large financial institutions, two years for smaller institutions).

Comments Received

The Bureau received several comments in response to proposed § 1002.114(a). A CDFI lender approved of the proposed effective date of 90 days after **Federal Register** publication of this rule. A joint letter from several trade associations did not object to the 90-day effective date. A business advocacy group requested a that there be no retroactive application of the rule prior to the effective date. They noted that the proposed rule would require numerous complex compliance burdens based on the collection of new data, the establishment of new internal processes, and the development of new systems, and urged the Bureau to clearly explain that the final rule does not apply retroactively, including as to draws made after the effective date on loans made before the effective date.

The Bureau received a large number of comments in response to proposed § 1002.114(b). Several comments supported an 18-month compliance period or requested a shorter period, but the vast majority of comments suggested a longer compliance period, for varied reasons.

Support. One community group preferred a 1-year implementation but was satisfied that the Bureau did not provide for a 2-year period as requested by lenders. A trade association offered appreciation that the proposed compliance period reflected consideration by the Bureau for the lenders but still requested a longer compliance period than proposed.

Requests to publish data quickly and frequently. A number of commenters urged the Bureau to finalize the rule quickly to collect and publish data as soon as possible. A range of commenters emphasized the urgency of the Bureau implementing this rule carefully and quickly. Two commenters stated that the ongoing failure to collect and publish data harms women-owned and minority-owned small businesses and communities because discriminatory practices are permitted to continue. One also said that the absence of 1071 data would compromise the goals of mission-driven lenders. A joint letter from community groups and community oriented lenders said that swift implementation was critical for consumers, regulators, and advocates to assess markets given the limited data currently available.

A number of commenters asserted that the Bureau should move quickly to implement the rule, collect and publish data given that more than 10 years have passed since the Dodd-Frank Act required the promulgation of this rule. A minority business advocacy group requested that initial data findings be published as soon as possible, and every six months so that stakeholders can monitor progress and utilize data.

Less than 18 months. Several commenters asserted that an 18-month compliance period was too long. Some commenters, including a joint letter community groups, community oriented lenders, and business advocacy groups, requested that the compliance date for this rule be January 1, 2024. Another commenter argued that a one-year period better served the statutory purposes of the rule. Several CDFI lenders stated that mission-based lenders ready to report within 18 months should be permitted to opt-in to report data. A community group suggested that section 1071's statutory purposes are better served by shorter compliance period considering Congress enacted section 1071 in the Dodd-Frank Act in 2010.

More than 18 months. A large number of commenters, including lenders, trade associations, and a community group, opposed the proposed compliance date. Many of these commenters asked for a longer compliance period without specifying how much time lenders needed. One commenter stated that even if the final rule were shorter than the NPRM, lenders would need more than 18 months.

Resources. Two industry commenters asserted that lenders needed more resources for new data collection and reporting systems to comply. A bank noted that it already faced thin margins and already had to comply with the Financial Accounting Standards Board's Current Expected Credit Losses rule.[835]

[835] Off. of the Comptroller of the Currency, Treasury; Bd. of Governors of the Fed. Rsrv. Sys.; and Fed. Deposit Ins. Corp., *Regulatory Capital Rule: Revised Transition of the Current Expected Credit Losses Methodology for Allowances,* Final Rule, 85 FR 61577 (Sept. 30, 2020) (delaying for two years the requirement that banking organizations implement the estimated impact on regulatory capital stemming from the implementation of Accounting Standards Update No. 2016–13, Financial Instruments—Credit Losses, Topic 326, Measurement of Credit Losses on Financial Instruments).

Scope and complexity. Two trade associations claimed that lenders needed more time to understand the scope of the final rule and to apply new processes to various lines of business. One commenter noted that the much of the data to be collected would be novel for lenders.

Previous experience. Two lenders requested additional time because of their lack of experience with Federal data collections, such as HMDA or CRA.

Policies and procedures. A number of commenters requested more time to develop and/or update policies and procedures for application intake and data collection. Several small lenders asserted that they would have to implement new application processes and adopt new forms. One bank noted that it would have to create formal applications and associated procedures for agricultural or business loans.

Technology. A number of commenters identified the need to purchase or upgrade compliance software in support of extending the compliance period. Some banks said they needed time—for some, years—to rewrite core processors to add data points for this rule. Several banks said they needed to automate their small business lending processes, a difficult task with many systems to choose from, review, develop and implement. Several banks asked for more time to buy software from vendors, including time to conduct due diligence, allow vendors to develop systems, test integration with existing systems, and manage vendors. One lender stated that 10 percent of agricultural loans are made using a scoring system called AgScore, which must be re-engineered to support this rule, a costly and time-consuming task.

Training. A number of banks said they needed more time to hire new staff and/or train existing employees.

Other regulations. Commenters asserted that other comparably complex data collection regulations provided for longer compliance periods. A number of banks and two credit union trade associations noted that the 2015 HMDA rule had a two-year compliance period, and by contrast that this rule is a major regulation covering many different products, requiring even more time for vendors to adapt. Several commenters cited their experience with the TILA/RESPA integrated disclosure rule, which gave two years to comply with updated requirements, as proof that 18 months was not sufficient to comply with this new rule.

Specific industries. Different types of lenders requested longer compliance periods for their industries. One commenter stated that 18 months was insufficient because most mission-based lenders were small, and that compliance would take time and resources. They also suggested that CDFIs unable to meet the 18-month deadline should get more time to comply. Two trade associations claimed that 18 months was insufficient even for larger credit unions, and that most credit unions had to wait for vendors to create compliance products. One commenter requested more time because equipment finance companies are not accustomed to Federal regulators. A commenter requested more time for community banks because they would have to rely on software and vendors, not internal staff.

Other comments. One bank claimed that a short deadline would cause unintended errors, leading to actions against the bank. Another bank claimed that compliance costs will increase cost of small business and agricultural lending, affecting customer profitability. A different bank claimed that it needed more time because many borrowers may not have or want to provide this data, and that small business owners require education to be willing to provide data for this rule. Another said rushed implementation would lead to unintended consequences.

Two years. Many banks, credit unions, and trade associations requested a two-year compliance period. A joint letter from several trade associations suggested a compliance period starting the January 1, two full years after the calendar year of the effective date. A bank asserted that an 18-month period would make the rule an undue regulatory burden, costly, and not commensurate to any reporting benefit.

Scope and complexity. Several industry commenters asserted that lenders needed two years to understand the full scope and complexity of the rule. One argued that two years was warranted because the scope of rule expanded after the SBREFA process, adding additional data points pursuant to ECOA section 704B(e)(2)(H) and a visual observation and surname requirement. The commenter also argued that car dealers face open scope and coverage issues, specifically the involvement of dealers exempt from Bureau rulemaking. One lender asked for more time because the rule is a new regulatory paradigm, applying to multiple credit products and loan systems even within one bank. Another lender justified two years because small businesses need more time to understand the requirements of the final rule.

Policies and procedures. Several industry commenters requested two years to permit lenders to develop and test new policies and procedures.

Technology. Some industry commenters requested at least two years to comply to have enough time to deal with all of the steps related to purchasing or upgrading compliance software, including finding and onboarding vendors, conducting due diligence on vendors (some lenders said they were required to vet third parties), integrating compliance software with existing software, testing software, and reconfiguring platforms, all before the compliance deadline. Some noted that no vendors, at the time comments were submitted, offered compliance software for this rule. One bank asked for more time to ensure that their software differentiated between data reported under different overlapping regulations, including CRA, HMDA, and FinCEN's beneficial owner rule. Two industry commenters noted that lenders needed more time to accommodate core providers to adjust and update their software. One bank observed that, by way of example, its core provider only finished software six weeks before the end of the two-year compliance period for the beneficial owner rule.

Staff and training. Several lenders said they needed at least two years to adjust staffing and train staff. A number of banks stated that they would need to hire new staff. Some industry commenters stated that lenders would need to train staff on compliance policies as well as new software.

Two industry commenters argued that small financial institutions in particular needed more time. One trade association said that early stage online lenders would be burdened by the rule while seeking to expand access to credit for small businesses. A bank asserted that small banks needed two years because, unlike large banks, vendors and not internal staff would develop compliance systems.

Other regulations. Several industry commenters justified a two-year period based on the compliance periods for comparable data collection regulations, including HMDA. One bank said that this rule was no less complex than HMDA and that no less time should be given to comply. Another bank observed that the 2015 HMDA rule justified a two-year period in part on the new time-consuming and complex requirement to collect open-end mortgage data; the bank argued that this rule was also new and complex. Two commenters noted that lenders' experience with HMDA showed how much time was needed to implement new systems, policies, procedures, data privacy, data security, staff training and compliance programs.

One trade association noted that this rule would be harder for financial institutions with no experience with data reporting regimes such as HMDA.

Other comments. A trade association argued that the proposed 18-month period was inconsistent with the two-year period in the SBREFA Outline of proposals under consideration.

30 months. Some industry commenters requested at least 30 months to comply with the final rule, for several reasons.

Scope and complexity. Several banks asserted that the scope and complexity of the rule warranted a 30-month compliance period. One bank stated that each product had a unique application process and record system, and different personnel. Another bank stated that the rule would result in far-reaching, expensive changes across the bank's many branches, including front and back-end staff. Several banks requested more time because of the strain on dedicated resources. One bank said it needed more time to ensure compliance as to all its products.

Processes. Several industry commenters requested 30 months to comply to create or change processes and procedures in response to the rule, including new collection and reporting processes.

Software. Some industry commenters requested 30 months to have time to purchase or upgrade software. Several noted that software to comply with this rule does not yet exist. Commenters also noted that vendor management requires time, including conducting third-party due diligence, integrating compliance software with existing software, and training staff on new software. One bank said that 30 months would give vendors time to develop and test solutions, and banks time to evaluate these solutions. One software vendor asserted that vendors needed 30 to 36 months to work with business partners, such as form vendors, to coordinate, make changes, and distribute work to lenders. The commenter noted that it needed lead time to analyze, plan, design, develop, test, document and distribute software changes to its financial institution clients before the compliance date. A bank stated that the collection of new data points would require extensive changes to software for applications, loan processing, core processing, data collection and fair lending, and that each update required testing and training.

Commenters offered specific concerns regarding small lenders and software. One trade association noted that core providers that small banks rely on do not now offer tools to comply with this rule. One bank, not a HMDA filer, expressed that it was at the mercy of its core provider regarding timing and expense. Another bank said it needed more time because it did not have ready access to its vendors because it was small compared to other lenders.

Several industry commenters requested 30 months to have time to hire new staff and/or train existing staff to comply with this rule. One bank noted that such training would involve staff from different areas of the bank, including commercial lending, compliance, underwriting, applications support, and business systems support. A community bank said that it would not have a dedicated team for this rule, but rather existing staff, including a loan operations manager, loan audit clerk, and compliance officer, with competing concerns, would meet monthly to work slowly through the rule. One bank noted the particular importance of training its lending staff.

A trade association requested a 30-month period on the grounds that a shorter period would result in flawed data the first few years, which could negatively impact analysis. Another commenter noted that small business lending is varied, involves more negotiation than consumer lending, and is therefore more difficult to capture consistent data for.

Some commenters justified a 30-month period on compliance periods for other complex regulations. Several lenders cited their experience with HMDA to justify a 30-month period. One noted that many HMDA software kits barely met deadlines, and significant updates were still needed after the deadline. Another bank, based on its experience with the TILA/RESPA integrated disclosure rule, stated that it would take longer than 18 months to comply with this rule.

Several lenders commented that they needed 30 months to comply because they had no experience with other data collection regulations such as HMDA or CRA.

Two banks expressed a concern that an 18-month period would hamper their ability to serve customers. One also said it would be challenging to comply with the new rule while still serving customers and maintaining day-to-day bank operations. Another said that to ensure data consistency, the adoption of new processes may produce less access to credit.

Some commenters supported a 30-month period for specific small business lenders. Some stated that 18 months was not sufficient for small and community banks to review, develop and implement collection systems. A number of smaller lenders and a trade association stated that while large lenders have dedicated compliance staff, smaller banks need more time because they rely on vendors and software. One bank stated that regulations should target large and not small banks, that rules often apply to lenders regardless of size, and that the Bureau should set a longer period for all lenders for the sake of small ones. A bank emphasized that a 30-month period would give smaller community banks time to prepare processes that work for both the bank and its customers.

A number of mission-based lenders stated that small CDFIs had limited capacity and needed more time to develop compliance systems. Several commenters stated that mission-based lenders should be able to opt-in to comply in 18 months if they were ready to do so.

A trade association expressed concern that banks it represented would have difficulties with the proposed 18-month period, especially for rural lenders with no HMDA experience, which would have to create new processes.

A software provider identified a sequence of factors justifying a 30-month period. First, this rule would require new data collection fields to collect, store, and report data. Such changes could only begin when this rule is finalized. After software changes are distributed, lenders must test software, implement procedural changes, and train employees on system updates prior to compliance date. Further, some clients may operate on different releases of software so multiple versions will have to be supported, requiring changes for multiple versions. The commenter requested more time to address these steps in an orderly fashion.

Several other comments supported a 30-month period. One bank noted that the time is needed to resolve unanticipated implementation issues. Another bank supported a 30-month period to match compliance examination cycles. A third bank argued that a 30-month to three-year period was not much more time than the proposed 18-month period, given that the Bureau justified its proposal on the 10 years that elapsed since the passage of the Dodd-Frank Act.

Three years. A plurality of commenters requesting a longer compliance period than proposed suggested three years to comply, including a wide variety of trade associations, as well as midsized and smaller banks, credit unions, and agricultural lenders.

General comments. Several commenters stated that a three-year period would permit lenders to make changes to achieve the statutory purposes of section 1071. One lender suggested a compliance date of January 1, 2026. A trade association asserted that the compliance period should be three years and should start on January 1 on the grounds that a partial year of data would not provide meaningful benefits and would be ignored because data users would want to make year-over-year comparisons.

Several industry commenters favoring a three-year period argued that it was inappropriate for the Bureau to use its 10-year delay in issuing this rule pursuant to the Dodd-Frank Act as grounds to burden lenders with a short compliance period. Two bank trade associations asserted that it was arbitrary and unreasonable for the Bureau to propose an 18-month period to comply with the broader requirements of the NPRM compared to the SBREFA outline of proposals under consideration, which contemplated a two-year compliance period.

Sequential changes. Two trade associations noted that compliance steps in sequence, each step dependent on the completion of prior one—vendors create new data collection and reporting systems, lenders develop and test procedures for these systems, staff are trained on the systems and procedures, then further testing may identify issues that require revisions and iterating again before the deadline. One commenter stated that, ideally, at least six months before the compliance date, lenders would receive software that can be tested and validated.

Scope and complexity. Some industry commenters based a three-year period in part on the need for time to understand and interpret this rule. Several commenters noted that this new rule involves the collection of new data and would be a ''sea change'' for small business lenders, especially those with no experience with HMDA or data reporting. A trade association stated it did not know how much more time to request without knowing the content of the final rule. Another trade association stated that a three-year period would give the Bureau time to educate and support lenders as they implement this rule, based on the experience with the Paycheck Protection Program.

Many banks and several trade associations cited the scope and complexity of the rule to justify a three-year period, specifically, that the rule would cover many different products with different processes. Two commenters requested a three-year period because compliance involves changes across many business units, systems, and small business lending channels. A group of trade associations asserted that the rule would require the collection of 21 data points, the separate maintenance of demographic information, and the firewall. Two trade associations stated that compliance with this rule would be significant and time-consuming. One bank noted that small business lending involved a wider variety of solutions than consumer lending. One bank noted that the rule as proposed would have required the reporting of 6,500 loans, 44 percent more than its 4,500 CRA-reportable small business loans.[836]

A number of industry commenters and a business advocacy group justified a three-year period to create, update, and test non-software processes and policies. Some commenters stated that lenders would need new procedures or workflows for applications and data collection. One bank stated that existing workflows would change to align with firewall. Several commenters stated that lenders would need to overhaul or obtain new forms and applications after the final rule. Other commenters claimed not to use written applications for small business and farm loans. One bank stated that it needed to develop a high-touch data collection system because of its variety of small business lending products. One trade association noted that lenders must wait for the final rule to change their policies and procedures, and that clarifications and questions regarding the rule would take months to address, especially new proposed provisions not discussed at SBREFA. One bank said it needed to establish controls and processes to train staff. A trade association stated lenders needed time to assign responsibility across departments, including compliance. Another bank observed that it would take time to receive direction from compliance vendors.

Software. Many comments supported a three-year compliance period based in part on technological issues. Some industry commenters justified a three-year period on the need to automate processes and update small business lending applications. One bank stated that it needed to build data collection procedures for its manual lending processes, and that small business lending is not automated to same extent as consumer lending. One bank stated that many lenders report HMDA and CRA data via a manual process, and this will need to be automated to collect the significantly expanded data under section 1071.

A number of industry commenters stated that lenders would need time to choose, onboard and integrate new software. Several banks said no existing software complies with this rule, and one bank stated that many providers were waiting for this rule to be finalized and would still take time to make a proven and accurate solution available. Some lenders and trade associations noted that many lenders need to find and vet vendors before buying a software system. Some industry commenters stated that lenders do not have technology in place to collect data for the rule. One bank offered a contrary view, reporting that its software vendor was already working on software to comply with this rule. A large bank stated that it would need additional time to build compliance software itself.

One bank said that it had no relationship with vendors and no data collection programs. A trade association stated that this rule would require significant infrastructure investments for credit unions. Another bank that it needed addition time to implement software before updating its processes. A trade association stated that lenders needed software before training staff. A group of trade associations stated that the integration of compliance systems would be an iterative process of testing, finding and fixing problems, and testing again, all across multiple lines of small business lending products. Another commenter identified a sequential process to purchasing software, including selection, installation, training and testing.

Several commenters offered other details on why their technology requirements justified three years to comply. One bank stated that it needed at least 24 months to implement new software, and 12 months more to have accurate reporting. Another bank stated that 18 months suffice for vendors to

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[836] This comment highlights the extent to which this final rule will greatly improve the comprehensiveness of application-level small business lending data available for analysis, compared to the data available under the status quo, such as current CRA regulations. The CFPB has worked closely with the OCC, FDIC, and Federal Reserve Board to harmonize this rule with those agencies' proposed CRA amendments; more comprehensive small business lending data from this final rule can lead to better analysis of business and community development needs in the context of the amended CRA regulations. *See, e.g.,* Bd. of Governors of the Fed. Rsrv. Sys.; Fed. Deposit Ins. Corp.; and Off. of the Comptroller of the Currency, *Treasury, Community Reinvestment Act, Joint Proposed Rule,* 87 FR 33884, 33941 (June 3, 2022) (''[T]he agencies propose using section 1071 data, once available, to develop market benchmarks.''); *id.* at 33998 (''In the longer term, the CRA's data collection and reporting requirements for small business loans and small farm loans would be eliminated and replaced by the CFPB's section 1071 data collection and reporting requirements.'').

develop and install a data collection and reporting system but would not suffice for lenders to implement the software and train staff. A different bank stated that it searched for 1071 software for over two years and would need 18 months to integrate the software with other systems. Another bank said it needed more than two years to develop, test, and implement systems of this scope. One bank stated that its vendor would take six months to upgrade software after the final rule is released. Yet another bank needed 18 months for software to become available, vetted and installed, and 18 months more to train staff. A trade association claimed that lenders needed more time because they decide what technology to build one to two years in advance, and more time was needed to take into account ''blackout'' periods, during which technology builds stop eight weeks before calendar year end, which the commenter believed could add up to four months to timeline to comply with this rule.

A number of industry commenters stated that lenders needed time to wait for vendors to prepare new software or update existing software, and time to test it. Several industry commenters and a business advocacy group also stated that lenders needed more time to onboard and test software.

A number of lenders, particularly small and mid-sized banks, requested more time to comply because they lacked control over the speed and preparation of third-party software vendors. A trade association for community banks stated that small banks depend more on vendors to develop new systems. Several commenters stated that core providers, particularly relied upon by community banks, need more time to adjust to collect new data points. That is, community banks must wait for core providers to update their systems, test updates and resolve problems, after which compliance vendors can develop systems to integrate with the core system. The same commenter stated that community banks that use a platform, not a core provider, to originate loans must ensure that, once their core provider has built the fields for all of the data points, each is mapped individually to the small business lending platform, requiring the creation of multiple APIs, which would result in more costs and delays.

Smaller lenders described complications they would face in obtaining software for this rule. One bank stated that lenders needed time to conduct due diligence on these vendors. Another bank stated that many financial institutions may make demands on the same vendors at the same time, slowing implementation. A third bank stated that covered financial institutions would compete for software implementation dates to comply with this rule, and that the smallest lenders will be at the greatest disadvantage for getting software in time to comply with this rule. Another commenter stated that community banks face higher costs to buy compliance software.

Two trade associations asserted that three years would suffice for credit unions to work with vendors to revise systems for this rule. Another trade association stated that credit unions required more time than 18 months because they are at the mercy of vendors and must train staff and update forms and processes.

A business advocacy group stated that the rule would result in significant, time-consuming changes to reprogram software because online lenders do not currently collect demographic information so as to avoid accessing data that would make intentional discrimination possible.

Staffing. A number of commenters, including a number of lenders and trade associations, justified a three-year compliance period on the time lenders needed to hire and/or train existing staff to collect, verify, and report data for this rule.

Some industry commenters stated that lenders would have to hire new staff for data collection, verification, and reporting. One bank stated that time would be needed to determine staffing needs. Two smaller banks stated that they would need an additional employee to collect and verify data for this rule. A State bankers association said that lenders needed more time because they and their small business customers were struggling with the lasting effects of the pandemic and labor market shortages.

Many commenters, including a number of lenders and trade associations, justified a three-year compliance period in part on the need to train staff, both new and existing employees, to comply with the rule. Several banks stated that they could not start to train staff until software and processes exists for compliance with this rule; one bank said that 18 months was not sufficient to do this well.

Several commenters said that lenders would need to train a variety of staff on compliance and software for this rule, including loan officers and customer-facing staff as well as compliance, risk, legal, and technology employees. Further, several banks and a business advocacy group observed that lenders needed to train staff on what to collect, including data points for this rule. A group of trade associations noted that some lenders are not accustomed to collecting data to the accuracy standards of the Bureau, and that staff familiar with HMDA and CRA would require more training not to be confused with overlaps with this rule.

Several industry commenters noted that the rule would require greater staffing resources. One bank said it would increase staff hours to collect and review data, which would impact operations. Another bank stated that the biggest hurdle to compliance would be allocating employee resources. Yet another bank noted that staff training is time consuming. One bank noted that it needed several months to train its 3,000 employees. A credit union trade association stated that a tight labor market, global pandemic, and economic crisis make updating services harder.

Some commenters stated that they needed three years to comply to communicate changes caused by the rule to consumer to minimize disruption. Several commenters noted the need to accustom small business applicants to the collection of ethnicity, race, and sex information. One bank stated that borrowers may resist this type of inquiry. Another bank said that customer education for this rule was important, that many customers already believe that lenders ask for too much information, and that customers may be driven from traditional banking to less safe products as a result.

Access to credit. Several commenters supported a longer compliance period on the grounds that financial institutions might need to pause or stop their small business lending until they were in compliance with this rule, hurting vulnerable small businesses that section 1071 was intended to benefit.

Data accuracy. A number of commenters stated that hasty implementation of the rule would result in data errors, bad data quality and bad analysis based on that data. A group of State banking regulators asked the Bureau to consider a longer compliance period so that financial institutions can better prepare to compile and accurately report data. Several banks and trade associations asserted that rushed implementation generally would make data in the first few years after the compliance date flawed, incomplete, or unusable, limiting the usefulness of the data for fair lending and business and community development purposes.

Some commenters asserted that more time to comply would make data more accurate, or otherwise justified a three-year compliance period on the grounds

of data accuracy. Several commenters stated that rushed compliance would result in errors which, in turn, would lead to Bureau actions against lenders as well as unnecessary public scrutiny, ultimately harming small businesses that section 1071 was intended to help. One bank stated that the implementation of policies and procedures, acquisition of software, and training of employees would take more than 18 months to implement, but that three years would suffice to ensure the collection of reliable data. Another bank stated that data will be error-laden in early years of collection until systems can be refined. A different bank stated that the proposed 18-month period will likely lead to flawed initial data reporting and flawed analyses. A trade association asserted that a three-year period more closely adhered to the expectation in the statute. Another trade association stated that a compliance period of fewer than three years would risk the viability of CDFI lending programs.

Many industry commenters requested a longer compliance period because many lenders lacked experience with data reporting regulations, such as HMDA or CRA. Specifically, a number of lenders and trade associations stated that lenders not subject to HMDA reporting needed three years to comply because they will start from scratch without existing vendors, processes or procedures to adapt to small business lending or train staff. A group of trade associations stated that banks that do not report HMDA/CRA data will meet vendors for first time and will not have experience with testing process. One bank stated that for lenders with limited staffing resources and no existing reporting mechanisms, 18 months to comply is unreasonable. Another bank stated that many lenders have not had to collect this amount of data.

Other regulations. A number of commenters compared the proposed compliance date with those of other regulations. One said that the proposed 18-month period was short compared to those of other complex rules. A bank said, based on past regulatory reporting rollouts, it would take three years to comply with this rule. Another commenter stated that historically, short implementation periods for complex rules are not feasible.

Some commenters compared the proposed 18-month period to comply with a new, complex rule with the more than two years that lenders had to comply with the 2015 HMDA rule, which only modified existing requirements. Commenters pointed out that, unlike the 2015 HMDA rule, this rule requires the construction of new systems for a new data collection regime rather than building on systems already in place. One commenter encouraged the Bureau to consider a period of three years or longer, especially to ensure that smaller lenders would have time to comply. A large bank pointed out that, unlike HMDA, this rule covers numerous credit products offered by lenders to small businesses, including loans, lines of credit, and credit cards, each of which uses a unique application process and system of record, and different personnel.

Other lenders and trade associations expressed concern about the proposed compliance period based on their experience with HMDA, noting that vendors were not ready before the initial deadlines established by the Bureau, which then had to provide leniency related to data accuracy for HMDA data, as well as issue multiple corrections and clarifications to HMDA rule since 2015. Several commenters noted that the 2015 HMDA rule took several years and resulted in Congress amending HMDA in 2018. One bank noted that, as with HMDA, lenders will spend many hours reviewing data to avoid errors and resubmission.

Commenters also compared the proposed § 1002.114(b) with compliance periods of other Federal rulemakings. One bank said that, based on its experience with the CRA, this rule would require more than 18 months. Several commenters stated that the experience with the TILA/RESPA integrated disclosure rule shows that 18 months were insufficient for major changes. One commenter requested three years to comply based on its experience with that same rule, noting that vendors sought clarity on that rule to make and deploy solutions, and the Bureau answered questions until the effective date, making implementation challenging. A trade association observed that industry had two years to comply with the FinCEN's customer due diligence rule,[837] which it said was a simpler regulation.

Two industry commenters took the opposite view, noting that lender experiences with past regulations are irrelevant. A bank said that a successful rollout would take more than 18 months even if a lender was experienced with data collection regulations. A trade association stated that even current HMDA reporters would find compliance with this rule challenging because of the differences between small business and agricultural lending and mortgage lending, specifically because small business lending involves different loan platforms, small business lending units do not offer a ''menu'' of standardized credit products, and clear application procedures do not exist because small business customers are unique.

Industry-specific rationales. A number of industry commenters suggested rationales specific to their industries to justify a three-year compliance period. An agricultural lender stated that many FCS lenders, community banks, and small credit unions would incur great expense if required to obtain new technology and train new employees within 18 months. A trade association noted that a compliance period of less than three years would burden CDFIs.

Some commenters, including a trade association and a number of banks, stated that small and community banks needed three years to comply rather than 18 months. One commenter emphasized that stakeholders it consulted stated that an 18-month period was inadequate, and that small lenders may take three years to comply. A bank emphasized that while larger banks have more resources for compliance, small banks will struggle without more time to comply and will be disadvantaged. A trade association noted that smaller banks that are not HMDA reporters would find a new data collection regime challenging. A group of State banking regulators stated that small lenders would face particular challenges early on in implementation. A trade association and a bank noted that small banks depend on vendors to develop systems. A bank stated that small and mid-sized lenders are a lower priority for vendors, which would erode their participation in small business lending. Two banks noted that small and community banks would struggle because of shortfalls in staffing and technology.

A trade association stated that mid-sized banks were unlikely to stand up systems in 18 months despite best efforts, based on the experience of lenders with other data reporting regimes.

A business advocacy group stated that innovative start-ups, small banks, and credit unions would struggle to implement the rule given the resources at their disposal.

A group of State banking regulators requested a longer compliance period,

[837] FinCEN's customer due diligence rule requires financial institutions to have procedures for each of its legal entity customer to identify each 25 percent natural person who owns more than 25 percent of the legal entity as well as one natural person executive of the legal entity. Fin. Crimes Enf't Network, *Customer Due Diligence Requirements for Financial Institutions,* Final Rules, 81 FR 29397 (May 11, 2016).

in part, so that the Bureau could ''demonstrate'' its ability to collect data from nondepository institutions subject to the rule.

A joint comment from two auto dealer trade associations requested a three-year period because they said the proposed 18-month period is untenable for dealerships in general and small dealerships in particular, which must coordinate compliance efforts with credit application system providers, vendors, and finance sources, after which systems must be updated and tested, and staff must be trained.

More than three years. One commenter said that the compliance period should be three to five years because the bank would have to make hard decisions on staffing and its lending capacity due to the additional reporting measures, and may exit the market. The commenter expressed concern that a short implementation period would force the bank to exit the small business lending market and hurt its current customers.

Tiered compliance. Some commenters supported some kind of phased or tiered compliance under which larger lenders would have earlier compliance dates and smaller lenders would have later compliance dates. Many industry commenters requested tiered compliance dates in addition to, or as an alternative to, a longer single compliance period for all lenders. Two commenters suggested tiered compliance starting not less than three years after the final rule is issued because the process of implementation would raise issues that require time and deliberate action to frame and solve.

Industry commenters justified tiered compliance on a number of grounds, including the scope and complexity of the rule, as well as the need for smaller lenders to implement and test automated collecting and reporting. One trade association observed that some lenders needed time to test systems to ensure accurate collection and reporting, and asserted that with an 18-month period, a bank would have just six months to collect data to do a trial run with one year of data before the compliance date.

Many commenters, including lenders and trade associations for State banks and credit unions, argued for tiered compliance because of the need to purchase or develop new software to comply with the rule. Industry commenters also pointed to other factors requiring a longer compliance period, include the time to find vendors, time to develop software, time for vendors to plan and execute network changes, and time to train and hire staff to integrate systems with software for this rule.

Two industry commenters emphasized the dependence of smaller lenders on third-party vendors to justify tiered compliance—that small lenders would need time to evaluate lenders and complete due diligence, that vendors would need time to develop new compliance software, and that lenders would need time to integrate and test software with existing systems.

Several trade associations emphasized that many lenders needed the additional time that tiered compliance would provide to permit them to hire and/or train compliance staff, and train existing lending staff, to comply with the rule.

Two trade associations suggested that tiered compliance dates were necessary for credit unions to educate their members and allow for the development of member notifications.

A number of commenters justified tiered compliance based on industry experience with complying with other regulations. Several commenters noted lenders had more than two years to comply with the 2015 HMDA rule, which amended existing regulations, while this rule is new and complicated. Several trade associations pointed to industry experience with Financial Accounting Standards Board's Current Expected Credit Loss rule as an example of rushed implementation; after initially setting a single compliance date, regulators later staggered implementation, requiring smaller institutions to comply later, recognizing high one-time costs and advantages large institutions had in negotiating with vendors.

A bank justified tiered implementation on the grounds that hasty implementation would lead to inaccurate data in the first few years of the rule.

Two trade associations stated that phased compliance is important for lenders not experienced with data collection rules to give them time to build infrastructure. One commenter noted that lenders that are not federally insured depositories in particular need more time to start training programs from scratch, and that it would be hard for such lenders to find and hire enough staff with coding expertise without regulatory data systems in place. Another commenter said that banks that do not comply with HMDA would need more time to comply with this rule than money-center banks that have HMDA experience.

Smaller lenders and trade associations justified longer compliance dates for smaller lenders on various grounds. One bank stated that smaller lenders could learn from the earlier compliance rollouts of large banks. Others said that tiered compliance would give smaller lenders more time to resolve unanticipated issues.

Several commenters suggested several compliance dates, tiered by lender type. A trade association suggested that smaller lenders should have a later compliance date to learn from largest banks, and to have time to resolve unanticipated issues. In particular, the commenter said that rural and underserved communities need more time than money-center banks.

Amongst commenters that supported tiered compliance dates, there was a variety of comments on how to determine which financial institutions should report later. Two commenters requested tiered or staggered compliance in any manner, whether by transaction type, lender type, or lender size. A community bank asked that the Bureau tier compliance dates based on asset-size or some other factor to provide a longer compliance period for community banks. One CDFI lender requested that the Bureau extend the compliance date to at least 30 months for mission-based lenders.

Two trade associations and a large credit union supported tiering based on loan volume. One of the trade associations asked for tiered compliance with the earliest date starting three years after the final rule is issued, on the grounds that credit unions often have little bargaining power with vendors and are often the last to receive system upgrades.

Several lenders suggested two compliance dates, with tiers set by asset size. One lender suggested two tiers, giving more time to lenders with less than $2 billion in assets because smaller institutions have smaller compliance and information technology staffs. The lender did not place much weight to the $2 billion threshold it proposed other than it would match ''small lender'' definitions in other areas of consumer financial law.

Several industry commenters suggested two compliance date tiers. One bank suggested giving smaller lenders 24 to 36 months more than large banks. Two banks suggested giving smaller lenders one year more than larger banks, which they argued could reduce competition for software installation, implementation help, and training, which in turn could reduce costs and resource issues for small lenders. These commenters believed that smaller lenders could learn best practices from larger banks. A trade association said that large lenders ($10 billion or more in assets), should have

two years to comply, while smaller lenders should have three years. The commenter stated this manner of tiering compliance dates would allow the Bureau to collect a large amount of data earlier, and would also give vendors more time to develop and integrate compliance products.

Several commenters suggested three compliance date tiers by asset size. A trade association suggested that the Bureau adopt three compliance tranches, giving large lenders one year to comply, medium-sized lenders two years, and small lenders three years. The commenter suggested the third tier should include the smallest lenders, community banks, and lenders to small businesses that the Bureau trusts and knows to be successful. Another bank proposed giving lenders with $5 billion or more in assets 18 months to comply, lenders with $1 billion or more 24 months to comply, and banks with $1 billion or less 30 months to comply. One bank suggested three tiers by size, without defining size, and proposing that the largest lenders comply in the first year, mid-sized lenders comply in second year, and small lenders comply in the third year. The commenter justified the earliest compliance date for large lenders because of the greater staff expertise, capacity and resources that these institutions had to comply with the rule.

Several commenters opposed tiered compliance dates. The industry commenters asserted that this rule represents a major change for small and large lenders alike, from a ban on collecting protected demographic information data to requiring collection of it for small business loans. These commenters claimed that no vendors have a compliance software ready for this rule, that all lenders need sufficient time to understand the content of this rule, change processes, build and test systems, train employees, and implement procedures and controls. These commenters warned that a failure to give financial institutions of all sizes adequate implementation time will limit access to small business credit, which negatively impact the economy. A community group opposed tiered compliance dates on the grounds that the proposed 18-month period was sufficient for all institutions, and that lenders had from the release of the NPRM in September 2021 to begin preliminary planning to comply with this rule.

Final Rule

The Bureau is finalizing § 1002.114(a) as proposed. The small business lending data collection rule will become effective 90 days after it is published in the **Federal Register**. The Bureau confirms, as requested by a commenter, that this final rule does not apply retroactively, including for funds drawn after the effective date where the loan was originated before the effective date. See also final comment 114(c)–2, which makes clear that covered applications received prior to a financial institution's compliance date, but final action is taken on or after that date, are not required to be reported.

The Bureau is not finalizing § 1002.114(b) as proposed, which would have required compliance with the final rule approximately 18 months after publication of the final rule in the **Federal Register**. Instead, the Bureau is finalizing a tiered approach to compliance dates. Specifically, the dates by which covered financial institutions are initially required to comply with the requirements of this rule are specified in four provisions:

First, under § 1002.114(b)(1), a covered financial institution that originated at least 2,500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning October 1, 2024. This compliance date is 18 months after the Bureau's issuance of this final rule.

Second, under § 1002.114(b)(2), a covered financial institution that is not subject to § 1002.114(b)(1) and that originated at least 500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning April 1, 2025. This compliance date is 24 months after the Bureau's issuance of this final rule.

Third, under § 1002.114(b)(3), a covered financial institution that is not subject to § 1002.114(b)(1) or (2) and that originated at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning January 1, 2026. This compliance date is 33 months after the Bureau's issuance of this final rule.[838]

Finally, under § 1002.114(b)(4), a financial institution that did not originate at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 but subsequently originates at least 100 such transactions in two consecutive calendar years shall comply with the requirements of this subpart in accordance with § 1002.105(b), but in any case no earlier than January 1, 2026. This compliance date is 33 months after the Bureau's issuance of this final rule.

In addition, the Bureau has added a number of provisions to the commentary accompanying § 1002.114. New comment 114(b)–1 explains that the applicable compliance date in § 1002.114(b) is the date by which a covered financial institution must begin to compile data as specified in § 1002.107, comply with the firewall requirement of § 1002.108, and begin to maintain records as specified in § 1002.111. In addition, the covered financial institution must comply with § 1002.110(c) and (d) no later than June 1 of the year after the applicable compliance date. New comment 114(b)–2 provides that when the compliance date of October 1, 2024 specified in § 1002.114(b)(1) applies to a covered financial institution, the financial institution is required to collect data for covered applications during the period from October 1 to December 31, 2024. The financial institution must compile data for this period pursuant to § 1002.107, comply with the firewall requirement of § 1002.108, and maintain records as specified in § 1002.111. In addition, for data collected during this period, the covered financial institution must comply with §§ 1002.109 and 1002.110(c) and (d) by June 1, 2025. New comment 114(b)–3 addresses informal names for compliance date provisions, providing for informal, simplified names to facilitate discussion of the compliance dates specified in § 1002.114(b)(1), (2), and (3). Under this new comment 114(b)–3, Tier 1 refers to the cohort of covered financial institutions that have a compliance date of October 1, 2024 pursuant to § 1002.114(b)(1), Tier 2 refers to the cohort with a compliance date of April 1, 2025 pursuant to § 1002.114(b)(2), and Tier 3 refers to the cohort with a compliance date of January 1, 2026 pursuant to § 1002.114(b)(3). New comments 114(b)–4(i) through (vii) provide examples of various scenarios that illustrate how to determine which compliance date specified in § 1002.114(b) applies to financial institutions.

The Bureau is adopting § 1002.114(b) pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071.

[838] The Bureau considered giving Tier 3 financial institutions 36 months to comply with the rule, as requested by many commenters. This would have resulted in a Tier 3 compliance date of April 1, 2026. However, the Bureau believes that there is no material difference between the 3 years (36 months) requested by certain commenters and the 33 months provided to covered financial institutions subject to Tier 3.

The Bureau is adopting a tiered approach to compliance for a number of reasons. The Bureau believes, all else equal, that the statutory purposes of section 1071 are better served by an earlier compliance date because it will result in the earlier publication of data by the Bureau and use by the public.

Most industry commenters that addressed the issue of the compliance date opposed § 1002.114(b) as proposed, and requested more than 18 months to comply with the rule. Views varied widely on how much more time was necessary. While commenters suggested compliance periods of 24 months, 30 months, three years, and in one case 3.5 years or more, a plurality of industry commenters supported a single compliance date of three years for all lenders. A sizable number of commenters also supported tiered compliance dates based on the size of the lender, as an alternative to single, compliance period longer than 18 months.

The Bureau gives credence to a set of three major factors commenters cited in requesting additional time, beyond 18 months, to comply with the rule (whether from 24 months to 3.5 years): the need to purchase or upgrade compliance software (including time to find and perform due diligence on vendors, purchase software, integrate compliance software with other systems, and test all of these); the need to create or adjust policies and procedures to comply with the rule; the need to train and, in some cases, hire staff to use the new software and implement the policies and procedures to collect data. Commenters did not clearly tie these factors to precise periods of time.

Many commenters identified the sequential and iterative nature of these major factors. Generally, a lender must purchase and integrate new software before developing new policies and procedures concerning the use of the software, and the lender must have new policies in place before hiring and training staff to implement the software and follow the new processes. These processes are also iterative in that, in testing software, procedures and staff training, lenders may identify errors in software, processes, or training, and need to make adjustments that may then require additional changes in other aspects of the overall compliance program or system.

The Bureau believes from comments received, and consistent with feedback received in SBREFA, that smaller financial institutions may face particular difficulties that justify providing them additional time to comply with the rule. Several industry commenters expressed their concern that they were at the mercy of their software vendors and other third-party providers and could not start compliance steps, such as establishing new policies and training employees, in the absence of such software. By contrast, one large bank requested more time to comply to develop in-house compliance software.

Other commenters noted that with a shorter compliance period, vendors may be overloaded with requests from a market of financial institutions attempting to comply at the same time with this rule. Several commenters cited their experience in attempting to obtain the services of third-party vendors to comply with other rules such as the TILA/RESPA integrated disclosure rule and the HMDA 2015 updates, and observed that vendors tended to service larger lenders first, leaving smaller lenders with little time to integrate software, update policies and procedures, train and hire employees, and test all of these systems.

Compounding these issues, many commenters—generally smaller lenders, some of which were rural or community financial institutions—stated that they did not have previous experience with data collection rules, such as HMDA or CRA. The Bureau is aware that this rule may be the first contact that many covered non-depository institutions have with a Federal data collection regime. Further, a substantial number of commenters noted that they used manual or analog systems and claimed that they would have to automate their operations to comply with the rule. The Bureau believes that the increased originations threshold under in final § 1002.105(b) may preclude many financial institutions that expressed concern that they would have to automate their processes from having to report data at all.

All of these factors suggest that smaller financial institutions would face particular difficulties in complying with this rule within 18 months. The comments suggested a variety of potential consequences stemming from insufficient time to comply. Some suggested that financial institutions would exit the market, that they would face greater costs to comply more quickly (for instance, a financial institution that might be able to use existing staff over the course of three years may need instead to hire additional staff to comply with the rule in 18 months), and/or that they may submit inaccurate or data of lesser quality to the Bureau than they would have if given more time to the comply.

The Bureau does not believe that financial institutions would exit the small business lending market because of the compliance date, but rather believes that many smaller institutions may simply find it challenging to comply within the 18-month compliance period. The Bureau gives some credence to the concern that a shorter compliance period may result in somewhat higher, though not significant, costs that in turn may be passed on to customers. The Bureau believes that smaller financial institutions, especially those unaccustomed to data collection rules, may stay in the market but may be unable to comply within 18 months for reasons at least partly out of their control. The Bureau believes, based on comments received, that generally smaller financial institutions are more likely to be at the mercy of vendors that may prioritize larger customers.

While a plurality of commenters requested a single, three-year compliance period for all lenders, the Bureau does not believe that such a change is justified. The Bureau received comparatively few comments from large banks regarding the sufficiency of an 18-month compliance period. One large bank stated that it would require additional time to develop its own compliance software. A trade association requested three years to comply with the rule on the grounds that larger lenders have more complex compliance systems to establish and operate because such lenders often had different divisions dedicated to different small business lending products. The Bureau does not believe, given the dearth of comments on this point, that the quality of data from large financial institutions is compromised by an 18-month compliance period. The Bureau thus believes that it would not be consistent with the statutory purposes of this rule to provide large financial institutions a longer compliance period.

As a result, the Bureau believes that tiered compliance dates balance several factors at once; that the statutory purposes of section 1071 are best advanced by, in aggregate collecting as much data as possible, as accurately as possible, as soon as possible; and that a system of tiered compliance dates accomplishes this better than a single 18-month compliance period.

In part, the Bureau believes that is accomplished by maintaining the existing 18-month compliance period for the largest-volume financial institutions that are likely to report the bulk of the application-level data, and are likely to do so accurately. These financial institutions are more likely

than smaller and even mid-sized institutions to have the resources and experience to, with relative celerity, upgrade or purchase compliance software, create pertinent policies and procedures, and train or hire existing staff. The Bureau believes that the experience that many of these larger-volume financial institutions have with other Federal data collection regimes, such as HMDA or CRA, gives them the ability to adapt to this rule within the time given to collect and submit data.

Further, by maintaining the 18-month compliance period for larger-volume financial institutions in Tier 1, collection and reporting of most small business lending data will begin quickly. That is, covered financial institutions will report to the Bureau the vast majority of small business lending applications—approximately 90 percent of the applications covered by this rule, as detailed in part IX.D.2 Table 4—on the timeline proposed in the NPRM.

The Bureau also believes that the statutory purposes of section 1071 are best advanced in aggregate by permitting small and mid-sized financial institutions, by volume of originations, to have more than 18 months to comply with this rule. As discussed above, the Bureau believes, based on the large volume of comments and the rationale provided by them, that an 18-month compliance period increases the likelihood that small and mid-sized financial institutions, for a variety for reasons that are unique to them, will have difficulty collecting and reporting data, and that the data reported would be more likely to be inaccurate or unreliable. Further, the Bureau believes based on the comments it has received, feedback received in SBREFA, and its own observations about the small business lending market that the smallest financial institutions, especially those that do not already report data to Federal agencies, have more manual processes and relatively few employees, which increases the likelihood that they submit unreliable and inaccurate data to the Bureau.

The Bureau believes that tiered compliance dates will improve the accuracy of data from smaller and mid-sized financial institutions. Later compliance dates for smaller and mid-sized financial institutions will mean they do not have to compete with larger financial institutions for the time and attention of software and compliance vendors. The Bureau understands that while the largest lenders are more likely to rely on in-house capacity to comply with the final rule, many other financial institutions with loan volumes likely to place them in Tier 1 may still rely on software vendors and may compete with smaller-volume financial institutions for the time and attention of software vendors. With a longer timeframe to comply, smaller and mid-sized financial institutions might also be able to avoid expedited and more costly overtime and overflow work, and would have time to learn lessons from the compliance experience of larger institutions.

Regarding the criteria for tiering, most commenters who addressed the issue suggested asset size as the criteria to determine which financial institutions should comply later. The primary virtue of that approach is its simplicity—most depositories know their total assets. However, many financial institutions that will be covered by this rule are nondepository institutions that may originate a large volume of loans but may have relatively few assets compared to depository institutions. Conversely, some depositories with a large volume of assets may have a low volume of small business loans. A tiering approach based on assets may require early reporting by large depositories with little interest in small business lending and exclude large-volume small business lenders with comparatively few assets. The Bureau does not believe that this approach would be as consistent with the statutory purposes of section 1071 as a criterion for tiering directly tied to a financial institution's relative activity in the small business lending market. As a result, the Bureau believes that the number of annual originations of covered credit transactions for small businesses should be the basis for tiering compliance dates

On the number of tiers, commenters tended to favor two tiers rather than three. The Bureau believes that the statutory purposes of the rule are better served by three tiers. The Bureau determined from reviewing all of the comments that there were meaningful differences in the compliance challenges faced by smaller volume, middle-volume, and large-volume financial institutions. The Bureau believes that three compliance dates will help vendors better manage their capacity to serve their customers. The Bureau also believes that three compliance dates may also help the Bureau be more responsive to industry during the transition period. By extending the implementation period, the Bureau will be better able to provide more tailored attention to smaller and mid-sized financial institutions.

General responses to comments received. The Bureau observes that the vast majority of comments it received identified specific factors or concerns regarding compliance with this rule that justified a longer compliance period. Nearly all of these comments also identified multiple factors or steps in the process of complying with this rule that justified a compliance period longer than the one proposed in the NPRM. As noted above, the Bureau observes that these comments, with very few exceptions, did not quantify specific amounts of additional time attributable to each specific factor or step in the compliance process that were identified. For instance, a frequent industry comment might have requested a three-year, rather than 18-month, compliance period, citing the need to purchase and implement software, create processes, and train staff, without attempting to attribute the additional 18 months to each of these three steps in the compliance process.

Requests to publish data quickly and frequently. Regarding requests to collect and publish small business lending data as soon as possible, the Bureau agrees that the absence of these data will continue to hinder vital capital flow to small businesses, as small business and community development needs cannot be effectively identified without this data. However, the Bureau must conduct its privacy analysis, so the publication of data will not immediately follow its collection. Regarding the request to publish data as soon as possible, and to publish data every six months so that stakeholders can monitor progress and utilize data, the Bureau is not adopting a 6-month reporting requirement because requiring financial institutions to provide multiple data submissions a year may be administratively challenging for both financial institutions to comply with and for the Bureau to process. However, the Bureau may consider publishing aggregate data more often than once a year in the future if administratively feasible.

Less than 18 months. The Bureau has considered comments asserting that 18 months is too long a compliance period. While some financial institutions could comply with this rule in less than 18 months, the Bureau believes that most financial institutions appear unable to, given the volume and intensity of comments requesting more time. The Bureau believes a one-year compliance period would be inconsistent with the statutory purposes of the rule because it appears that such a short period could be costly for financial institutions and result in inaccurate data. The Bureau agrees that mission-based lenders (or any other lenders) ready to report within 18 months should be permitted

to do so, and the rule permits them to do so.

More than 18 months. Regarding the comments requesting a compliance period of more than 18 months, the Bureau agrees in part. As discussed above, the Bureau believes that many lower-volume financial institutions, with either lower assets or a low volume of small business lending and thus potentially fewer resources dedicated to that line of business, may need additional time to comply with the rule for the reasons provided above.

Regarding comments concerning resources, the Bureau agrees in part. The Bureau does not believe that more time is justified solely because the rule may cause a financial institution to expend resources to comply with the rule. However, the Bureau agrees that smaller financial institutions may need more time to marshal the necessary resources, as discussed above.

The Bureau has considered comments stating that financial institutions needed more time to understand the final rule and its scope. While the application of this rule would be new to some lines of business, and while some data would be novel the Bureau believes that financial institutions have had enough time to understand the concepts in the rule, especially for those financial institutions that have had experience with other Federal data collection rules, such as HMDA, CRA, or CDFI Fund. The concepts in the rule implement 2010 statutory language, and the rule's implementation of those statutory concepts relies on well-known concepts from existing rules, particularly the HMDA and the CRA regulatory requirements. Nonetheless, the Bureau acknowledges that preparing for compliance may be somewhat more difficult for financial institutions, particularly smaller institutions, with no previous experience with Federal data collections. The Bureau believes that final § 1002.114(b) provides sufficient additional time for such financial institutions to come into compliance with the final rule.

Regarding comments that financial institutions need more time to establish policies and procedures, the Bureau does not believe this is necessary for larger-volume lenders. The Bureau's proposed 18-month compliance period was intended to accommodate the need of financial institutions to develop or update policies and procedures to comply with the rule. The Bureau believes, however, that more time may be warranted for smaller financial institutions that do not have existing written policies or procedures and do not currently use written applications for small business or agricultural lending applications. The Bureau does not have reason to believe that there are larger-volume lenders that do not currently use forms or formal written applications.

Regarding comments requesting more time to comply because of technological issues, the Bureau acknowledges the various steps that may be involved in obtaining software needed to imply with this rule, including updating core processors, automating analog systems, conducting due diligence, choosing vendors, and testing and integrating systems.

The Bureau agrees with commenters that smaller-volume lenders may need more time than proposed to prepare software before the rule's compliance date. In particular, the Bureau understands that smaller financial institutions may need time to transition from informal applications to automated systems. Regarding the reengineering of agricultural credit scoring systems, the Bureau understood this issue to apply to smaller FCS lenders and believes that the additional time provided by the final compliance period provision would suffice for changes to be made to AgScore and for them to adjust accordingly.

Regarding the comments that banks needed more time to hire new staff and/or train existing employees, the Bureau notes that not enough detail was provided by commenters that explained why this factor on its own justified more than 18 months to comply with this rule.

Regarding the comments that the compliance periods for other similar regulations provided more time, the Bureau acknowledges that this rule, unlike HMDA and the TILA/RESPA integrated disclosure rule, covers a variety of different product types, that this rule is a new rulemaking rather than an amendment to existing regulations. The Bureau notes from its experience that smaller financial institutions in particular appeared to face challenges complying within the timeframe given for the 2015 HMDA rule amending Regulation C and the TILA/RESPA integrated disclosure rule. The Bureau agrees, from the experience of past rulemakings, that smaller financial institutions may wait longer than larger institutions for vendors to prioritize them.

Regarding various industry-specific rationales given for extending the compliance period, the Bureau observes that many of the comments advocated for types of financial institutions that tended to be smaller, such as CDFIs, credit unions, and community banks. The Bureau believes that final § 1002.114(b) will provide most of the smaller volume lenders the additional time they need to comply.

Regarding comments that even larger credit unions would have to wait for vendors to create compliance products, the Bureau agrees only in part. The Bureau believes that vendors are more likely to focus on larger financial institutions—including larger credit unions—earlier, but that smaller financial institutions, including credit unions, are more likely to have to wait longer.

Regarding the comment that equipment finance companies may be less accustomed to Federal regulators, the Bureau agrees but does not believe that this justifies a longer compliance period specifically for this type of lender. The Bureau believes that equipment finance companies with larger volumes of originations are likely to have sufficient experience and resources to prepare to come into compliance more quickly.

Regarding the comment that a short compliance period would promote unintentional errors, the Bureau agrees in part. The Bureau believes that faced with limited time and resources, smaller financial institutions are more likely to submit inaccurate data, and that this is one of the rationales for providing lower-volume institutions additional time to comply with the rule. Regarding the concern that compliance costs will directly increase lending costs, the Bureau acknowledges in its impacts analysis in part IX below that this may take place, but that the per-loan impact of this rule will be relatively low.

Regarding the comments that many borrowers do not possess or are unwilling to provide data pursuant to this rule, the Bureau agrees that educating small business applicants would improve their responses to requests for data under this rule. Regarding the comment that rushed implementation would lead to unintended consequences, the Bureau observes that the notice and comment processes has identified potentially unintended consequences of an 18-month compliance period, and that the final tiered compliance provision is intended to address these concerns.

Two years. Regarding the comments favoring a two-year compliance period for financial institutions, the Bureau agrees in part. Based on a consideration of a variety of factors, including the comments it has received, the Bureau has determined that a two-year compliance period is appropriate for mid-sized financial institutions. The Bureau does not believe that two years

is an appropriate compliance period for all institutions. The Bureau believes that two years more time than is needed by the largest volume financial institutions, which have the ability to comply earlier, and too little time for the smallest volume financial institutions, which need closer to three years to comply with this rule.

The Bureau has considered the comment asserting that the proposed compliance period would make the rule an undue regulatory burden, costly, and not be commensurate to any potential reporting benefit. As set out above, the Bureau believes that a shorter compliance period would be challenging for many smaller and mid-sized financial institutions, and the Bureau believes that it is more likely to obtain more accurate data if it provides smaller volume financial institutions more time to comply with this rule.

Scope and complexity. The Bureau has considered comments stating that financial institutions needed a two-year compliance period to understand the full scope and complexity of the new rule. While the proposed rule included provisions not considered during SBREFA, such as additional data points pursuant to ECOA section 704B9(e)(2)(H), the Bureau does not believe that the increased complexity of the rule alone justifies additional time. Most of the new provisions in the NPRM are well-known outside of the context of this rule. In addition, the Bureau has in some ways limited the scope of this rule further by, for instance, not finalizing certain more complex provisions, such as the proposed visual observation and surname analysis requirement. Regarding scope and coverage issues faced by motor vehicle dealers, the Bureau does not believe that there are open issues requiring resolution as suggested by some commenters. The issues raised concerning the application of Bureau regulations to indirect motor vehicle lenders are well-established and not unique to this rulemaking. The Bureau likewise does not believe that this rule represents an entirely new regulatory paradigm; the many comments the Bureau received concerning the overlap between this rule and HMDA, CRA, and CDFI Fund data collections suggest that the concepts in this rule are already well understood by many financial institutions and not necessarily novel or paradigm-shifting. While the Bureau agrees that this rule is the first to attempt to collect application-level data comprehensively from the entire small business lending market, the Bureau does not believe that this alone is a reason to extend the compliance period of the rule.

Policies and procedures. The Bureau has considered comments stating that financial institutions needed two years to develop and test new policies and procedures. However, the comments did not provide enough detail to support extending the compliance period based on this factor alone.

Technology. Regarding comments requesting two years to comply because of the need to purchase or upgrade compliance software, the Bureau agrees in part. The Bureau acknowledges the various steps related to implementing or updating compliance software, including finding and vetting vendors, integrating compliance software with other systems. The Bureau acknowledges the concerns of some commenters that vendors may not be ready with compliance software before the proposed compliance date. The Bureau, as noted in part II above, has worked proactively with vendors and technology departments of financial institutions since the release of the NPRM to help them speed their work The Bureau believes that the tiered compliance schedule will ensure that financial institutions in need of time to buy or upgrade software will have that time.

Staff and training. Regarding comments requesting a two-year compliance period in order to have additional time to hire new staff and train existing staff, the Bureau took those factors into account when proposing an 18-month compliance date. However, the Bureau agrees that small financial institutions may require additional time to comply because they may not have the staff to develop compliance systems that larger financial institutions may have. The Bureau believes that smaller institutions may be particularly reliant upon vendors and third-party software and, as mentioned before, may not be prioritized by these providers.

Other regulations. Regarding the comments that a two-year period based was justified based on the compliance periods for other similar data collection regulations, the Bureau agrees in part for the reasons specified above. The Bureau acknowledges that industry's experience with the 2015 HMDA rule suggests that more time is required for smaller financial institutions in particular, and especially those with no past experience with a data collection regime like HMDA.

Other comments. Regarding concerns that the proposed compliance period was inconsistent with the two-year period that the Bureau previously considered in the SBREFA process, the Bureau now believes that the two-year period is appropriate for financial institutions with a moderate volume of originations.

30 months. The Bureau has considered comments requesting a single 30-month compliance period but does not believe this approach would be appropriate, for the reasons provided below.

Scope and complexity. Regarding the comments that the scope and complexity of the rule warrants a 30-month compliance period, the Bureau acknowledges the breadth and complexity of this rule but does not believe that the time needed to understand the rule in itself justifies one additional year to comply with the rule.

Processes. The Bureau acknowledges that compliance with the rule may itself entail complex changes to the various processes pertaining to small business lending, including front and back-end operations, and operations across different branches. The Bureau notes that while industry commenters explained the complexity of changing processes and procedures with some clarity, the Bureau anticipated these types of changes in proposing an 18-month compliance period. In any case, these commenters identified various changes they would have to make in response to the rule without explaining why these changes justified extending the proposed compliance period by 12 months.

Software. Regarding the comments requesting 30 months to comply with the rule because of the need to purchase new software or upgrade existing software, the Bureau agrees in part. The Bureau acknowledges the various steps and complexities in the process to upgrade or purchase software that commenters have identified, but the Bureau does not believe that all financial institutions need more time to purchase or upgrade software. The Bureau also acknowledges concerns that compliance software for this rule did not exist when comments were submitted in response to the NPRM. The Bureau understands from its outreach that software providers have been developing compliance products since the release of the NPRM, and while such products cannot be finalized until after the final rule, the Bureau believes that such software will be available for timely implementation by financial institutions, especially because the Bureau is committed to providing assistance to technology departments from financial institutions and software providers to develop compliance solutions in time to meet the final tiered

compliance dates. Regarding the comment that software providers need 30 to 36 months to work with their business partners, the Bureau believes based on its outreach and comments received from some banks that this work had already begun with the release of the NPRM, and that the compliance dates provided in final § 1002.114(b) should be sufficient for software providers to work with their business partners and financial institutions.

The Bureau acknowledges commenters' concerns about small financial institutions and their ability to implement software before the proposed compliance date. The Bureau believes that lower volume lenders, especially those without previous experience with data collection rules, are likely to be at the mercy of compliance software providers and core providers, and are not as likely to have priority access to new software or provider assistance in implementing it. The Bureau does not, however, agree that these concerns justify a single 30-month compliance period. Instead, the Bureau believes that these concerns justify tiered compliance based on the financial institution's transaction volume.

Staffing and training. Regarding comments that a single, 30-month compliance period is needed to accommodate the hiring of new staff and/or training of existing staff, the Bureau agrees in part. The Bureau acknowledges that this rule may require the hiring or training of staff in variety of different areas and roles across financial institutions. The Bureau emphasizes, however, the comment specific to smaller volume lenders that a community bank would not have a dedicated implementation team for this rule, but rather would assign responsibility for rule implementation to existing employees across the bank in addition to their existing tasks.

Data accuracy. The Bureau acknowledges the comments that the proposed compliance period may result in data inaccuracies, but does not believe that a single, 30-month compliance period would be the most appropriate way to address these concerns. The Bureau, for the reasons provided already, believes that smaller and even moderate volume lenders, if subject to an 18-month compliance period data, may be at particular greater risk of collecting and submitting inaccurate data to the Bureau. The Bureau acknowledges the comment that small business lending is varied, involves more negotiation than consumer lending, and therefore makes it more difficult to capture consistent data for, but the Bureau does not believe that this factor alone justifies extending the compliance period. The Bureau observes that the existing regulations that collect data on small business and small farm lending already take into account the varied and more individually negotiated nature of such transactions.

Other regulations. The Bureau acknowledges the comments concerns that other comparably complex regulations identified by commenters, such as the 2015 HMDA rule amendments and the TILA/RESPA integrated disclosure rule, provided for compliance periods longer than the 18 months proposed by this rule. The Bureau acknowledges the comment observing that in response to the 2015 HMDA amendments, many software providers barely met the compliance date for that rule, and that significant updates were still required after the deadline. The Bureau agrees that smaller lenders may need more time to comply because of their lack of experience with data collection regulations such as those under HMDA or CRA. However, the Bureau does not believe that a uniform, 30-month compliance period would be the appropriate way to address all these concerns. The Bureau believes that the specific comments it received advocating for a 30-month compliance period for smaller volume lenders or for those inexperienced with data collection rules support the tiered compliance dates set forth in the final rule.

Customer relationships. Regarding the concerns that a short compliance period would hamper the ability of their ability to serve commercial lending customers, the Bureau agrees in part. The Bureau believes that smaller lenders and, to a lesser extent, moderate volume lenders may find it challenging to comply with the new rule while still serving customers and maintaining day-to-day bank operations. The Bureau acknowledges the concern that some commenters may adopt new processes to ensure data quality but provide less access to credit for applicants. The Bureau does not believe that a uniform, 30-month compliance period would be the appropriate way to address these concerns in a manner consistent with the statutory purposes of the rule. Rather, the Bureau believes that the customer relationships of smaller volume lenders are likelier to be affected by a shorter compliance period than the customer relationships of larger lenders.

Sector specific. Regarding the comments that 18 months was not sufficient for smaller lenders, the Bureau agrees. The Bureau believes the differences between the compliance challenges faced by smaller and larger lenders suffice to justify a longer compliance period for smaller-volume lenders. The Bureau agrees with the multiple comments stating that smaller institutions, such as community banks, CDFIs, and rural lenders, are more limited in their capacity to expend the additional time and resources needed to comply with this rule within 18 months, and with comments that larger lenders do not have such limitations and often have staff dedicated to regulatory compliance. Regarding the comment that regulations should apply only to large banks, not smaller banks, the Bureau notes that while the Dodd-Frank Act contains provisions specific to larger institutions, it does not apply exclusively to larger lenders. The Bureau, however, agrees that the compliance date provision of this rule should not apply to all financial institutions regardless of size, given the differences in the relative capacity to comply quickly, as the final tiered compliance date provision recognizes.

Regarding the comments of a software provider concerning the various steps in the process to implementing compliance software, the Bureau appreciates the complexity of the process and the back-and-forth between software vendors and lenders. The Bureau, however, believes that the tiered compliance provision provides for more time for a majority of smaller and moderate volume lenders to work through the software implementation process. The Bureau is providing resources, such as the Filing Instructions Guide, concurrent with the release of this final rule to aid software vendors' and financial institutions' development of software expeditiously.

Other comments. Regarding the comment requesting for 30 months to address unanticipated implementation issues, the Bureau believes that the final compliance date provision provides enough time and leeway for lenders to address any such issues. Regarding the comment that a 30-month compliance period would match the normal compliance examination cycle, the Bureau disagrees as not every financial institution subject to this rule has examinations on this schedule. Regarding the comment that an 18-month compliance period is not justified by the length of time that has elapsed since the passage of the Dodd-Frank Act, the Bureau notes that in part, it agrees, providing an additional six to 18 months to most lenders.

Three years. The Bureau is not adopting a single compliance period of three years for all covered financial

institutions, for the reasons below. The Bureau acknowledges that much of the reasoning provided in support of a single, three-year compliance period justifies the compliance period for Tier 3 financial institutions. As noted above, the Bureau believes that there is no material difference between 33 months and three years for purposes of this rule and the compliance of Tier 3 institutions.

General comments. Regarding the comments that a single, three-year period would achieve the statutory purposes of the rule, the Bureau believes that having larger- and moderate-volume lenders begin collecting data in 18 or 24 months, respectively, rather than 33 months, while waiting to obtain more accurate data from smallest-volume financial institutions, is most likely to maximize the speed with which the Bureau receives the largest possible volume of accurate data. Because of this, the Bureau believes that the final tiered compliance provision better accomplishes the statutory purposes of the rule. Regarding the comment that such a three-year compliance period should start on January 1, the Bureau believes that earlier collection of data is consistent with the purposes of section 1071, even if it results in the collection of a partial year of data. While less useful in a year-over-year comparison, a partial year of data would not be ignored entirely. Given the new data points that would be collected under the final rule, a partial year of collection will give data users valuable information they could not access from other sources, for the purposes of facilitating fair lending enforcement and identifying business and community development needs.

The Bureau has considered comments asserting that by proposing an 18-month compliance period, the Bureau has shifted the burden of rapidly complying with the rule onto lenders. The proposed compliance date reflected an attempt to balance competing concerns, and the final compliance date reflects a reconsideration of how best to balance the need to collect data quickly, and the need to collect it accurately.

Regarding the comments that it was arbitrary and unreasonable for the Bureau to propose a broader rule with an 18-month compliance period in the NPRM, compared to a rule of lesser scope and a two-year compliance period in the SBREFA process, the Bureau is not finalizing a blanket 18-month compliance period in this final rule, as explained above. And even if the Bureau were finalizing an 18-month compliance period as proposed, the Bureau would disagree with the commenters for a number of reasons.

First, the Bureau does not believe that the scope of data collection and reporting under the NPRM expanded greatly compared to the SBREFA outline of proposals under consideration. While several data points were proposed pursuant to ECOA section 704B9(e)(2)(H), most of these data points (such as pricing, application method, application recipient, reasons for denial) are data in possession of financial institutions, as items that are part of the underwriting or lending process. Some of the other items, such as time in business and NAICS Code, are captured by some lenders in any case. Similarly, the NPRM (but not the SBREFA Outline) included several provisions giving leeway to financial institutions attempting to comply in good faith, such as the bona fide error and safe harbor provisions.

Second, even assuming that the scope of data collection and reporting under the NPRM were greatly expanded as compared to the SBREFA Outline, the final rule includes a variety of provisions intended to streamline compliance as compared to the NPRM. For instance, the Bureau has simplified the approach to pricing, time in business, and NAICS code (requiring the collection of just 3 digits rather than 6), and the Bureau is no longer requiring the use of visual observation and surname analysis. The Bureau is also providing a grace period during which it does not intend to assess penalties, so long as financial institutions attempts to comply with this rule in good faith (see part VII below). The Bureau also believes that the materials it has prepared for concurrent release with the final rule, including the initial version of the Filing Instructions Guide, will have the effect of facilitating compliance with the rule.

Regarding the comment that the Bureau was shifting the burden of its delay in issuing the rule to industry, the Bureau disagrees. The Bureau's intention in proposing an 18-month compliance period was balancing two factors—providing sufficient time to comply while obtaining data as soon as possible. The Bureau believes that the final tiered compliance provision better strikes that balance by differentiating between lenders more likely to be able to comply earlier with accurate data, and lenders that are likely to need more time to report accurate data.

Sequential changes. The Bureau acknowledges the comments that the implementation of compliance systems involves numerous steps in a specific order. However, the Bureau does not believe that this justifies a single, three-year compliance period for all financial institutions. The Bureau believes that it is generally correct that compliance must proceed in a specific order, and it also believes that larger lenders are more likely to have the capacity and resources to work on different steps of compliance implementation in parallel rather than purely sequentially, and thus comply in a shorter amount of time than smaller-volume lenders with less capacity and resources.

Scope and complexity. Regarding the comments that a three-year period is needed to carefully understand and interpret the new rule, the Bureau agrees that this rule will be entirely new to many lenders with no experience with other data collection rules. However, the Bureau believes that such lenders are likelier to be smaller, lower-volume lenders, and that the final tiered compliance regime give them the additional time they need to understand this rule. Regarding the comment that lenders could only understand the content of the regulations after the issuance of the final rule, the Bureau observes that it has endeavored to simplify this final rule compared to the content of the NPRM. Regarding comments that a single three-year period would give the Bureau time to educate and support lenders as they implemented this rule, the Bureau believes that the finalized system of tiered compliance dates provides sufficient time to educate and support smaller, lower-volume lenders more likely to need this help.

The Bureau acknowledges that this rule would cover many different financial products and services, often with different processes, involving many changes across business units and systems, but the Bureau does not believe that a single three-year compliance period for all financial institutions is warranted on these grounds. The Bureau acknowledges that this rule is more comprehensive than existing collections of small business lending data, both in terms of how many financial institutions will be required to report under the rule, and in terms of the scope of what is required of any given financial institutions. However, the Bureau observes that many larger volume lenders have already complied with similar data reporting requirements for small business lending, including CRA and the Paycheck Protection Program, which also involved many data points and, for larger volume lenders, compliance across different business units and systems. The scope of this rule is somewhat more expansive than past data collections, but, as many

other commenters have pointed out, the significant overlap between this rule and the data required by other rules means that the content of this rule is likely to be well understood by many financial institutions.

Regarding the comments that the rule requires the collection of 21 data points, the separation of demographic information, and consideration of the feasibility of a firewall, the Bureau notes that these comments summarized the provisions of the rule without explaining how compliance with these provisions would require three years rather than 18 months. Regarding the comment that the regulatory burden of the rule would be significant and time-consuming, the Bureau refers to the impacts analysis in part IX. In short, such comments do not explain how the Bureau's specific attempts to quantify costs were erroneous, and do not address specific amounts of time that tasks would take.

Policies and processes. Regarding comments that lenders need three years to create, update, and test non-software processes and policies, the Bureau acknowledges that some lenders do not currently use written applications for small business and farm loans, and would need to start using them. The Bureau believes that these lenders are more likely to be smaller lenders with lower volumes of originations. The Bureau also acknowledges that lenders would not be able to change procedures, forms, policies, and systems until the final rule is issued, and that clarifications and questions may take some time to address. The Bureau does not believe this justifies a single three-year compliance period for all lenders.

Further, while stating that 18 months was insufficient, commenters did not specify the additional amount of time needed to create new procedures or workflows for applications, change existing workflows to align with the firewall requirement, overhaul their forms and applications, or to obtain new ones. The Bureau believes that the proposed compliance date would have provided sufficient time for these processes. The Bureau believes, however, that smaller lenders with lower volumes of originations may need more time than other lenders to adjust their processes and procedures to comply with the rule for the reasons provided.

Technology. The Bureau acknowledges the many comments that it received requesting a longer compliance period to implement software solutions, and the various steps in that process, including identifying, vetting, and choosing vendors, and integrating and testing software. The Bureau acknowledges that the implementation process for software can be iterative and sequential. The Bureau understands that many lenders, especially smaller and community banks, that will need to automate currently manual lending processes to collect data for this rule. In particular, primarily lower-volume lenders, such as community banks and rural institutions, will need additional time to automate their processes with software to accurately collect data, including some lenders that collect HMDA and CRA data by manual processes. The Bureau also understands that many lenders not experienced with data collection rules have no relationships with vendors.

While some lenders said that they could not begin to implement software until vendors create it, the Bureau notes that one commenter had identified a vendor already at work on compliance software for this rule as of early 2022. Regarding the comment from a larger lender stating that it would need additional time to build compliance software itself, the Bureau notes that it received relatively few comments from larger lenders.

The Bureau notes that of the comments citing software changes to justify a three-year compliance period, only several provided any estimates of the time needed to implement software. The few estimates there were ranged from as few as six months from the issuance of the final rule to upgrade software to 18 months to two years to implement software, and further time still to train staff and test software. The Bureau believes that these comments may overestimate the time vendors will take to prepare compliance software. Some estimates assumed that vendors would not start their work until after the release of the final rule, but the Bureau understands from comments and other feedback that some software vendors started work on compliance software for this rule not long after the release of the NPRM. The Bureau also believes, based on other comments received, that the longer periods suggested by commenters are most likely to apply to smaller and mid-sized lenders, for the reasons discussed before—that vendors are likely to prioritize larger lenders in implementing new or upgraded software.

Regarding the comment that lenders should have software six months before the compliance date for testing, the Bureau believes that the tiered compliance provision would provide most lenders this extra time. In any case, the Bureau believes that the grace period discussed in part VII may permit lenders to continue testing after their compliance dates, if needed. Regarding the comment that lenders need more than 18 months to comply because they make build technology decisions one to two years in advance, the Bureau believes that the release of the NPRM gave lenders time to plan and budget for compliance technology well in advance of this final rule. Regarding the comment that some lenders adopt blackout periods of eight weeks at the end of the year, which could add four months to the time needed by lenders, the Bureau does not believe additional changes are needed to final § 1002.114(b). The commenter did not suggest how common such blackouts were amongst lenders, nor how an eight-week blackout period would necessitate a four-month compliance date delay.

The Bureau acknowledges commenters' concerns that small and mid-sized banks will likely need more time to comply because of their greater dependence on the timing of third-party software vendors because these comments were based on industry experience with software vendors in the context of past rulemakings. The Bureau believes comments that vendors may become time or resource-constrained and have difficulties serving many lenders at once, and, given a single compliance date, are less likely to prioritize smaller lenders. The Bureau gives credence to comments that small lenders struggled to implement compliance systems for the TILA/RESPA integrated disclosure and HMDA rulemakings before their respective compliance dates because small lenders competed with larger lenders for the limited time and attention of vendors in advance of regulatory deadlines.

Staffing. The Bureau acknowledges the many comments that lenders need more time to hire new staff and train existing staff to collect, verify, and report data for this rule; that training may apply to staff across different departments and business units within financial institutions; and that training can be time-consuming. The Bureau observes that comments requesting a three-year period based in part on staffing concerns did not estimate how much of the additional time requested was attributable to staffing issues. One exception was a comment from a lender that said it would need several months to train its staff of 3,000 employees; the Bureau believes that this comment tends to support an 18-month compliance period for larger lenders.

The Bureau understands that certain staff training—on compliance software for this rule—may occur only after software is implemented. However, the

Bureau believes that other training may be conducted in parallel with the development of software, such as the training on the content of this rule. The Bureau agrees that lender staff with no familiarity with data collection rules may need more time to be trained in complying with this rule. The Bureau notes that the concern that staff already familiar with the HMDA and CRA rules would need training to avoid confusion with this rule is mooted by the Bureau's decision to exclude HMDA-reportable loans from reporting under this rule, and the proposed amendments to the CRA rules that would eliminate the existing CRA reporting regime.

Regarding other comments, the Bureau agrees that part of the compliance process will involve communicating operational changes resulting from this rule to customers to minimize disruption and increase the likelihood that they will answer inquiries related to protected demographic information. The Bureau acknowledges that some customers may believe that lenders already request too much data but believes that it is speculative to say that customers may be driven to less safe financial products to avoid providing data for this rule.

Access to credit. Regarding comments requesting a longer compliance period because lenders might need to pause or stop their small business lending until they were in compliance with this rule, hurting the small businesses that section 1071 was intended to benefit, the Bureau does not believe that a reduction in access to credit is likely for the reasons set out in part IX.

Data accuracy. The Bureau, for the reasons stated above, agrees that smaller and mid-sized lenders are more likely to need more time to comply with this rule to ensure the accuracy of the data that they will submit. The Bureau agrees with the group of State banking regulators that the implementation timeframe should be increased for many financial institutions to better equip them to accurately report data.

The Bureau makes particular note of comments from smaller lenders and their representatives that lenders lacking experience with data reporting regulations, such as HMDA or CRA, require more time to report accurate data. Inexperienced lenders must create processes from scratch, develop vendor relationships, and become accustomed to new procedures, such as testing software and other systems, to ensure the accuracy of data. The Bureau also agrees that the proposed 18-month period is not sufficient for lenders with lower-volume small business lending operations that may face limited staffing resources and that have never before collected the amount of data required by this rule.

The Bureau agrees in principle that rushed implementation generally would make data in the first few years after the compliance date flawed, incomplete, or unusable, limiting the usefulness of the data for section 1071's fair lending and business and community development purposes. The Bureau believes that the tiered compliance date approach it is taking in this final rule will not result in rushed implementation. Rather, its final compliance provisions will provide sufficient time for especially smaller and mid-sized lenders to implement compliance systems and prepare to collect and report accurate data.

Regarding the comments that data will be error-laden in the first few years of collection until systems, policies, and procedures can be refined, the Bureau has accounted for this in its final rule, with its bona fide error provision and additional safe harbors for certain data points. As discussed in part VII, the Bureau is also providing a grace period for lenders during which it does not intend to assess penalties for errors, so long as lenders engaged in good faith compliance efforts.

Regarding the assertion that a three-year compliance period more closely adhered to the expectation in the statute, the Bureau notes that text of the statute does not identify a specific compliance period, much less one as specific as three years. The Bureau interprets section 1071 as requiring a compliance period that best advances the statutory purposes of the rule. For the reasons specified above, the Bureau believes that its tiered compliance provision does this. In any case, the Bureau believes that the majority of covered financial institutions will report data with Tier 3, and thus will have 33 months to comply with the rule from its issuance.

Other regulations. Regarding the comments that other comparably complex regulations—such as the 2015 HMDA rule, CRA, the TILA/RESPA integrated disclosure rule, and FinCEN's customer due diligence rule—provided for more time to comply that the proposed 18-month compliance period, the Bureau agrees that these other rules may be instructive as to how much time smaller and mid-sized lenders might need to prepare to comply with this rule. However, the Bureau does not believe that this necessitates a single compliance period of three years.

The Bureau acknowledges the comment that, unlike the 2015 HMDA rule, this rule does not involve building on an existing system but rather making a new data collection system, and that smaller-volume lenders in particular should therefore have closer to three years to comply. The Bureau also acknowledges that this rule, unlike HMDA, encompasses different credit products for small businesses which may use or require different processes, systems, and personnel.

The Bureau agrees that smaller-volume lenders should have more time because they are more likely to have to build new systems and face challenges. The Bureau believes that larger lenders are less likely to have to start from scratch in complying with this rule, that they are more likely to be familiar with concepts from this rule borrowed or analogous to provisions in other existing data collection regulations, such as HMDA and CRA. This remains true even if larger lenders are more likely than smaller lenders to offer different credit products for small businesses which use different processes, systems, and personnel.

The Bureau acknowledges commenters' concerns that based on industry experience with the 2015 HMDA rule, vendors were not likely to be ready in time for lenders to comply with this rule. The Bureau believes that the tiered compliance provision will give vendors time to work with covered financial institutions on a timely basis by spreading out software needs across three compliance dates. Vendors will be able to focus on smaller-volume lenders in Tiers 2 and 3, avoiding the hasty implementation or inattentive or delayed service commenters mentioned experiencing in complying with the 2015 HMDA rule and the TILA/RESPA integrated disclosure rule.

The Bureau acknowledges comments that the Bureau to provide leniency regarding data accuracy for initial submissions after the 2015 HMDA rule, and that lenders spent hours reviewing data to avoid errors and resubmissions under HMDA. The Bureau notes that the final rule contains provisions—including the bona fide error provision and the various safe harbors for several data points—that relieve lenders of the need to provide perfectly accurate data, especially in early submissions of data. As discussed in part VII below, the Bureau is also providing a grace period for lenders during which it does not intend to assess penalties for errors.

The Bureau appreciates the concerns that vendors may need time to make inquiries to obtain clarity on the provisions of this final rule after its release to deploy solutions, as they did with the TILA/RESPA integrated disclosure rule. The Bureau intends to

work with vendors to answer inquiries about this rule as early as possible. The Bureau is releasing certain compliance aids and guides concurrently with the final rule to assist vendors in advance of the compliance dates; with previous rules; in the past, such materials were only made available months after the release of final rules. The Bureau believes that the leeway the Bureau is providing, in the form of the grace periods for all three compliance tiers, also may give vendors more time to test, adjust and improve their systems.

Regarding the comments that experiences with past regulations are irrelevant, the Bureau disagrees that experience with past rules will not help lenders comply more quickly with this rule. The Bureau believes that experienced lenders, especially larger ones, have developed institutional knowledge and infrastructure in complying with regulations that will enable them to adapt to more quickly to new rules than lenders without such experience. The Bureau believes that the experience with data collection regulations, such as HMDA and CRA, is particularly relevant to compliance with this rule.

Industry-specific rationales. The Bureau finds compelling the comments arguing that smaller-volume lenders—including FCS lenders, community banks, small credit unions, CDFIs, and start-up lenders—would face greater challenges and costs in complying with the rule within the proposed 18-month period. The Bureau gives particular weight to concerns of other regulators that small financial institutions may need closer to three years to comply with the rule because they face particular challenges in implementation.

In short, the Bureau finds the specific explanations compelling and reasonable—larger banks, as commenters pointed out, have more resources for compliance efforts, while smaller and even midsized banks may have less resources to, for instance, pay for staff for overtime or other short-term capacity to comply within 18 months. The Bureau also believes that small and mid-sized financial institutions will be a lower priority for vendors, based on the Bureau's outreach and comments by smaller lenders that experienced this in complying with past Bureau rulemakings. All of this suggests that smaller and, to a lesser extent, mid-sized financial institutions may face a tradeoff between speedy compliance and expending resources that larger lenders do not face.

The Bureau acknowledges the comment that mid-sized banks may face challenges standing up systems in 18 months despite their best efforts. The Bureau believes, however, that relative to the lenders with the smallest volume of small business loans, middle-volume lenders tend to have more resources and are more capable of complying somewhat more quickly with this rule. The Bureau believes that while a 33-month compliance period may be appropriate for smaller-volume lenders, a two-year compliance period is appropriate for middle-volume lenders.

Regarding the comment that the Bureau should consider a longer compliance period based on its capacity to collect data from non-depository institutions subject to the rule, the Bureau believes the challenge may be ensuring compliance by non-depositories that have not previously been subject to Federal data collection regimes. Nonetheless, the Bureau believes that larger non-depository lenders are likelier to be able to prepare to comply with this rule more readily while smaller volume lenders have additional time to prepare to comply.

Regarding the comments that the Bureau should provide three years to comply because the proposed 18-month period is not tenable for motor vehicle dealers in general and small dealerships in particular, the Bureau observes that motor vehicle dealers are not covered financial institutions under this rule. Moreover, as described in the section-by-section analysis of § 1002.109(a)(3), the Bureau believes that motor vehicle dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting small business lending data on behalf of other reporting financial institutions.

More than three years. Regarding the comment that the Bureau should adopt a compliance period of three to five years because community banks would have to make hard decisions on staffing and lending capacity, resulting in potential market exit, the Bureau does not believe that such a lengthy compliance period is necessary for all financial institutions. The Bureau is providing Tier 3 lenders—which the Bureau believes will include many smaller community banks—33 months, or nearly three years, to prepare to comply with the final rule. The commenter did not provide any details that would justify an even lengthier compliance period.

Tiered compliance. Regarding the large number of comments received from industry commenters that requested tiered compliance—often as an alternative to a single compliance date longer than 18 months—the Bureau agrees for the reasons set out above.

The Bureau appreciates industry comments in support of tiered compliance periods on the grounds that such a system would give smaller lenders would have more time to comply with the rule, including that the scope and complexity of the rule and the need to test systems to ensure accurate reporting would be particularly challenging to smaller lenders.

The Bureau observes that many commenters that requested tiered compliance periods on the grounds that smaller banks and credit unions, especially those serving rural and underserved communities, needed more time to comply to have time to implement new compliance software. The Bureau acknowledges the comments identifying discrete steps in the process of implementing software, including finding vendors, giving vendors time to develop software, planning and executing network changes, and training staff but notes that these steps are not unique to smaller or mid-sized lenders. The Bureau observes that smaller-volume lenders may find these steps more challenging for a number of reasons already articulated above. The Bureau acknowledges that smaller lenders may have little bargaining power with vendors and are often the last to receive system upgrades. The Bureau believes that tiered compliance dates are justified because hasty implementation by smaller banks facing difficulties implementing this rule may result in inaccurate data.

The Bureau acknowledges certain factors identified by commenters, such as the need for lenders to hire and/or train additional compliance staff, train existing lending staff, educate customers on the content of the rule, are not unique to smaller lenders. However, the Bureau believes that smaller-volume lenders, especially those without previous experience complying with data collection rules, may face more challenges with all of these factors than larger lenders.

The Bureau agrees with the comments that smaller financial institutions—including CDFIs, credit unions, and lenders servicing rural and underserved communities—should have a later compliance date to learn from money-center banks. The Bureau agrees that tiered compliance is important for lenders inexperienced with data collection rules to give them time to build compliance infrastructure. The Bureau agrees that such lenders may face more challenges than depository institutions in complying quickly with

this rule, needing to create compliance training programs from scratch, and that they may have a harder time obtaining expertise to implement compliance software and procedures. The Bureau agrees with the comment that banks with no HMDA compliance experience may need more time to comply with this rule than larger banks with such experience. The Bureau believes that the experience of larger banks with HMDA will enable them to more quickly comprehend this rule and implement compliance systems for this rule. This experience will also enable such banks to train their staffs more quickly. The Bureau further agrees that, under a tiered compliance system, smaller-volume lenders may learn from the earlier implement of large banks, and that tiered compliance would give smaller lenders more time to resolve unanticipated issues.

The Bureau believes that industry experience with the staggered effective dates in the Financial Accounting Standards Board's Current Expected Credit Loss rule somewhat informs the final tiered compliance provision. The Bureau believes that the approach taken by the Financial Accounting Standards Board and other Federal regulators regarding the Current Expected Credit Loss rule support the Bureau's approach here.

Regarding the number of compliance date tiers, the Bureau believes that the three tiers included in this final rule are more appropriate than two as suggested by some commenters, for the reasons already articulated. However, commenters distinguished not just between smaller and larger lenders; comments also identified mid-volume lenders as facing unique issues in complying with the rule, occupying a space between large and small lenders. Mid-volume lenders face certain challenges complying with the rule compared to larger lenders, but have greater resources and, often, more experience with Federal regulations and data collections than small lenders.

Regarding the comments supporting the adoptions of three compliance tiers, the Bureau agrees. Regarding the comment that the Bureau should adopt three compliance tiers, giving the largest lenders one year to comply, medium-sized lenders two years, and small lenders three years, the Bureau agrees in part. The Bureau agrees that earlier compliance dates are justified for large lenders because they have greater staff expertise, as well as capacity and resources, to comply with data collection regulations. However, the Bureau believes that a one-year compliance period may be insufficient for many larger financial institutions to comply with this rule.

Regarding the comment that the third compliance tier should include trusted small business lenders, the CFPB intends to propose, in a follow-on notice of proposed rulemaking, that lenders with strong records under the CRA or other relevant frameworks be permitted additional time to come into compliance with the rule. That approach is consistent with the statutory purposes of the rule.

Regarding the request for tiered compliance starting not less than three years after the final rule, the Bureau does not believe such an approach would be appropriate, for the reasons specified above concerning the request for a single three-year compliance period. The Bureau believes that a three-year period for the earliest tier is inconsistent with the statutory purposes of the rule because larger volume financial institutions are capable of adequate compliance with this rule within 18 months. Further delay for these lenders would result in a longer period during which data are unavailable to facilitate the enforcement of fair lending laws or to identify business and community development needs and opportunities.

Regarding the requests that the Bureau use asset size to determine compliance date tiers, the Bureau acknowledges that asset size can sometimes be a proxy for determining the resources and capacity a lender has to prepare to come into compliance with the rule. It is also a simple metric to implement, given that there are recognized standards for reporting assets. The Bureau agrees that institutions with less assets often have smaller compliance and information technology staffs.

However, the Bureau notes that this rule applies to non-depository institutions as well. Some such lenders may have high volumes of originations but relatively low assets. As a result, the Bureau observes that asset size may not be as reliable a proxy for the capacity and resources a non-depository institution has to comply quickly with the rule. The Bureau believes that volume of originations is, in the context of small business lending, a better proxy than asset size for determining the capacity of a lender to comply with this rule. The Bureau also believes that tiering based on volume of originations is proportional to the interest a lender would have in complying with this rule, regardless of asset size.

Regarding the comments opposing tiered compliance dates, the Bureau appreciates that this rule represents a great change for small and large financial institutions that may proceed through similar steps to implement the rule, including understanding the rule, changing processes, building and testing systems, training staff, and adding procedures and controls. The Bureau does not believe, however, that the magnitude of challenges lenders face is the same regardless of the size or capacity of the institution. The Bureau believes that the largest volume lenders that will be in Tier 1 have the capacity to comply with this rule within 18 months, especially given the leeway provided by this rule—in the form of the bona fide error thresholds and safe harbors—and by the grace period to report data that is sufficiently accurate. The Bureau agrees with the comment that limiting access to small business credit could have a negative impact on the economy, but does not believe the final tiered compliance date provision would ''inevitably'' result in any diminishing of access to credit for small businesses, as discussed in more detail in part IX below.

Regarding the comment opposing tiered compliance dates on the grounds that 18 months was sufficient for all institutions, the Bureau disagrees for the reasons specified above. While many smaller-volume lenders may be able to comply within 18 months, the Bureau believes that many such lenders may find it challenging to comply within 18 months. Regarding the comment that financial institutions have had since the release of the NPRM in September 2021 to begin preliminary planning to comply with this rule, the Bureau agrees in part. While the final rule differs from the NPRM in several aspects, many provisions are based on statutory requirements—such as the mandatory data points, the firewall provision, the recordkeeping requirements, and the privacy analysis—and would have been finalized in some manner, permitting some planning for financial institutions concerned with preparing for implementation well in advance of the eventual compliance date. The Bureau does not believe, however, that the September 2021 release of the NPRM gives smaller volume lenders the ability to comply with this rule within 18 months of its issuance.

Regarding the comment that the proposed compliance period of 18 months would give banks just six months to collect data to do a trial run with one year of data before compliance date, the Bureau observes that smaller volume lenders in Tiers 2 or 3 would have more time to test their collection systems. The Bureau also notes that pursuant to final § 1002.114(c)(1), all

financial institutions may start collecting data one year before their respective compliance dates, giving especially smaller-volume lenders more time to test their systems.

114(c) Special Transitional Rules

The Bureau is adopting two transitional rules in § 1002.114(c) to facilitate the initial compliance of financial institutions with subpart B. Final § 1002.114(c)(1) permits, but does not require, financial institutions as described by § 1002.114(b)(1) through (3) to collect information regarding applicants' minority-owned business status, women-owned business status, LGBTQI+-owned business status, and the ethnicity, race, and sex of applicants' principal owners under final § 1002.107(a)(18) and (19) beginning 12 months prior to the financial institution's applicable compliance date as set forth in § 1002.114(b)(1) through (3). A financial institution collecting such information pursuant to § 1002.114(c)(1) must do so in accordance with the requirements set out in §§ 1002.107(a)(18) and (19), 1002.108, and 1002.111(b) and (c). In addition, comment 114(c)–2 clarifies that a financial institution that receives an application prior to its compliance date under § 1002.114(b), but takes final action on the application after the compliance date, is not required to collect data regarding that application under § 1002.107 and not required to report the application pursuant to § 1002.109.

Final § 1002.114(c)(2) permits a financial institution that is unable to determine the number of originations of covered credit transactions for small businesses for calendar years 2022 and 2023, because for some or all of this period it does not have readily accessible the information needed to determine whether its covered credit transactions were originated for small businesses as defined in § 1002.106(b), to use a reasonable method to estimate its originations to small businesses for either or both of the calendar years 2022 and 2023.

The Bureau believes that these transitional rules pursuant to its authority under ECOA section 704B(g)(1), are necessary to carry out, enforce, and compile data pursuant to section 1071.

114(c)(1) Collection of Certain Information Prior to a Financial Institution's Compliance Date

Proposed Rule

Proposed § 1002.114(c)(1) would have provided that a financial institution that will be a covered financial institution as of the compliance date in proposed § 1002.114(b) is permitted, but not required, to collect information regarding whether an applicant for a covered credit transaction is a minority-owned business under proposed § 1002.107(a)(18), a women-owned business under proposed § 1002.107(a)(19), and the ethnicity, race, and sex of the applicant's principal owners under proposed § 1002.107(a)(20) beginning 12 months prior to the compliance date. A financial institution collecting such information pursuant to proposed § 1002.114(c)(1) would have been required to do so in accordance with the requirements set out in proposed §§ 1002.107(18) through (20) and 1002.108.

The Bureau sought comment on the approach in this proposal.

Comments Received

A joint letter from several trade associations supported the proposed provision permitting early collection of data. A community group agreed with the reasoning and approach to allowing voluntary reporting by financial institutions, inquired whether the Bureau was permitting voluntary reporting of date only for demographic information, and suggested that to permit the reporting of only demographic information would be of limited use. A business advocacy group commended the Bureau for encouraging the reporting of data before the start of the compliance period, and encouraged the Bureau to offer incentives to enable collection of data as early as possible to help enable the analysis of fair lending. Several CDFI lenders suggested that mission-oriented lenders ready to report data in 18 months should be able to opt in. Two banks recommended that the 12-month period of voluntary collection in advance of the compliance date should be extended further, noting that such a transitional period would be a critical period for lenders to implement, test, and if necessary, modify data collection and maintenance processes and systems before the compliance date. One trade association requested that the Bureau clarify that applications submitted before the compliance date, but approved after the compliance date, not be considered covered applications for purposes of determining coverage.

Final Rule

The Bureau is finalizing § 1002.114(c)(1), maintaining the provision in principle but making several changes. First, final § 1002.114(c)(1) permits, but does not require, a financial institution that will be a covered financial institution by the compliance dates set out in § 1002.114(b)(1) through (3) to collect protected demographic information pursuant to § 1002.107(a)(18) and (19) beginning 12 months prior to the compliance date applicable to that financial institution. This regulatory text has been adjusted to account for the change from a single compliance date in proposed § 1002.114(b) to the three different compliance dates in final § 1002.114(b)(1) through (3). Second, final § 1002.114(c)(1) clarifies that any protected demographic information collected under this provision must comply with the requirements of § 1002.107(a)(18) and (19), and § 1002.108, as proposed, and adds a new requirement that any demographic information collected must comply with the requirements of § 1002.111(b) and (c). Third, final § 1002.114(c)(1) clarifies that a financial institution that receives an application prior to its compliance date specified in § 1002.114(b), but takes financial action on or after that compliance date, is not required to collect data regarding that application pursuant to § 1002.107 nor to report the application pursuant to § 1002.109.

The Bureau is also finalizing new comments 114(b)–1 through 4. Comment 114(b)–1 specifies the provisions of this rule that a covered financial institution must comply with by the compliance date that applies to it under § 1002.114(b). Comment 114(b)–2 specifies the provisions of this rule that covered financial institutions that must comply with the initial partial year collection pursuant to § 1002.114(b)(1), from October 1, 2024 through December 31, 2024. Comment 114(b)–3 establishes informal names for compliance date provisions (Tier 1, Tier 2 and Tier 3) to facilitate discussion of the compliance dates specified in § 1002.114(b)(1), (2), and (3). Comment 114(b)–4 illustrates the application of § 1002.114(b) to determine the compliance dates of a variety of financial institutions, based on a variety of volumes of originations of covered credit transactions to small businesses.

The Bureau believes that this provision will give financial institutions time to test their procedures and systems for compiling and maintaining this information in advance of actually being required to collect and subsequently report it to the Bureau. Under this provision, financial institutions will have time to adjust any procedures or systems that may result in the inaccurate compilation or maintenance of applicants' protected demographic information, the collection of which is required by section 1071 but

otherwise generally prohibited under ECOA and Regulation B. (Financial institutions could of course collect the other information that would be required by this proposed rule at any time, without needing express permission in Regulation B to do so.) The Bureau believes that this provision will facilitate compliance and improve the quality and accuracy of the data reported to the Bureau and therefore is necessary to carry out, enforce, and compile data pursuant to section 1071, and will carry out the purposes of ECOA, and is necessary or proper to effectuate the purposes of ECOA and facilitate or substantiate compliance therewith.

Regarding the question as to whether the proposed provision permits voluntary reporting only of protected demographic information, the Bureau observes that the provision actually only permits the collection, not reporting, of demographic information. The provision is necessary because, in its absence, ECOA and § 1002.5(b) of Regulation B would otherwise prohibit creditors from collecting such demographic information, while creditors are not prohibited by ECOA and Regulation B from collecting the other data points required by this rule. Regarding the comments encouraging the Bureau to offer incentives to collect data as early as possible to help enable the analysis of fair lending, the Bureau notes that the provision exists only to help financial institutions better prepare to comply with the rule. The Bureau is not adopting any additional incentives, as suggested by commenters, and indeed it is unclear what incentives it might offer to further encourage early reporting.

Regarding the comment that mission-oriented lenders ready to report data in 18 months should be able to opt in, the Bureau agrees. Regarding the request to extend the transitional period further such that financial institutions could collect protected demographic information without being required to report it for a period longer than 12 months, the Bureau acknowledges these concerns but does not believe such a change would be appropriate. The Bureau's decision to provide most smaller-volume financial institutions additional time by way of tiered compliance dates, as well as a grace period during which it does not intend to exercise its supervisory or enforcement authorities, all give financial institutions additional time and leeway to establish their compliance systems. Further, institutions seeking longer periods to collect demographic information would not necessarily have even one year of information upon which to base a determination that they may have to begin preparing to comply with the rule, potentially resulting in the collection (but not reporting) of protected demographic data in a way that completely overrides the general prohibition in existing § 1002.5(b).

Regarding the request to clarify that applications submitted before the compliance date, but approved after, not be considered covered applications, the Bureau agrees that such clarity is useful and thus final § 1002.114(c)(1) addresses and implements this request.

114(c)(2) Determining Which Compliance Date Applies to a Financial Institution That Does Not Collect Information Sufficient To Determine Small Business Status

Proposed Rule

Proposed § 1002.114(c)(2) would have provided that for purposes of determining whether a financial institution is a covered financial institution under proposed § 1002.105(b) as of the compliance date specified in proposed § 1002.114(b), a financial institution would be permitted, but not required, to use its originations of covered credit transactions for small businesses in the second and third preceding calendar years (rather than its originations in the two immediately preceding calendar years).

The Bureau sought comment on the approach in this proposal.

Comments Received

A joint letter from trade associations representing the commercial real estate industry supported the proposed provision and suggested an edit to the regulatory text of proposed § 1002.114(c)(2) specifying that a financial institution is permitted, but not required, to use its originations in the first two full calendar years after the effective date of the rule, rather than its originations in the two immediately preceding calendar years.

A joint letter from trade associations, in commenting on the proposed compliance date, claimed that 18 months was not enough time to determine covered financial institution status pursuant to § 1002.105(b) because lenders would be required to collect gross annual revenue data to determine the small business status of their originations for purposes of originations thresholds, but they could not collect such data until after the publication of the final rule. The commenter noted that many lenders do not collect gross annual revenue for their commercial loans (*e.g.,* investment property loans are underwritten based on net operating income), and that some lenders that collected gross revenue data did not have it readily accessible. The commenter requested a longer compliance period to give lenders time to understand the content of the final rule before the start of a calendar year to track originations for small businesses to avoid retroactive application of the final rule. The commenter suggested, instead, a two-calendar-year period to collect gross annual revenue data, followed by the compliance date starting the third calendar year for those financial institutions that determine they are covered. The commenter noted that its proposed schedule was a minimum, and was predicated on having a gap between publication of the final rule and the start of the first calendar year during which lenders would track the small business status of originations, and that the Bureau published technical specifications sufficiently in advance of the third calendar year. A trade association, also commenting on the compliance period, claimed that two years would allow for implementation by lenders, would provide time to track originations of covered transactions and, therefore, the small business status of applicants, and would allow lenders to make changes necessary to achieve the statutory purposes of the rule.

Final Rule

The Bureau is not finalizing § 1002.114(c)(2) as proposed. The Bureau is instead implementing a different provision stating that a financial institution that is unable to determine the number of covered credit transactions it originated for small businesses for calendar years 2022 and 2023 for purposes of determining its compliance date pursuant to § 1002.114(b), because for some or all of this period it does not have readily accessible the information needed to determine whether its covered credit transactions were originated for small businesses as defined in § 1002.106, is permitted to use any reasonable method to estimate its originations to small businesses for either or both of the calendar years 2022 and 2023. The Bureau is also implementing new comments 114(c)–3 through –6. Comment 114(c)–3 specifies circumstances under which a financial institution has readily accessible the information needed to determine the small business status of its covered credit transactions for purposes of determining its compliance date. Final

comment 114(c)–4 specifies certain circumstances under which a financial institution does not have readily accessible the information needed to determine small business status of its covered credit transactions for purposes of determining its compliance date. Final comment 114(c)–5 identifies three reasonable methods that may be used by financial institutions to estimate the number of covered credit transactions for small businesses for purposes of determining its compliance date. Final comment 114(c)–6 provides examples of financial institutions applying each of the three reasonable methods identified in comment 114(c)–5 by financial institutions, as well as financial institutions applying reasonable methods not specified in comment 114(c)–5, to estimate the number of covered credit transactions for purposes of determining its compliance date.

The Bureau believes that, in the context of the proposed single compliance date, proposed § 1002.114(c)(2) would have provided greater clarity and certainty to financial institutions as to whether or not they would be covered financial institutions. This may have been particularly important for those financial institutions that originated a volume of covered credit transactions close to the threshold under proposed § 1002.105(b) and a single compliance date. The Bureau believed this provision would have been necessary to carry out, enforce, and compile data pursuant to section 1071.

However, because of the changes to the compliance date provision in final § 1002.114(b), from a single compliance date to several tiers of compliance dates, the Bureau believes that § 1002.114(c)(2) as originally proposed may no longer effectively serve the purposes for which it was originally intended. The Bureau believes that because the final rule provides for several compliance dates, the optionality provided by proposed § 1002.114(c)(2) is no longer necessary and may even make compliance more confusing. The transition to several compliance dates in the final rule, from a single compliance date in the proposal, means that many lower-volume financial institutions will have one to two years in advance of their compliance date to determine whether they are covered financial institutions that must report data at all. For instance, an institution with a compliance date of January 1, 2026, based on its annual originations in 2022 and 2023, may not be a covered financial institution at all by its compliance date if it has less than 100 annual originations in 2024 or 2025.

The Bureau received one comment directly addressing proposed § 1002.114(c)(2). By contrast, the Bureau received multiple comments on the difficulty that some financial institutions may face in determining their coverage under this rule, and therefore their compliance date, because they do not collect information on the gross annual revenue of their applicants for business credit. Some industry commenters, as set out in the section-by-section analysis of § 1002.107(a)(14), noted either that they did not collecting data on gross annual revenue of some small business applicants, or that there would be difficulties in collecting such data.

In response to these comments, the Bureau has revised § 1002.114(c)(2) to provide greater flexibility for those financial institutions that do not have ready access to data on gross annual revenue to determine what compliance date will apply to them for purposes of § 1002.114(b). Because of the changes to this rule after the proposal, the Bureau believes that this provision, as finalized, will provide greater clarity and certainty to those financial institutions that do not currently collect gross annual revenue data as to which compliance date will apply to them. This will be particularly important for those financial institutions that originated a volume of potentially covered credit transactions close to the threshold under § 1002.105(b), and those financial institutions that originated a volume of potentially covered credit transactions close to the thresholds in § 1002.114(b). The Bureau believes this provision is necessary to carry out, enforce, and compile data pursuant to section 1071.

Appendix E to Part 1002—Sample Form for Collecting Certain Applicant-Provided Data Under Subpart B

Proposed Rule

The Bureau proposed a sample data collection form that financial institutions could choose to use to collect minority-owned business status, women-owned business status, and principal owners' ethnicity, race, and sex. The proposed sample data collection form would have been similar to the HMDA data collection form and would have included a notice of the applicant's right to refuse to provide the information as well as an explanation of why the financial institution is requesting the information. The sample data collection form would have also included the definitions of minority individual, minority-owned business, principal owner, and women-owned business as they would have been defined in proposed § 1002.102(*l*), (m), (o), and (s), respectively.

Additionally, to aid financial institutions with the collection of the information in proposed § 1002.107(a)(21), the sample data collection form would have included a question about the applicant's number of principal owners. The sample data collection form would have also included language that a financial institution would have been able to use to satisfy the notice requirement under ECOA section 704B(d)(2) if it determined that one or more employees or officers should have access to the applicant's protected demographic information pursuant to proposed § 1002.108(b)(2).

The Bureau requested comment on the proposed sample data collection form, including the proposed language for the notice under ECOA section 704B(d)(2). The Bureau also generally requested comment on whether to provide additional clarification regarding any aspect of the sample data collection form or the related notice provided pursuant to ECOA section 704B(d)(2). In addition, the Bureau sought comment on whether the sample data collection form should identify the Bureau to applicants as a potential resource in connection with their applicable legal rights or for additional information about the data collection, including concerns regarding non-compliance. It also sought comment on whether financial institutions need additional information on how to adapt this form for use in digital modes of data collection, and, if so, what specific information would be most useful. The Bureau further requested comment on whether a sample data collection form in Spanish or other languages would be useful to financial institutions.

Comments Received

Commenters were generally supportive of the Bureau's inclusion of a sample data collection form in the final rule, stating that the sample data collection form would help financial institutions meet the demographic data collection requirements.

Several commenters had suggestions for language to add to the proposed sample data collection form. One trade association suggested that the data collection form disclose, as the beginning, that the applicant is not required to respond to the questions, and second inquire as to whether the applicant is a small business based on its gross annual revenue and establish that the form is not required if the applicant is not a small business. One bank commented that the form should

include language, in bold, to the applicant stating that the information provided will not be used against them and is not derogatory.

A bank urged providing an option on the proposed form for an applicant to indicate if the applicant's principal owner was present when the form was completed or if the responses were provided by the principal owner, to lessen confusion and discomfort during the application process. The bank stated such an option would also improve data quality where a financial institution does not meet with a principal owner in person and thus cannot make ethnicity and race determinations on the basis of visual observation and/or surname analysis. A trade association suggested including options to indicate on the form if the applicant declined to answer and that the applicant was not available, which could be used if an applicant representative was uncertain of an absent principal owner's ethnicity, race, and/or sex or was unsure if the principal owner wished to provide such information.

A community group commenter recommended that the sample data collection form include a notice that the Americans with Disabilities Act prohibits discrimination in lending practices on the basis of an applicant's disability.

An individual commenter suggested that applications include an explanation of why the Bureau is collecting protected demographic information after a demographic information collection section, which would allow an applicant to make an informed decision in providing information and know who to contact in the event of discrimination.

A bank and a trade association stated that the proposed sample data collection form is misleading because it would have indicated that the demographic information is required and would not have stated that the borrower has the right to refuse to provide the requested information. In contrast, however, a CDFI lender supported the statement on the proposed form that applicants are not required to provide the information requested but are encouraged to do so. This commenter also supported the notice on the sample form that while provided information could not be used to discriminate against the applicant, some employees may have access to the information.

Some lenders and trade associations expressed concerns about the text on the proposed sample form that would have disclosed that, if an applicant does not provide ethnicity, race, or sex information for at least one principal owner and the financial institution meets with a principal owner in person or via electronic media with an enabled video component, the financial institution is required by Federal law to report at least one principal owner's ethnicity and race based on visual observation and/or surname. Some of these commenters, who also opposed the proposed visual observation and surname data collection requirement this language would have referenced, stated that the proposed disclosure language may discourage an applicant from seeking an in-person meeting with the financial institution or pressure applicants to provide the information to avoid inaccurate guesses by bank employees or officers. Other commenters requested that the disclosure about the proposed visual observation and surname data collection requirement be removed from the form, because it would inform an applicant that the financial institution will be collecting information about their principal owners' ethnicity and race regardless of their choice to not provide the information. A joint letter from several trade associations representing the commercial real estate industry opposing the proposed visual observation and surname data collection requirement stated that the related disclosure language on the proposed form should be removed if the data collection requirement is not adopted for the final rule.

Some community groups, a CDFI lender, and a joint trade association letter recommended that the Bureau provide non-English translations of any sample forms, including in Spanish. Two community groups suggested that the data collection form be provided in English, Spanish, and Mandarin Chinese. They stated that providing the forms in multiple languages would help reduce confusion and help lenders. Other community groups and a lender suggested that the proposed form be provided in at least the top ten spoken languages in the United States, as determined by the Census, so applicants can understand the data being collected and its context. They stated that the translations are necessary to honor the statutory intent, and that immigrants are more likely to start businesses than non-immigrants, and research shows that many immigrants and immigrant entrepreneurs have limited English proficiency, which leads to difficulties in navigating the financial marketplace.

A trade association and a bank requested flexibility to solicit responses to the questions on the proposed sample collection form across different circumstances, and specifically asked for clarification that financial institutions could list the response ''I do not wish to provide this information,'' as the first response option and not the last, as it is listed for all the proposed questions on the form. The commenters also asked for flexibility, when using an electronic data collection form, to collapse subcategories of questions, so that they appear only when an applicant clicks on a question to facilitate readability. The commenters also asked for clarification for applications taken orally, as to whether all categories of responses must be read to the applicant, even if the applicant has responded to an earlier response option. These commenters also requested a safe harbor from liability for not using the language of the sample data collection form when taking a covered application orally, stating that some words on the form are long, complex, and may be difficult for employees to pronounce. These commenters also stated that the sample data collection form should disclose which data points will be published to allow applicants to make informed decisions, address privacy concerns, and improve data quality.

Some commenters had suggestions for additional forms or materials the Bureau should issue. A trade association stated that the Bureau should create a business-specific form to request information, which the commenter stated should be optional for financial institutions to use. Several commenters, including banks, community groups, and a minority business advocacy group, asked the Bureau to create a uniform or model data collection or application form. The commenters generally stated that such a form would facilitate accurate data collection. One bank asserted that the likelihood of a respondent providing information would be higher, citing Paycheck Protection Program data that the majority of applicants chose not to provide demographic information. The bank stated that absent a uniform CFPB-issued form, collection and the resulting data will be flawed. Two commenters cited the HMDA model application forms as an example of such a uniform application, which one said effectively explains to borrowers why data are being collected and encourages completion of the data while also giving the borrower some assurance that they will not be discriminated against for either furnishing (or not) the data. A trade association and a bank urged the Bureau to create a specific data collection form for loans covered by HMDA and by section 1071, if HMDA-reportable loans are included in the

final rule, to facilitate consistent reporting. A trade association and a business advocacy group encouraged the Bureau to evaluate the sample data collection form and instructions on an ongoing basis for any necessary changes.

Final Rule

Pursuant to its authority under ECOA section 704B(g)(1), the Bureau is finalizing appendix E to help financial institutions comply with requirements to collect applicants' protected demographic information and to keep an applicant's responses to inquiries for such information separately from the credit application and accompanying information. The introductory language in the sample form includes right to refuse, firewall, and non-discrimination notices. When lenders choose to use the form, this language serves to facilitate compliance with ECOA section 704B(c) and, when applicable, 704B(d)(2), as well as with comment 107(a)(19)–4, which requires that applicants be informed that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. Though the sample form reflects a number of legal requirements applicable to collection, the rule does not require use of the form itself. Rather, the sample form is intended as a compliance resource for lenders who choose to use it.

The Bureau agrees generally with commenters that the sample data collection form at final appendix E will help facilitate financial institutions' efforts to comply with the data collection requirements of the final rule, meet their statutory obligations, and that it will streamline the data collection process. To further these goals, the sample data collection form at final appendix E reflects edits made by the Bureau in response to comments received and further Bureau consideration. The final version of the form also considers feedback from user testing, conducted to learn about small business owners' likely experience in filling out the form and to explore design and language options to make the form effective.[839]

The Bureau received comments suggesting that the Bureau provide more guidance or specific text on the form about the purpose of the data collected through the form. The Bureau agrees with commenters that it is important to provide applicants with a general explanation of the rule and its purpose. As discussed in the section-by-section analysis of § 1002.107(a)(19), in response to similar comments and in consideration of feedback from the user testing, comments 107(a)(18)–4 and 107(a)(19)–4 provide that a financial institution must inform an applicant that Federal law requires it to ask for the applicant's principal owners' ethnicity, race, and sex to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. The Bureau has also included sample language for the statement on the sample form at appendix E. In the Bureau's user testing, participants also generally reflected a preference for upfront placement of language establishing that Federal law requires the collection of the requested information and emphasizing the purpose of collecting the information, to ensure that small business owners are treated fairly. As revised, the introduction on the first page of the final sample data collection form starts with this statement and also reiterates the purpose of the data collection in the last sentence. As discussed in the section-by-section analysis of § 1002.108, the Bureau has also revised the firewall notice in the introduction. The Bureau has moved its placement to the second paragraph of the introduction. In line with a suggestion by a commenter, the Bureau has also generally revised the language of the non-discrimination notice to emphasize that the financial institution may not discriminate against the applicant on the basis of its answers, by bolding and capitalizing the phrase, ''Federal law prohibits discrimination'' in that disclosure, along with other edits.[840]

To accommodate the changes described above, the right to refuse notice is now included later in the introduction. The Bureau received comments that the proposed sample data collection form does not state that applicants have the right to refuse to provide the information requested—which the Bureau notes is incorrect—and a suggestion that the form emphasize that right at the very beginning. In the user testing, some participants also recommended greater emphasis on the right to refuse.[841] After consideration of all the received feedback, the Bureau believes that the introduction of the sample data collection form appropriately addresses an applicant's right to refuse to provide the information requested. In particular, the preceding introductory material in the sample data collection form, as described above, will inform applicants about what they are refusing when exercising that right.

The first page of the final sample form also includes a question about the applicant's business status under final § 1002.107(a)(18). Whereas the proposed sample form originally had separate inquiries for an applicant's minority-owned business status and women-owned business status, the final sample data collection form combines those questions, along with the inquiry about whether the applicant is an LGBTQI+-owned business, into one question to streamline the questions on the data collection form.[842] The Bureau also received feedback during its user testing of the forms that the term ''business status'' was confusing for applicants. In consideration of that feedback and comments received generally urging the Bureau to make the sample data collection form clearer for applicants, the Bureau has revised the sample question heading to read ''Business ownership status.''

As discussed in the section-by-section analysis of § 1002.102(m), the Bureau is not adopting its proposed definition for minority individual in the final rule, because it is incorporating the substance of the minority individual definition in the ''minority-owned business'' definition at final § 1002.102(m). To facilitate the readability of the combined business ownership status question on the final sample data collection form, the Bureau is including a separate explanation for what is meant by a minority individual, which is similar to the approach to the minority-owned business question on the proposed sample data collection form. A financial institution is permitted to use the language on the sample form to satisfy the rule's requirement to provide certain definitions when requesting an applicant's business status.

The first page of the final sample data collection form also includes a question about the number of the applicant's principal owners, as did the first page of the Bureau's proposed form. The Bureau has revised the question to include check boxes for potential responses instead of a write-in text field as proposed, to reduce the likelihood of

[839] CFPB, *User testing for sample data collection form for the small business lending final rule* (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.*

[840] *Id.* at app. A.

[841] *Id.*

[842] Two versions of a combined question were tested in the Bureau's user testing. The version in final appendix E is the version the Bureau believes is conceptually simpler for applicants to understand.

error by applicants in responding to the question.

Final comments 102(o)–3 and 107(a)(20)–1 clarify that a financial institution must provide the definition of principal owner set forth in § 1002.102(o) when requesting information about the number of an applicant's principal owners. As discussed further in the section-by-section analyses of §§ 1002.102(o) and 1002.107(a)(20), in consideration of overall feedback from commenters to improve applicant understanding of the data collection and positive feedback received in the course of the user testing, the Bureau has revised the number of principal owners inquiry on the final sample data collection form to use the term ''individual'' instead of the term ''natural person'' when providing the definition of a principal owner.

As explained in the section-by-section analysis of § 1002.107(a)(19), the Bureau has elected to not adopt the proposed requirement that a financial institution collect at least one principal owner's ethnicity and race information through visual observation and/or surname analysis under certain circumstances. As a result, the Bureau has removed the proposed disclosure regarding this requirement from the second page of the final sample data collection form, rendering commenters' objections to the disclosure moot.

In the Bureau's user testing, some participants expressed confusion about differences between the ethnicity and race questions on the sample data collection form. Some users also stated it was not obvious how many separate questions they had to answer. To ensure that the sample data collection form is clear and easily understood, on the second page of the form the Bureau has numbered the sample questions about a principal owner's ethnicity, sex (as ''sex/gender''), and race (from one to three, in that order) to make more apparent that the questions are separate inquiries. The Bureau has also changed the inquiries on that page to appear as questions (*e.g.,* for ethnicity, to ask ''Are you Hispanic or Latino?'') to make the substance of each inquiry clearer. The Bureau has also made edits to rearrange the questions and to the format of the ethnicity and race aggregate categories and disaggregated subcategories on the final form, to make clearer for the reader that the disaggregated subcategories are associated with the aggregate categories. The Bureau has further updated the instruction associated with each of the response options with a write-in text field to direct the applicant to ''specify'' a response and not ''print'' a response as proposed, to facilitate the use of the instruction for paper, electronic, and oral applications.

The Bureau carefully considered the comment suggesting that the sample form first note applicants' right to refuse and, second, establish that if the applicant is not a small business it does not need to fill out the form, by including an inquiry about the applicant's gross annual revenue. However, in the Bureau's user testing, participants preferred having information explaining that the data collection was required under Federal law at the beginning of the form and emphasized the importance of explaining the purpose of the data collection.[843] And, for the reasons explained above, the Bureau believes the placement of the right to refuse in the introductory text is appropriate.

The Bureau also does not believe that it is necessary for the sample form to include an inquiry establishing the applicant's small business status. Financial institutions will be required to maintain reasonably designed procedures to collect applicant-provided data, pursuant to § 1002.107(c). The Bureau has also included a safe harbor under § 1002.112(c) for a financial institution that initially collects data under § 1002.107(a)(18) and (19) regarding whether an applicant for a covered credit transaction is a minority-owned, a women-owned, and/or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners, but later concludes that it should not have collected this data, if certain conditions are met. The Bureau believes these other regulatory provisions will mitigate the possibility that data will be incorrectly collected and protect financial institutions from inadvertent collection. As a result, the Bureau does not believe that it is necessary for the sample form to include a question to establish the applicant's small business status.

The Bureau considered the commenter's suggestion to include a disclosure about the American with Disabilities Act on the final sample data collection form. The sample form has been developed by the Bureau to address a financial institution's disclosure and data collection obligations under section 1071 and the Bureau believes it would be confusing for the sample form to include text as to the applicability of other laws.

[843] CFPB, *User testing for sample data collection form for the small business lending final rule* at app. A, at 6, 11–12, 14 (Mar. 2023), *https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.*

The Bureau is not adopting commenters' suggestions that the sample data collection form include options for indicating whether an applicant's principal owners or the applicant are not present or available, that the data was not provided by principal owner, or that the applicant declines to fill out the form. As discussed above, the proposed form would have included a notice about the applicant's right to refuse to provide the information requested. This right to refuse notice also appears, with some edits, on the final sample data collection form. The Bureau believes it is reasonable to assume that if the person filling out the data collection form on behalf of an applicant does not feel comfortable providing the information for any reason, including because they are not the principal owner at issue or do not believe they can provide accurate responses, that they will exercise the right to refuse to provide the requested information. Further, an applicant can also choose to not fill out the entirety of the form, to not provide responses to a specific question, or to select the ''I do not wish to provide this information'' or similar response option available for each of the demographic questions on the sample data collection form. As a result, the Bureau does not believe it is necessary to include the suggested options on the sample data collection form to address any discomfort by persons that may be completing the data collection form, who are not principal owners, as suggested by some commenters. Further, as explained in the section-by-section analysis of § 1002.107(a)(19), the Bureau is not finalizing its proposal to require a financial institution to collect at least one principal owner's ethnicity and race on the basis of visual observation and/or surname analysis under certain circumstances. All financial institutions will be required to report only applicant-provided responses to the demographic questions on the final sample data collection form. As a result, the Bureau does not believe the suggested options are necessary to address data quality concerns relating to the proposed visual observation and surname data collection requirement, as suggested by one commenter.

The Bureau has considered comments suggesting that the sample data collection form disclose what information will be published. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with the data and make modification and deletion

decisions to the public, application-level dataset. As a result, the Bureau does not have definitive information about the public, application-level dataset available to put on the sample data collection form. The Bureau takes the privacy of such information seriously and, as noted, will be making appropriate modifications and deletions to any data before making it public. However, the Bureau intends to continue engage with the public about how to mitigate privacy risk.

The Bureau also considered the suggestion to translate the sample data collection form into other languages. Generally, Bureau stakeholders have underscored the importance of language access as a way of ensuring fair and competitive access to financial services and products. Persons with limited English proficiency in the United States make up a significant portion of the population. According to a report, more than one in five immigrant entrepreneurs, or nearly 773,000 people, in the United States in 2018 had limited English proficiency.[844] More than 67 million people, or close to 22 percent of the U.S. population over the age of five, speak a language other than English at home.[845] In 2021, over five million households reported that all their members were of limited English speaking ability.[846]

The Bureau believes that competitive, transparent, and fair markets are supported by providing translations of key material in the customer's preferred language, along with the corresponding English-language material. Accordingly, the Bureau will make available translations of the sample data collection form, for financial institutions that wish to use them. Use of these translations, like use of the form itself, is not required under rule, but the Bureau is providing them as an implementation resource for lenders.

Some commenters asked for flexibility as to the presentation of the information, inquiries, and response options on the sample data collection form at final appendix E. Generally, the Bureau believes that applicants should have substantially similar experiences, regardless of a financial institution's method of collection, when being provided with required notices under the final rule (*e.g.,* the firewall notice, the non-discrimination notice, and the right to refuse notice) and when asked for protected demographic information. The Bureau has designed the sample data collection form at final appendix E to assist financial institutions with their compliance obligations and to maximize the likelihood that an applicant will provide demographic information, after review of the comments received, user testing feedback, and other considerations. However, the Bureau notes that the use of the sample data collection form at final appendix E to collect information required under the final rule is not mandatory, and financial institutions are thus not prohibited from modifying the form, so long as the resulting collection method complies with applicable rule requirements.

With regard to a couple of commenters' request for clarification as to whether a financial institution must read all of the categories of responses if collecting over the phone or orally even if an applicant has responded to an earlier response option, the Bureau is uncertain whether the commenters' request is referring to the collection of a principal owner's ethnicity and race information, which provides aggregate categories and disaggregated subcategories as response options. If so, the Bureau notes that it has revised the associated commentary for § 1002.107(a)(19) to provide financial institutions with certain flexibility when inquiring about a principal owner's ethnicity and race information. Generally, comment 107(a)(19)–16 provides that for applications taken orally through means other than by a paper or electronic form (*e.g.,* telephone applications), the financial institution will not be required to read aloud every disaggregated ethnicity and race subcategory, in the manner described in the comment. Further, because an applicant using a paper version of the sample data collection form will reference all available answer options to a question at once and may review the answer options in any order, the Bureau does not believe that the answer options for a specified question need to be provided in a specific order for an application taken over the phone, as long as all the answer options are presented. However, for the requirement to collect ethnicity and race information specifically, comment 107(a)(19)–16 clarifies that the financial institution may not present the applicant with the option to decline to provide the information requested without also presenting specified aggregate categories and disaggregated subcategories for ethnicity and race. This would apply even if the applicant informs the financial institution, before the financial institution has asked for a principal owner's ethnicity and race information, that it does not wish to provide such information.

The Bureau is not including other sample, uniform, or model applications or data collection forms in the final rule, as suggested by some commenters. There are a variety of products that are covered transactions under the final rule, and the Bureau understands that covered financial institutions may need to ask for the information (except for the protected demographic information) they are required to report to the Bureau in different ways. The Bureau does not believe that a sample, uniform, or model application or data collection form would be able to account for such potential variations. Thus, any additional forms may have limited utility and could incorrectly suggest that financial institutions are limited in the manner in which they collect non-demographic data under this final rule. As a result, the Bureau is not providing such a form at this time. The Bureau may consider issuing other guidance, tools, and compliance aids if it later determines doing so is necessary.

The Bureau notes that there is no need for a specific data collection form for loans that are reportable under both HMDA and section 1071, as the Bureau has decided to exclude HMDA-reportable loans from the data requirements of the final rule as discussed in the section-by-section analysis of § 1002.104(b)(2).

Some commenters urged the Bureau to continue to review the sample data collection form and its instructions after these final rules are issued. The Bureau anticipates receiving and feedback as the final rules are implemented and, as with all the regulations it administers, will issue guidance as necessary and consider if changes to any aspect of the final rules are required, whether through rulemaking or otherwise.

[844] New Am. Econ. Rsch. Fund, *Assessing Language Barriers for Immigrant Entrepreneurs* (Aug. 13, 2020), *https://research.newamericaneconomy.org/report/covid19-immigrant-entrepreneurs-languages/* (analyzing 2018 data from the Census Bureau's American Community Survey).

[845] U.S. Census Bureau, *American Community Survey, 2021 American Community Survey 1-Year Estimates, Table S1601: Language Spoken at Home, https://data.census.gov/cedsci/table?q=language%20spoken%20at%20home&tid=ACSST1Y2021.S1601* (last visited Mar. 20, 2023).

[846] U.S. Census Bureau, *American Community Survey, 2021 American Community Survey 1-Year Estimates, Table S1602: Limited English Speaking Households, https://data.census.gov/cedsci/table?q=language%20spoken%20at%20home&tid=ACSST1Y2021.S1602* (last visited Mar. 20, 2023). The U.S. Census defines a ''limited English speaking household'' as one in which no member 14 years old and over (1) speaks only English or (2) speaks a non-English language and speaks English ''very well.'' *See* U.S. Census Bureau, *Frequently Asked Questions (FAQs) About Language Use, https://www.census.gov/topics/population/language-use/about/faqs.html#:~:text=What%20is%20a%20Limited%20English,least%20some%20difficulty%20with%20English* (last visited Mar. 20, 2023).

Appendix F to Part 1002—Tolerances for Bona Fide Errors in Data Reported Under Subpart B

Proposed Rule

The Bureau proposed appendix H, which would have set out a Threshold Table, as referred to in proposed § 1002.112(b) and proposed comment 112(b)–1. As these provisions would have explained, a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of a financial institution's data submission for a given data field do not equal or exceed the threshold in column C of the Threshold Table.

Under the Threshold Table in proposed appendix H, column A listed the size of the financial institution's small business lending application register in ranges of application register counts (*e.g.,* 25 to 50, 51–100, 101–130, etc.). The applicable register count range would have then determined both the size of the random sample, under column B, and the applicable error threshold, under column C. The error threshold of column C, as proposed comment 112(b)–1 would have explained, identifies the maximum number of errors that a particular data field in a financial institution's small business lending application register may contain such that the financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field. Column D would have been illustrative, showing the error threshold as a percentage of the random sample size.

Proposed appendix H would also have included examples of how financial institutions would use the Threshold Table.

The Bureau sought comment on proposed appendix H. In particular, the Bureau sought comment on whether the register count ranges in column A, the random sample sizes in column B, and the error thresholds in column C were appropriate. The Bureau further sought comment on whether a covered financial institution should be required to correct and resubmit data for a particular data field, if the institution has met or exceeded the thresholds provided in appendix H.

Comments Received

A number of commenters, including banks, trade associations, and a community group addressed the proposed appendix H and its tolerance thresholds. The community group supported the structure of the tolerances as sensible, noting that larger lenders should face more stringent tolerances, expressed as lower percentages, and that the proposed thresholds were time-tested, and balanced reasonableness and data integrity, because they were consistent with Regulation C (implementing HMDA).

Many banks and trade associations stated that the tolerances set out in proposed appendix H were too low and should be raised. One commenter said that limited error tolerances would create undue hardships for banks, and that it was imperative to work through processes to create valid data, and that invalid data are likely to raise false red flags that are burdensome for banks to defend. Another commenter stated that the tolerances were too low and needed to be raised because of the great amount of time needed to verify and re-verify data points. A trade association advocated for higher tolerance thresholds in recognition of the substantial implementation efforts which will need to occur, and to provide banks a more meaningful opportunity to effectively implement the rule.

A number of industry commenters noted that the thresholds in proposed appendix H were based on the tolerance thresholds for resubmitting data under Regulation C and HMDA, and asserted that these thresholds were too low for this rule, citing the number of data points required and the complexity of the data reporting requirements. Several of these commenters asked that the error threshold be increased to a ''more reasonable level'' without specifying exact threshold percentages. One commenter requesting higher tolerances noted that HMDA reporting requirements had been in place for decades and that HMDA reporters thus have had decades to fine tune their processes and procedures.

A bank said that the proposed thresholds left a margin of error that is statistically 0 percent, and claimed that by adopting error thresholds similar to the HMDA requirements, financial institutions would have to conduct a 100 percent audit to ensure accurate data collection/reporting, which they said would burden lenders. Another bank suggested that because data entry errors are inevitable the tolerance levels should be changed to a ''reasonable'' rate, and that a 95 percent confidence level would be sufficient. A trade association stated that the tolerance thresholds were unrealistically low, given that small business loan data collection is entirely unprecedented and would require new systems and processes. The commenter stated that 90 to 97.5 percent data accuracy was out of reach for most of the trade association's lenders, particularly in the first year. The commenter also noted that stringent data accuracy requirements under HMDA were already costly.

A group of trade associations similarly requested that the tolerance thresholds be increased, in recognition of the substantial implementation efforts that financial institutions will undertake for a new data collection and reporting regime, requiring new processes and procedures, noting that despite all of these efforts that bona fide errors are likely to occur, especially given the substantial number of data points the Bureau is mandating.

A bank suggested that the tolerance thresholds did not appropriately scale, noting that while there were seven tiers there were only two threshold levels. The bank asked that the Bureau implement more threshold levels and increase the thresholds, especially for low and intermediate volume lenders. Another bank said that the Bureau should increases the tolerance thresholds for lenders that had between 191 to 500 applications, to at least 4 percent but preferably 5 percent. A third bank suggested expanding the threshold categories, to include different groupings, by number of applications: 501 to 1,000; 1,001 to 10,000; 10,001 to 100,000; and more than 100,000. The bank also suggested incremental increases in the threshold number of bona fide errors.

Final Rule

The Bureau is finalizing appendix H, renumbered as appendix F, with revisions that include the deletion of the first two rows of Table 1 to appendix F. These rows, covering small business lending application register counts of 25 to 50 applications and 51–100 applications, are omitted to correspond with the change in the originations threshold to determine if a financial institution is a covered financial institution under final § 1002.105(b), from 25 originations to 100 originations. While each provision looks to different metrics—originations for § 1002.105(b) and applications for appendix F—it is not possible for a lender to have originated more than 100 covered credit transactions for small businesses in a given year without also having received more than 100 applications for covered credit transactions. The Bureau believes that rows containing register counts of less than 100 are superfluous. Table 1 of appendix F is adjusted accordingly.

For the reasons set out in the section-by-section analysis of § 1002.112(b), the Bureau is finalizing appendix F pursuant to its authority under ECOA

section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, and its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to exempt any financial institution or class of financial institutions from the requirements section 1071 as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

Regarding the various comments on the tolerance thresholds in proposed appendix H, the Bureau agrees with the comment that the structure of the tolerance thresholds was sensible, that larger lenders should face more stringent tolerances, and that the proposed thresholds were time-tested because of their use in examinations under Regulation C. The Bureau has considered the various comments asserting that the tolerances, based on the HMDA examination thresholds, are too low. The error thresholds were, as one commenter mentioned, tested in the HMDA context and reasonably balance the competing concerns of data quality and practicability of implementation. Further, commenters claiming that the thresholds were too low did not acknowledge one major difference with the HMDA thresholds; while the HMDA thresholds determine when lenders must resubmit their HMDA data to the Bureau, § 1002.112(b), with the thresholds in appendix F, serve to eliminate financial institution liability under ECOA and this rule for bona fide errors under the thresholds. The Bureau does not believe that limited tolerances will create undue hardships, given the need to validate and re-validate data, nor that they will raise false red flags that will be burdensome for banks to defend. The revised compliance date provision in § 1002.114(b) will provide the majority of covered financial institutions more time to validate their data in advance of the first submission to the Bureau under this rule. In addition, the Bureau is providing a grace period of one year, during which it does not intend to assess penalties for errors in data submitted by financial institutions that make good faith efforts to comply with rule (see part VII below).

Regarding the comment that higher tolerance thresholds are needed in recognition of the substantial implementation efforts which will need to occur, the Bureau observes that it is recognizing these efforts in other ways, including the added time to comply under revised § 1002.114(b), and the grace period offered to all institutions in their first 12 months of collecting data.

Regarding the comment that HMDA reporting requirements had been in place for decades, and that HMDA reporters had decades to fine tune their processes and procedures, and that the Bureau should increase the tolerances in proposed appendix H, the Bureau acknowledges that many HMDA reporters have had time to fine tune their processes, but also notes that the tolerances apply nonetheless to new HMDA reporters as well. In any case, the comment appears to support the point that the HMDA tolerances have been time-tested and are reasonable to implement.

Regarding the comments that the proposed thresholds leave a margin of error of 0 percent, that they would require lenders to conduct a 100 percent audit to ensure accurate data collection, and that a 95 percent confidence level would be sufficient, the Bureau refers the commenter to appendix F, which specifies the actual error thresholds based on the number of transactions, ranging from 10 percent for the reporters with the lowest volumes to 2.5 percent for those with the highest. Regarding the comment that 90 to 97.5 percent data accuracy would be out of reach for most of the trade association's lenders, particularly in the first year, the Bureau notes that in addition to the error thresholds, lenders will have the benefit of several other safe harbors, a grace period, and additional time to comply for most lenders as specified in § 1002.114(b).

Regarding the comment that the tolerance thresholds do not scale and that there were only two threshold levels, the Bureau notes that proposed appendix H, finalized as appendix F, specified more than two thresholds (five) and that final appendix F specifies four—6.4 percent, 5.4 percent, 5.1 percent, and 2.5 percent. The Bureau is not implementing more threshold levels or to increasing the thresholds, as requested by some commenters, as these thresholds are already relatively high for low and intermediate volume lenders. Regarding the comment requesting that the Bureau increases the tolerance thresholds for the lenders that had between 191 to 500 applications to at least 4 percent but preferably 5 percent, the Bureau notes that the error threshold for lenders in this range is already 5.1 percent. Regarding the suggested expansion of threshold categories, to include more groupings between 500 and 100,000, the Bureau notes that no explanation was given about what such additional ranges would accomplish, or what specific thresholds should be applied to these new ranges, other than that they should increase incrementally. The Bureau is also not adopting incremental increases in the error thresholds. Appendix F reflects the experience of HMDA examinations, and financial institutions with more applications are expected to have a lower percentage of errors than those that receive fewer applications.

VI. Effective Date and Compliance Dates

The Bureau is adopting an effective date of 90 days after the publication of this final rule in the **Federal Register** consistent with section 553(d) of the Administrative Procedure Act [847] and with section 801(a)(3) of the Congressional Review Act.[848]

This final rule includes the addition of a new subpart B to Regulation B comprised of final §§ 1002.101 through 1002.114 and related commentary, appendices E and F. This final rule also amends certain sections of existing Regulation B, renumbered as subpart A, specifically § 1002.5(a)(4) and commentary related to § 1002.5(a)(2) and (4). It also makes conforming changes in several other provisions in existing Regulation B.

Further, for the reasons specified in the section-by-section analysis of § 1002.114(b), the Bureau is finalizing three different compliance dates, based on the number of originations of covered credit transactions for small businesses, rather than the single compliance date in the NPRM, which proposed a compliance period of 18 months after the publication of the final rule in the **Federal Register**. As specified in § 1002.114(b)(1), covered financial institutions in Tier 1, which had at least 2,500 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, will have a compliance date of October 1, 2024. As specified in § 1002.114(b)(2), covered financial institutions in Tier 2, which had at least 500 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, will have a compliance date of April 1, 2025. As specified in § 1002.114(b)(3), covered financial institutions in Tier 3, which had at least 100 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, will have a compliance date of January 1, 2026. As specified in § 1002.114(b)(4), covered financial institutions which did not have at least 100 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, but subsequently

[847] 5 U.S.C. 553(d).

[848] 5 U.S.C. 801(a)(3).

originates at least 100 such transactions in two consecutive calendar years, will have a compliance date of no earlier than January 1, 2026.

VII. Grace Period Policy Statement

During the SBREFA process and in response to the NPRM, the Bureau received numerous comments requesting a grace period in the early period after financial institutions are required to comply with the Bureau's final rule implementing section 1071. The Bureau agrees that it is appropriate to provide a grace period during which it does not intend to exercise its enforcement and supervisory authorities, assuming good faith compliance efforts by financial institutions; for instance, attempts to discourage applicants from providing data would not be in good faith. This Grace Period Policy Statement explains how the Bureau intends to implement such a grace period.

Comments Received

In the context of responding to the proposal presented during SBREFA for a two-year implementation period, some small entity representatives and other stakeholders suggested that the Bureau adopt a grace period for data errors in the first year(s) after the rule goes into effect. These comments suggested that the Bureau adopt a grace period of some kind during which financial institutions would not be penalized for errors when trying to comply with the Bureau's rule implementing section 1071. This grace period would be akin to the first year in which the 2015 revisions to Regulation C were effective, when examinations were used to troubleshoot and perfect data reporting rather than penalize reporters.[849]

In response to both the proposed enforcement and the compliance date provisions in the NPRM, the Bureau received a number of comments requesting a grace period during which the Bureau would either not examine financial institutions for compliance with this rule, or would not assess penalties for violations of the rule. Several lenders supported a grace period without specifying how long the grace period should be. One of these commenters asked that the Bureau provide a grace period for at least one exam cycle.

Many industry commenters requested a grace period of one year or more from Bureau enforcement and examinations for data errors. Commenters offered various reasons in support of this grace period. Many lenders and trade associations stated that a one-year grace period would be consistent with the Bureau's approach to the 2015 HMDA rule. Some commenters with HMDA experience observed that the one-year grace period in that context was helpful for compliance efforts. Several other industry commenters stated that the experience with the 2015 HMDA rule demonstrated that a grace period would improve data accuracy, as it would allow financial institutions time to identity errors and implement corrective action without penalty.

Several banks stated that a grace period would be critical to give lenders an opportunity to ensure systems are working properly. One said that a one-year grace period would foster cooperation and frank discussions between covered financial institutions and the Bureau, and that lenders would be more open and proactive in working with the Bureau to ensure their compliance. Other commenters requested a grace period on the grounds that compliance with the rule was a significant change involving the revamping of systems, and that the grace period would protect lenders from scrutiny for unintentional and bona fide errors. Several stated that a grace period was necessary to provide banks an opportunity to implement the rule effectively, perform testing, and ensure that loan operation systems, software, and other technologies are functioning correctly. A trade association requested that the Bureau work with other regulators to provide a grace period so that lenders are not penalized immediately for errors. A bank stated that the numerous data points and the various reportable sub-parts to those data points would inevitably lead to errors. Another industry commenter requested a one-year grace period to permit lenders to avoid penalties for data errors in spite of their best efforts. Two trade associations requested a one-year grace period as necessary protections given the need to implement substantial changes under the rule. A trade association and a bank asserted that a one-year grace period should be provided because honest errors are only discovered in the process of implementation, and a grace period would permit not only the lenders that committed these errors to learn from them, but also the industry as a whole. Similarly, a bank stated that the grace period would help ensure that all lenders were on the same page regarding all the different circumstances presented by the rule. Another bank stated that compliance with the rule would be new to all financial institutions. A different bank stated that the grace period would ensure that the rule would not cause undue compliance hardships on banks and would help banks create valid data. A trade association urged that the Bureau use enforcement actions sparingly in the 12 months following the rule's compliance date.

A smaller number of industry commenters requested a two-year grace period. One bank justified a two-year period because of the burden of compiling, maintaining, and reporting data under the rule. Another bank cited the magnitude of the rule's requirements and the tremendous effort to implement software, create policies and procedures, and train staff appropriately, and noted that such a grace period would allow for data quality testing in a real-life environment and lead to improvements in data accuracy. Several industry commenters requested that the Bureau avoid enforcement actions related to technical deficiencies for two years. Commenters also stated, in support of a two-year grace period, that absent such a grace period small business credit may be limited and the economy may be hurt; that compliance with the rule is spread across different business units, systems, and channels for larger lenders, and that current compliance systems are built to *avoid* collecting key data required by the rule (such as demographic information).

Some industry commenters stated that the experience with the 2015 HMDA rule showed that the Bureau should provide a two-year grace period. Two of these commenters noted that the Bureau should follow its approach in the 2015 HMDA rule, in which the Bureau imposed no penalties for two years after the new HMDA data collections took effect.[850] These commenters also stated that with such a grace period, lenders could self-correct issues with data accuracy without threat of enforcement actions for the inevitable tech and other challenges that will arise initially.

Policy Statement

The Bureau agrees that a grace period is appropriate. The following discussion explains how the Bureau intends to exercise its supervisory and enforcement discretion following a

[849] CFPB, *CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance* (Dec. 21, 2017), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/.*

[850] CFPB, *Statement with respect to HMDA implementation* (Dec. 21, 2017), *https://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf.*

covered financial institution's initial compliance date.

With respect to institutions subject to the Bureau's supervisory or enforcement jurisdiction, the Bureau intends to provide a 12-month grace period for the initial data submission from covered financial institutions that have compliance dates specified in § 1002.114(b)(2), and (3) (*i.e.,* Tier 2 and Tier 3 institutions), covered financial institutions subject to § 1002.114(b)(4) that must start collecting data on January 1, 2026, and any financial institutions that make a voluntarily submission for the first time for data collected in 2025 or 2026.

With respect to covered financial institutions subject to the Bureau's supervisory or enforcement jurisdiction that make good faith efforts to the comply with the rule that have a compliance date specified in § 1002.114(b)(1) (*i.e.,* Tier 1 institution), as well as any financial institutions that make a voluntarily submission for the first time for data collected in 2024, the Bureau intends to provide a grace period covering the 3 months of data collected in 2024 (from October 1, 2024 through December 31, 2024) as well as the first 9 months of data collected in 2025 (from January 1, 2025 through September 30, 2025).

With respect to covered financial institutions subject to the Bureau's supervisory or enforcement jurisdiction that make good faith efforts to the comply with the rule that have a compliance date specified in § 1002.114(b)(2) (*i.e.,* Tier 2 institution), as well as any financial institutions that make a voluntarily submission for the first time for data collected in 2025, the Bureau intends to provide a 12-month grace period covering the 9 months of data collected in 2025 (from April 1, 2025 through December 31, 2025) as well as the data collected in the first three months of 2026 (from January 1, 2026 through March 31, 2026).

With respect to covered financial institutions subject to the Bureau's supervisory or enforcement jurisdiction that make good faith efforts to the comply with the rule that have a compliance date specified in § 1002.114(b)(3) (*i.e.,* Tier 3 institution), as well as any financial institutions that make a voluntarily submission for the first time for data collected in 2026, the Bureau intends to provide a grace period covering the 12 months of data collected in calendar year 2026 (from January 1, 2026 through December 31, 2026).

The Bureau believes that a 12-month grace period will give institutions further time to diagnose and address unintentional errors without the prospect of penalties for inadvertent compliance issues, and may ultimately assist other covered financial institutions, especially those in later compliance tiers, in identifying best practices. While the Bureau believes that financial institutions in each reporting tier are capable of fully preparing to comply with the rule by their respective compliance dates, the Bureau believes that the use of its discretion providing a grace period that covers 12 months for each tier may result in more deliberate and thoughtful compliance with the rule, while still providing important data regarding small business lending as soon as feasibly possible.

During the grace period, if the Bureau identifies errors in a financial institution's initial data submissions, the Bureau does not intend to require data resubmission unless data errors are material. Further, the Bureau does not intend to assess penalties with respect to errors in the initial data submissions. Any examinations of these initial data submissions will consider the good faith efforts of the financial institutions to comply with the data collection and reporting requirements. The examinations will be diagnostic and will help to identify compliance weaknesses. However, errors that are not the result of good faith compliance efforts by financial institutions, especially attempts to discourage the reporting of data, will remain subject to the Bureau's full supervisory and enforcement authority, including the assessment of penalties.

The Bureau believes that these initial data submissions will provide financial institutions an opportunity to identify any gaps in their implementation of this rule and make improvements in their compliance management systems for future years.

The Bureau agrees with commenters who said that a grace period will promote openness and frankness, and will permit the Bureau to help financial institutions identify errors and, thereby, self-correct to avoid such errors in the future. The Bureau can also use data collected during the grace period to alert financial institutions of common errors and potential best practices in data collection and submissions under this rule.

The Bureau believes that a grace period covering institutions' first 12 months of data submission is sufficient, especially given the other accommodations the Bureau is making to ensure that financial institutions are not unduly penalized for good faith errors, such as the bona fide error provision and the various safe harbors the Bureau has finalized in this rule, and the other provisions that the Bureau believes are likely to lead to more accurate data, such as the tiered compliance date structure, for the reasons specified in the section-by-section analysis of § 1002.114(b). The Bureau does not believe that a two-year grace period is necessary to avoid impacting small businesses' access to credit; as the impacts analysis in part X below suggests, the Bureau does not believe that this rule will materially impact the access small businesses have to credit.

Regarding the comment that the Bureau work with other regulators to provide a grace period so that lenders are not penalized immediately for errors, the Bureau notes that, unlike with HMDA, the Bureau is the sole agency that will be in a position to examine financial institutions' submissions for data errors in the first instance.

This is a general statement of policy under the Administrative Procedure Act.[851] It articulates considerations relevant to the Bureau's exercise of its authorities. It does not impose any legal requirements, nor does it confer rights of any kind. It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[852]

VIII. Public Disclosure of Data

A. Background

Section 1071 of the Dodd-Frank Act amended ECOA to require financial institutions to collect and report to the Bureau data about applications for credit for women-owned, minority-owned, and small businesses, and for those data to be subsequently disclosed to the public.[853] Section 1071 further states that the Bureau may ''at its discretion, delete or modify data collected under [section 1071] which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.'' [854] Under the final rule, financial institutions may not compile, maintain, or submit any name, specific address, telephone number, email address or any personally identifiable information concerning any

[851] 5 U.S.C. 553(b).

[852] 44 U.S.C. 3501 through 3521.

[853] *See* ECOA section 704B(e)(1) and (f)(2).

[854] ECOA section 704B(e)(4).

individual who is, or is connected with, an applicant, other than as would be required pursuant to final § 1002.107. Nonetheless, as the statute recognizes, publication of the data fields set forth in § 1002.107(a) in an unedited, application-level format could potentially affect privacy interests—for example, through the re-identification of, and risk of harm to, small businesses and related natural persons.

The CFPB is not determining its final approach to protecting such interests via pre-publication deletion and modification because it lacks the reported data it needs to finalize its approach and it does not see comparable datasets to use for this purpose. In light of comments received on the NPRM's privacy analysis, this part VIII offers a preliminary assessment of how it might appropriately assess and advance privacy interests by means of selective deletion or modification. The CFPB is not at this point identifying the specific procedural vehicle for effecting its privacy assessment. With respect to both substance and process, it will continue to engage with external stakeholders; and it intends to invite further input on how it plans to appropriately protect privacy in connection with publishing application-level data.

B. Preliminary Privacy Assessment

1. Overview

Under ECOA section 704B(e)(4), Congress provided the CFPB with broad discretion to modify or delete data prior to public disclosure to advance privacy interests.[855] The NPRM proposed the use a balancing test for the exercise of this discretion. Specifically, it stated that it would modify or, as appropriate, delete data fields from collected application-level data where release of the unmodified data would pose risks to the privacy interests of applicants, related natural persons, or financial institutions that would not be justified by the benefits of such release to the public in light of the statutory purposes of section 1071. The Bureau explained that disclosure of an unmodified individual data field may create a risk to privacy interests if such disclosure either would substantially facilitate the re-identification of an applicant or related natural person, or would disclose information about applicants or related natural persons, or an identified financial institution, that is not otherwise public and that may be harmful or sensitive.

This balancing test would have required that the Bureau consider the benefits of disclosure in light of section 1071's purposes and, where these benefits did not justify the privacy risks the disclosure would create, modify the public application-level dataset to appropriately balance privacy risks and disclosure benefits. The Bureau would have deleted a data field prior to publishing the application-level dataset if other modifications would not appropriately balance the privacy risks and disclosure benefits. An individual data field would have been a candidate for modification or deletion under the balancing test if its disclosure in unmodified form would create a risk of re-identification or a risk of harm or sensitivity.

Section 1071 requires financial institutions to compile and maintain data and provides that such information be made available to the public upon request.[856] Accordingly, section 1071 contemplates that the public know what published application-level data are associated with particular financial institutions. As a result, the re-identification risk element of the balancing test analysis would not have applied to financial institutions, although the Bureau would have considered the risk to a financial institution that the release of 1071 data in unmodified form would inappropriately disclose commercially sensitive information.

The Bureau sought comment on the design of the balancing test. It also sought comment on whether the balancing test should apply to the privacy interests of natural persons generally or only of those related to applicants.

Comments Received

A wide range of commenters provided feedback on the proposed balancing test. Many community groups, as well as a several members of Congress, generally supported the NPRM approach. Others, including industry and several community groups, saw it as too subjective. These community groups stated that future Bureau leadership could choose to restrict publication by releasing truncated or aggregated data, but not application-level data. A lender and a trade association were concerned that the balancing test would not sufficiently protect privacy interests. Another commenter stated that the approach would be ineffective if a third party had personal knowledge of an applicant or related natural person because modifications to prevent re-identification risk in this scenario would critically reduce data utility. A joint letter from community and business advocacy groups asked the Bureau to confirm that the balancing test would evolve. They asked the Bureau to assess market developments and how well the final rule achieved statutory purposes, and to use this information to modify its publication approach. Industry commenters asked the CFPB to limit or wholly abandon release of application-level data.[857] For example, one commenter said that the agency should use exception authority under ECOA section 704B(g)(2) to not publish application-level data to avoid risks and burdens to the commercial and reputational interests of financial institutions.

Several commenters provided feedback about what benefits and risks the balancing test should consider. A joint letter from community groups, community-oriented lenders, and business advocacy groups, along with a joint letter from several members of Congress, supported the Bureau's stated intent to consider the benefits of public disclosure and the statutory purposes of section 1071. In contrast, an industry commenter said that the balancing test should not consider fair lending enforcement as a relevant benefit. According to this commenter, using the data for fair lending enforcement would subject financial institutions to unjustified scrutiny by regulators and hinder the development of innovative underwriting techniques.

Several commenters specifically stressed the importance of the Bureau considering the personal privacy interests of small business owners. More generally, a number of industry commenters, as well as several members of Congress, supported the Bureau's considering the privacy interests of applicants, related natural persons, and financial institutions. Numerous commenters said that public application-level data could pose significant privacy risks to these entities. Some noted that publication carries risks of re-identification and the disclosure of sensitive commercial and financial information. Industry commenters also reported that small business customers express privacy concerns whenever the government mandates disclosure of their business information. Commenters cited negative reactions to Paycheck Protection Program reporting requirements.

[855] *Id.*

[856] *See* ECOA section 704B(e), (f)(2)(B).

[857] Commenters also provided feedback on potential modification and deletions for each of the Bureau's proposed data points; those comments are addressed in detail for each data point in part VIII.B.6 below.

Some community groups saw the privacy risks associated with publication as low. Several asserted that HMDA data, which contains similar data fields, has not resulted in an increase of fraud or identify theft against mortgage applicants. Some commenters also noted that the interval between reporting and publication would reduce the likelihood of misuse, as would the public availability of some of the date from existing sources. Several community groups and a CDFI lender urged the Bureau not to give weight to the privacy interests of financial institutions. According to these commenters, publication should not consider the commercial, proprietary, litigation, and reputational interests of financial institutions. A joint letter from community and business advocacy groups stated that because section 1071 contemplates the disclosure of financial institution identity, the Bureau should not consider any of their privacy interests. Conversely, some commenters raised concerns about financial institution privacy interests. A trade association said that failing to consider such interests would result in the disclosure of trade secrets and other confidential information.

Some commenters suggested that the balancing test include various presumptions for or against the publication of 1071 data. Community groups and a CDFI lender generally agreed that the balancing test should include a strong presumption in favor of disclosure. For example, some commenters stated that the Bureau should only modify or delete application-level data where its unmodified publication would pose privacy risks that meet a particular significance threshold—for example, where data fields would be ''highly sensitive'' or ''clear'' re-identification risk exists). Several industry commenters, on the other hand, suggested that the balancing test incorporate a presumption in favor of protecting privacy interests. For instance, a few commenters suggested that the Bureau give special consideration to the privacy interests of small financial institutions. These commenters warned that small business customers may gravitate to larger lenders because they believe it would be harder to identify individual applicants or related natural persons in data reported by large lenders.

Current Approach

In light of the comments received on the balancing test, the Bureau is now of the preliminary view that re-identification risk to small businesses and their owners is the core risk from which the preponderance of cognizable privacy risks flow. In this respect, the Bureau is focused particularly on risks to personal privacy interests.[858] The Bureau's preliminary assessment is that it will consider modification and deletion techniques to reduce those risks, while also considering the non-personal commercial privacy risks of small businesses. Lender privacy interests would be considered only where publication would create a compelling risk to those interests.

Although some comments urged that it not publish any application-level data, the Bureau does not intend to withhold all such data from the public because that would critically undermine the stated purposes of section 1071 and run contrary to the express disclosure provisions in the statute. This drastic step is also unnecessary to adequately mitigate relevant privacy risks.

In response to comments positing harms that could arise from a third party having personal knowledge of an applicant or its owners, the Bureau agrees that this scenario heightens privacy risks. The Bureau will observe market developments to assess the likelihood and nature of this risk as it considers the appropriate approach to publication.

The Bureau does not intend to separately assess disclosure benefits when making modification and deletion decisions about individual data points. After considering commenters' feedback about the value of the data fields, the Bureau is preliminarily of the view that all of the data fields have significant disclosure benefits that will facilitate fair lending enforcement as well as business and community development.

Most comments on privacy risk generally supported the Bureau's intention to consider the privacy interests of small businesses, related individuals, and financial institutions. While the Bureau cannot conduct the statistical analysis necessary for a full re-identification analysis until it receives reported data from financial institutions, the Bureau's preliminary privacy assessment accepts that some such data likely could re-identify applicants and their owners, potentially disclosing sensitive information. The personal privacy interests of small business owners, in particular, implicate compelling risks of harms or sensitivities. As acknowledged in the NPRM, some privacy risks are mitigated by the interval between collection and publication, and some 1071 data are already available from other sources. But publication of some data fields potentially poses significant risks of harm or sensitivities to both the personal privacy interests and non-personal commercial privacy interests of applicants and related individuals. While public HMDA data do not result in substantial privacy harms for mortgage applicants, that is in part because the Bureau makes modifications and deletions before publication, informed by a privacy risk assessment.[859]

The Bureau does not intend to ignore the privacy interests of financial institutions. As discussed further below, however, the privacy risks to financial institutions raised by commenters are less significant than those to small businesses and related individuals. Accordingly, while the Bureau does not intend to exclude consideration of financial institution privacy risks, it anticipates modifying or deleting data to protect a financial institution's privacy interests only when publication poses a compelling privacy risk. At this time, commenters have not identified compelling privacy risks to financial institutions.

In response to comments, the CFPB does not believe that a presumption or threshold would provide the Bureau with a more administrable standard. However, partly in response to comments on these issues, the Bureau's preliminary privacy assessment is more directly focused on the most significant privacy risks—particularly re-identification risk—than the balancing test described in the NPRM.

2. Implementation Process

Proposed Approach

The NPRM did not include a full application of the balancing test to most of the proposed data points. It stated that the Bureau would analyze the re-identification risk element, in part, using a statistical analysis. However, the absence of an existing dataset or an alternative set of sufficiently similar data significantly impeded the Bureau's ability to discern whether a proposed data field, individually or in combination with other data, would substantially facilitate re-identification of small businesses and related persons, and how specifically to modify data to reduce that risk. Underestimating the degree to which a 1071 data field, individually or in combination with

[858] The Bureau is considering whether the risks to sole proprietors, where the business and owner are indistinguishable for tax or legal purposes, may also qualify as personal risks. This may be the case where information reflects the sole proprietor's personal information, such as creditworthiness.

[859] *See generally* 82 FR 44586 (Sept. 25, 2017).

other data, facilitates re-identification risk could unnecessarily increase privacy risks to an applicant or a related individual, while overestimating re-identification risk could unnecessarily reduce data utility. Accordingly, the Bureau believed that a re-identification analysis of data other than actual reported 1071 data would not provide an accurate basis on which the Bureau could apply the balancing test to modify or delete data.

In light of these limitations, the Bureau considered deferring even initial analysis until after it had obtained a full year of reported 1071 data. Doing so, however, would have reduced opportunities for public feedback on privacy issues and their relationship to the proposed rule. The Bureau saw substantial value in setting forth its partial analysis under other aspects of the balancing test. Specifically, the Bureau set forth an initial analysis of the benefits and harms or sensitivities associated with the proposed data fields, the capacity and motives of third parties to match proposed 1071 data fields to other identifiable datasets, and potential modification techniques it might consider to address privacy risks. The Bureau responds to public feedback from commenters and updates this initial analysis below.

In the NPRM, the Bureau indicated that a policy statement, rather than a notice-and-comment rulemaking, would be an appropriate vehicle for announcing its intentions with respect to data modifications and deletions. The Bureau offered several reasons for this approach. Under section 1071, the Bureau may delete or modify data at its discretion, in contrast to other provisions in the statute that require legislative rulemaking.[860] Further, the Bureau's suggested approach with respect to modifications and deletions would not impose compliance obligations on financial institutions.[861] In addition, the Bureau stated that preserving the ability to exercise its discretion to modify or delete data through policy statements would allow the Bureau to manage the relationship between privacy risks and benefits of disclosure more actively. The Bureau believed this flexibility may be especially important in the event that the Bureau becomes aware of developments that might contribute to privacy risks. The Bureau stated that potential uses of the application-level data in furtherance of the statute's purposes may also evolve, such that the benefits associated with the disclosure of certain data may increase to an extent that justifies providing more information to the public in less modified form.

As a result, the Bureau suggested that after the first full year of data are reported, but before it releases data to the public, it would publish a policy statement setting forth its intentions with respect to modifications and deletions to the public application-level data. Before publishing that policy statement, the Bureau intended to conduct a balancing test analysis based on feedback to the NPRM as well as a quantitative analysis of re-identification risk using reported 1071 data. The Bureau stated that in the interests of making data available in a timely manner, it did not intend to put its ultimate balancing test analysis out for public comment prior to issuing the policy statement. The Bureau sought comment on this approach.

Comments Received

A wide range of commenters provided feedback on the Bureau's general approach to implementing the balancing test. Several community group and industry commenters supported the Bureau's intention to defer modification and deletion decisions until it had obtained a full year of 1071 data. While not explicitly opposed, other community groups and a minority business advocacy group asked the Bureau to publish data as fast as possible to help realize the statute's purposes. Some noted that the data remain unavailable despite Congress amending ECOA on this point more than a decade ago. Commenters also provided feedback about when the Bureau should begin publishing application-level data. Several commenters stated that the Bureau should commit in the final rule to releasing data by a date certain; some suggested January 1, 2024 as a target.

Several industry commenters opposed deferring modification and deletion decisions until the Bureau received a full year of 1071 data. Some stated that if the Bureau published modification and deletion decisions before lenders started to collect data, small business applicants would better understand how to protect their privacy interests. Another said that publishing a full privacy analysis before the rule is effective is necessary for financial institutions to evaluate privacy risks. Other commenters asserted that deferring re-identification analysis until after data are reported is unnecessary because it is already apparent that some proposed data fields, such as NAICS code and census tract, create a unique set of records that can be matched to public datasets. Several commenters offered alternative timing for modification and deletion decisions. Some suggested that the Bureau publish such decisions in this final rule. Another suggested that the Bureau publish interim decisions in this final rule, which could then be adjusted through notice-and-comment rulemaking after the Bureau receives the first full year of data. Others asked the Bureau to publish a full privacy analysis before the rule becomes effective. One lender suggested that data not be published for at least a year after the final rule is implemented to enable the Bureau to assess the effectiveness of its privacy analysis.

The Bureau received a significant amount of feedback about its intention of announcing modification and deletion decisions in a policy statement without seeking additional comment. One industry commenter supported this approach, but most industry commenters on this issue asked the Bureau to seek additional comment on its privacy analysis and on its modification and deletion decisions, regardless of whether the Bureau announced publication decisions in a policy statement or through a legislative rulemaking. Commenters stated that the opportunity to comment would promote public confidence in the data collection process and contribute to a more accurate dataset. A number of commenters argued that the opportunity to comment on the full balancing test and on modification and deletion decisions would be necessary for stakeholders to provide meaningful feedback on privacy risk. According to some commenters, this would be particularly important for smaller financial institutions that were unable to provide adequate comment on what they considered to be complex privacy issues raised in the NPRM. Two lenders urged the Bureau to hold public meetings or hearings in compliance with the Regulatory Flexibility Act to seek feedback from smaller financial institutions and small businesses to, among other things, specifically address the privacy risks associated with reporting and publishing application-level data. A few industry commenters stated that the opportunity to comment on the full privacy analysis would be consistent with the Bureau's approach

[860] *Compare* ECOA section 704B(e)(4), *with* ECOA section 704B(f)(2).

[861] Section 1071 requires financial institutions to compile and maintain data and provides that such data be publicly available upon request. *See* ECOA section 704B(e), (f)(2)(B). As discussed in the section-by-section analysis of § 1002.110, the Bureau is finalizing its proposal to publish data on behalf of financial institutions.

adopted in the 2015 HMDA final rule. One commenter stated that the Bureau's analysis of the first full year of reported data would likely generate additional privacy issues that would warrant public input. Two others suggested that the Bureau seek comment about how it would release unmodified data to outside parties for research or other purposes.

Several industry commenters, as well as a joint letter from several members of Congress, specifically requested that the Bureau implement its privacy assessment, and make associated modifications and deletions, via legislative rule. Some of these commenters asserted that this was required under administrative law. A group of trade associations contended that section 1071 does not permit the Bureau to use its discretion to make modification and deletion decisions outside an Administrative Procedure Act rulemaking process. According to this commenter, two provisions in section 1071 provide the Bureau ''discretion'': ECOA section 704B(e)(4) provides the Bureau discretion to delete or modify public application-level data and ECOA section 704B(f)(3) provides the Bureau discretion to compile and publish aggregate 1071 data. Noting that the Bureau proposed § 1002.110(b) to implement the latter provision in this rule, the commenter asserted that the Bureau did not adequately explain how it was appropriate to implement the former provision outside a rule. The commenter said that these provisions should be implemented in a formal rulemaking. In addition, some industry commenters stated that increasing transparency about forthcoming publication, including potentially through a notice-and-comment rulemaking, would protect the Bureau from litigation under FOIA. In this respect, commenters cited litigation involving the SBA's publication of Paycheck Protection Program data.[862]

Citing the benefits of transparency and to facilitate information about credit access and fair lending information, a joint letter from community groups, community-oriented lenders, and business advocacy groups stated that the Bureau should produce and release aggregate analyses of 1071 data in addition to releasing application-level data.

Current Approach

For reasons discussed below, the Bureau intends to conduct a full privacy analysis and issue modification and deletion decisions with respect to the publication of application-level data after it obtains a full year of reported 1071 data. However, the Bureau is not committing at this time to issue modification and deletion decisions through a policy statement. Instead, the Bureau will continue to consider the specific timing and vehicle choice for issuing modification and deletion decisions, as it remains engaged with stakeholders on privacy and publication issues.

Publication of application-level data will substantially advance the fair lending enforcement and business and community development purposes of section 1071. The Bureau thus intends to conduct a full privacy analysis and issue modification and deletion decisions as soon as practicable. It will also continue to consider feedback obtained to date and to engage with the public on how best to mitigate re-identification risk and other risks to privacy interests. While the Bureau is not determining the vehicle with which it will announce modification and deletion decisions with respect to application-level data, or the precise timing of such decisions, it anticipates that those decisions will continue to be informed by public engagement.

The Bureau intends to announce modification and deletion decisions only after obtaining a full year of application-level data. The Bureau lacks the data needed to perform an accurate re-identification analysis and commenters were not able to identify an alternative dataset that could be used for this purpose. Without data for an accurate re-identification analysis, the Bureau cannot conduct a full privacy analysis to inform modification and deletion decisions.[863] As discussed further below, there are certain data fields that the Bureau anticipates may present comparatively high risk to privacy interests, including the combination of NAICS code and census tract. However, the Bureau lacks data to confirm whether these data fields in fact create unique records that can be matched to public datasets.

The Bureau is not committing to a specific timeline for publishing application-level data. However, a target date of January 1, 2024 for publication, as suggested by some commenters, is not feasible because covered financial institutions are not required to begin collecting data under this rule until October 1, 2024 at the earliest. The Bureau intends to treat data under this rule as confidential in accordance with 12 CFR part 1070 until such time as it has completed its privacy analysis and published the data, and it will work expeditiously to those ends.

Robust feedback, including in response to the NPRM, SBREFA, and other outreach, about the risks and benefits of 1071 data publication, has informed the Bureau's thinking to date.[864] The Bureau intends to continue to seek further public engagement with respect to these issues. It does not believe, however, that such further engagement must be by formal comment either to ensure robust engagement or for the sake of procedural consistency with the Bureau's approach in HMDA.[865]

The Bureau is not establishing a separate program by which industry, community researchers, or academics will have access to unmodified data; the published data, subject to the modifications and deletions made by the Bureau, will be available to all users. However, it intends the Bureau plans to exercise its discretion to provide access to State or Federal regulators to the extent such disclosure is relevant to the exercise of the agency's authorities, and subject to appropriate restrictions. The Bureau plans to provide such access to Federal regulators that enforce ECOA.[866]

The Administrative Procedure Act and other laws do not require the Bureau to seek comment on the full privacy analysis or to issue modification and deletion decisions through a legislative rule with formal notice and comment. Section 1071 states that the Bureau may ''at its discretion, delete or modify data collected under [section 1071] which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.'' [867] Statutorily, this provides the Bureau with flexibility to decide how it will make modification and deletion decisions, including the flexibility to do so without a legislative rulemaking. Other provisions of section 1071 plainly require the Bureau to engage in formal rulemaking, indicating that Congress did not intend such a requirement

[862] *See, e.g., WP Co. LLC* v. *U.S. Small Bus. Admin.,* 502 F. Supp. 3d 1 (D.D.C. Nov. 5, 2020).

[863] As discussed below, the Bureau is announcing more conclusive intentions with respect to modifications or deletions for individual contact information, unique identifier, and the use of free-form text in responses for certain data fields.

[864] See part III above for additional information.

[865] Unlike for HMDA, no data yet exists that the Bureau could use to conduct a full privacy analysis and make modification and deletion decisions.

[866] Other regulators with authority to enforce ECOA include the OCC, the Board, the FDIC, the NCUA, the Surface Transportation Board, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, the SEC, the SBA, the Secretary of Transportation, and the FTC. *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a).

[867] ECOA section 704B(e)(4).

here.[868] The Bureau does not agree that it is implementing ECOA section 704B(e)(4) and (f)(3) inconsistently. It is codifying and implementing these provisions in final § 1002.110(a) and (b) to preserve its discretion to make publication decisions without legislative rulemaking. Further, the circumstances of this rulemaking are distinguishable from the relevant facts in the PPP litigation that commenters cited.

At the same time, the Bureau is also not committing at this time to issuing modification and deletion decisions through a policy statement. As the Bureau has not yet obtained a full year of reported data to use in completing its privacy risk assessment, it is prudent to continue considering specific timing and vehicle choice for issuing modification and deletion decisions. Following further public engagement, including further opportunities for input, the Bureau will announce these decisions at a later date. Finally, the Bureau agrees with commenters that it should produce and release aggregate analyses of 1071 data in addition to releasing application-level data. The Bureau anticipates releasing select aggregated data before it publishes application-level data.

3. Publication Benefits

Proposed Approach

In the NPRM, the Bureau sought comment on its understanding of the benefits of public disclosure of the 1071 dataset as a whole as well as the disclosure benefits for individual proposed data fields. The Bureau expected that users of the data would rely on this information to help achieve the statutory purposes of facilitating the enforcement of fair lending laws, and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[869]

Comments Received

The Bureau received robust feedback on the general benefits of public disclosure of application-level data from lenders, trade associations, community groups, several members of Congress, individual commenters, and others. It received comparatively few substantive comments on the potential disclosure benefits associated with particular individual data fields.

Many commenters supported the publication of application-level data and agreed that the data will facilitate enforcement of fair lending laws. Some community groups stated that the transparency afforded by the publication of 1071 data generally would discourage predatory and discriminatory practices in the small business lending market. One of these commenters noted that action taken data, particularly categorical information such as denials, incompletes, or approved but not accepted by the applicant, were integral to promoting the fair lending purpose of section 1071. Other commenters said that transparency would protect responsible lenders from unfair scrutiny. Many community groups, along with some lenders, individual commenters, and others also stated that 1071 data would allow governmental entities and community groups to monitor individual lenders' lending practices, identify lending disparities on a granular level, and enforce ECOA to the benefit of women and minority business owners. Community groups, a business advocacy group, and a CDFI lender further stated that HMDA data reporting has demonstrated that loan-level data enables community organizations, economists, and governmental entities to identify disparities between populations, which facilitates enforcement of fair lending laws. Other commenters expressed particular support for the publication of agricultural lending data, noting that the inclusion of data from agricultural creditors would help address discrimination in farm credit lending. These commenters cited a long history of discrimination targeting socially disadvantaged farmers and producers, including women-owned and minority-owned farms, in the farm credit market. Other stated that the 1071 dataset would help reveal where responsible lenders are serving small businesses fairly, aiding in the remediation of deficiencies, or removing barriers to equitable lending. A joint letter from community groups, community-oriented lenders, and business advocacy groups stated that the data would reveal disparities in access to credit in immigrant communities. Other community group commenters, along with two minority business advocacy groups, stated that application-level data would improve the understanding of demographic disparities in small business lending and support efforts to identify, address, and eliminate practices that create lending gaps for women-owned and minority-owned small businesses.

Commenters also asserted that the publication of application-level data would promote the business and community development purpose of section 1071, stating that the data would provide greater understanding of small business credit trends, such as lending dynamics or credit request cycles for different industries, and would improve understanding of the small business lending market more broadly. Some commenters, including a minority business advocacy group, stated that disclosure would help facilitate development of targeted programs to help address inequities and foster efficiency in the small business credit marketplace. For example, commenters said disclosure would allow community groups and lenders to compare how lenders are meeting community credit needs, develop score cards on local lending, identify gaps in lending, and advocate for low-income and microbusinesses. A CDFI lender stated that pricing information data would allow stakeholders to assess loan affordability in underserved communities. Citing the benefits of increased transparency, a commenter noted that publishing small business credit transaction data would support price discovery by allowing the comparison of credit costs between institutions, credit types, and business types, which is critical for market efficiency. Commenters also said that disclosure would help community groups educate small businesses, facilitate the development of tools to effectively identify barriers small businesses face, and empower owners to access credit on fair terms.

In contrast, several industry commenters saw little benefit from publication because the data would not include all factors that lenders rely on to make credit decisions. Some said that every small business loan is unique and without contextual information the data would not meaningfully increase understanding about the small business lending market. Others asserted that the data would be insufficient to conduct fair lending analyses, suggesting that data collection and publication are less effective mechanisms for identifying discrimination than examinations or disparate impact analyses. According to these commenters, HMDA data do not effectively reveal discrimination in the mortgage industry. One of these commenters also stated that publication would be ineffective because, as proposed, the data would not enable identification of additional types of discrimination, such as discouragement of particular groups of applicants. Two

[868] *See, e.g.,* ECOA section 704B(g).

[869] *See* ECOA section 704B(a).

lenders suggested that the dataset duplicate data already required under HMDA and the CRA. A trade association suggested that data from credit unions would not be comparable to data from other lenders because of community-based member restrictions. A joint trade association letter disagreed with the Bureau's proposed analysis of the disclosure benefits of application-level data, suggesting that the Bureau's analysis was vaguely defined and not clearly linked to the statutory purposes of section 1071.

Current Approach

The Bureau has considered the comments above, and also relied on the NPRM's discussion of—and requests for comment on—the potential benefits of disclosing particular data fields. Given the comparative lack of comments on such benefits, the Bureau concludes that the NPRM's initial assessments of the utility of individual data fields were generally correct.

As Congress recognized, market transparency through publication of application-level data will serve to realize their intended purposes in section 1071. Publishing such data will help to identify and discourage potential fair lending violations in small business lending, while protecting responsible lenders from unfair scrutiny. The Bureau agrees with commenters that published data will help address discrimination in agricultural lending. Publication of this data will also improve understanding of small business credit needs and will provide insights into the small business lending market, promoting the business and community development purposes of section 1071. Increased transparency can make it easier for small businesses to access credit efficiently, and easier for lenders and potential lenders to identify opportunities in the market, thereby increasing access to credit. Moreover, data users, such as community groups, researchers, and public officials, will be able to use the data to help determine whether certain types of credit are disproportionately available to different communities. Insights gained from publication will enable lenders, advocates, investors, and the public sector to better meet the needs of small businesses.

These benefits are material even as the dataset may not include all factors that lenders may rely on in making credit decisions. The Bureau notes the feedback of SBREFA commenters discussed in the NPRM and the numerous comments from lenders, trade associations, individual commenters, and community groups discussed above who expressed general agreement that public data will facilitate the observation of small business lending practices in ways that are currently not possible. For example, data points such as pricing information and census tract will facilitate comparison of pricing data across discrete geographic locations allowing data users to efficiently compare credit costs offered by financial institutions. The relative lack of substantive comments disagreeing with the NPRM's initial assessment of the benefits of disclosing particular data fields also speaks to the utility of the data fields in relation to the stated statutory purposes.

Commenters did not offer substantive evidence to back claims that data collection and publication do not help facilitate fair lending enforcement. In addition, whether other approaches to fair lending enforcement are more or less effective misses the point that analysis of data collected under this rule—as is true for data collected under HMDA—will contribute to robust and effective fair lending analysis. Further, publication of application-level data collected under the final rule will not inappropriately duplicate efforts under HMDA or CRA. Final § 1002.104(b)(3) excludes HMDA-reportable transactions from coverage. Data collected under the final rule will cover more types of transactions from more institutions than existing CRA data, and it will include applications as well as originations. As discussed in part II.F.2.i and elsewhere, Federal prudential regulators have proposed to use data collected under the CFPB's final rule, once it becomes available, for purposes of CRA small business and small farm lending assessments, rather than drawing data from FFIEC Call Reports.[870]

The benefits from publishing application-level data are so substantial that the Bureau is now of the view that each data field warrants inclusion in public data, subject to completion of the Bureau's full privacy analysis. Accordingly, the Bureau intends to publish application-level data except to the extent that it modifies or deletes data consistent with its privacy analysis.

4. Privacy Risk

The NPRM considered the risks to privacy that might result from publication of application-level data reported to the Bureau. Based on its analysis at that time, the Bureau recognized that publication of the complete data set, without any form of modification, could pose risks to privacy interests. As discussed in more detail below, this was because certain data fields could create re-identification risk and disclosure of some fields would create a risk of harm or sensitivity. Accordingly, the Bureau intended to consider whether pre-publication modifications or deletions would reduce these risks to privacy and appropriately balance them with the benefits of disclosure.

The Bureau sought comment on the range of privacy concerns discussed in the NPRM, including potential re-identification of small businesses and financial institutions, as well as the types of harms and sensitivities that unmodified release of data could have caused to financial institutions and small business applicants, which are described further below. As discussed above, informed by the comments on the NPRM, the Bureau's preliminary assessment is that it should adjust the balancing test articulated in the NPRM to assess, primarily, whether data, individually or in combination with other data, create significant re-identification risk for small businesses and their owners. Though this approach focuses primarily on re-identification risk, the privacy harms or sensitivities discussed below clarify the consequences of re-identification and underscore the importance of managing re-identification risk. Because re-identification is a prerequisite to any potential harms or sensitivities that may result from publishing data, the Bureau also concludes that actions taken to prevent re-identification will mitigate those harms or sensitivities for small business applications and their owners. In addition, the Bureau's preliminary view is that its privacy assessment should not consider financial institution privacy interests except where the Bureau identifies a compelling risk to such interests.

i. Re-Identification Risk

Proposed Approach

The NPRM explained that, while information that directly identifies natural persons, such as name, address, date of birth, or Social Security number would not be collected, publication of application-level data in an unmodified format potentially could be used to re-identify small business applicants and related natural persons and potentially harm their privacy interests. The Bureau identified two re-identification scenarios. First, a third party may use common data fields to match a data record to a record in another dataset that contains the identity of the applicant or related natural person. Second, a third party may rely on pre-existing personal

[870] 87 FR 33884, 33930 (June 3, 2022).

knowledge to recognize an applicant's record in the unmodified data. The Bureau used the term ''adversary'' to refer to either type of third party.[871]

Re-identification based on matching. Under the first scenario, the Bureau explained that it might be possible to match a data record to an identified dataset, either directly or through a combination of intermediate datasets.[872] However, successfully re-identifying a data record would require several steps and could present a significant challenge. An adversary generally would have to isolate a record that is unique or rare within the data. A record is unique or rare when the values of the data fields associated with it are shared by zero or few other records. The Bureau stated that it believed actual data would be needed to perform an accurate re-identification analysis. Thus, it did not intend to apply the balancing test until after it had analyzed re-identification risk with a full year of reported data.

The Bureau explained that a data record having unique combinations of values would not automatically result in re-identification; an adversary would also have to find a record corresponding to the applicant or related natural person in another dataset by matching similar combinations of data fields. Once a data record had been matched, an adversary would possess any additional fields found in the corresponding record but not found in the data record—including, potentially, the applicant's identity. However, even after accomplishing such a match, an adversary might not have accurately re-identified the true applicant to whom the data record relates. For example, if the corresponding record was not the only record in the other dataset to share certain data fields with the unique data record, an adversary would have to make a probabilistic determination as to which corresponding record belongs to the applicant.

The Bureau expected that census tract and NAICS code, if published as proposed and without modification, could significantly contribute to re-identification risk. Geographic and industry information are publicly available in a variety of sources and in a form that directly identifies businesses or in a way that could be derived with reasonable accuracy. This information is also likely to produce unique instances in the data, both when used separately, but particularly when combined. Other proposed data fields could have resulted in unique combinations (particularly when combined with census tract), but the Bureau stated it would need actual data to analyze their contribution to uniqueness.

In this context, the Bureau indicated that particularly relevant sources of identified data for matching purposes were UCC filings, property records, and titles. Such filings could pose a serious re-identification risk because of the availability of information about the lender, the applicant, and the date of transaction. For example, an adversary might be able to use the date and financial institution listed in UCC filings to identify the applicants of originated loans in the public application-level data. UCC filings also typically have the address of the borrower. With this information, combinations of financial institution identity, action taken date, and census tract data might result in unique combinations that an adversary could connect to a publicly available source of information to re-identify the applicant.

With respect to covered loans secured by residential and commercial property, publicly available real estate transaction records and property tax records would be particularly relevant sources of identified data, as the Bureau described in its proposed policy guidance on the disclosure of loan-level HMDA data.[873] Because some of the data fields in such public records are also present in application-level data, publication without any modifications would have created a risk that these public records could be directly matched to a data record. UCC filings also frequently include the name of the lender, the name of the business, and the date that the filing was submitted. Though the availability differs by State, UCC filings are often searchable in State databases, and are frequently mined by data brokers. UCC statements are often filed against specific collateral and business assets generally. The NPRM accordingly indicated that such filings could pose a serious re-identification risk.

The NPRM also explained that public records in loan-level datasets for programs like the SBA's 7(a), 8(a), 504, and Paycheck Protection Program, as well as State-level registries of women-owned and minority-owned businesses for contracting purposes, could contribute to re-identification risk. These datasets include information such as loan program guarantee information, industry information or NAICS code, demographic information about the business owners, time in business, and number of employees. As a result, the time in business and number of workers data fields might significantly contribute to reidentification risk, especially in combination with other data fields like census tract and NAICS code. Similarly, loan-level performance datasets made available by the Government-Sponsored Enterprises include information such as borrower demographic information, loan program guarantee information, pricing data, loan term, loan purpose, and the year of action taken. Asset-backed securities datasets for securitized mortgage and auto loans are made available by the Securities and Exchange Commission through the Electronic Data Gathering, Analysis, and Retrieval system. These datasets, which include information about the lender, the date of action taken, pricing data, loan term, loan amount applied for and approved, are available online with limited restrictions on access. But these datasets do not include the name of the borrower; as described above, this means that an adversary who is able to match a record in one of these datasets to a record in the data would need to make an additional match to an identified dataset to re-identify an applicant. And some of these datasets contain restrictions on use, such as a prohibition on attempting to re-identify borrowers. Finally, the Bureau noted the existence of private datasets that might be matched to the data. For example, data brokers collect information about small businesses from a wide range of sources and sell it for a variety of purposes, including marketing, identity verification, and fraud detection.[874] These datasets typically include data collected from commercial, government, and other publicly available sources and could contain data such as NAICS code, location, and estimates of gross annual income, number of workers, and information about related natural persons, including the ethnicity and race of principal owners.

In addition to considering the steps an adversary would need to take to re-identify applicants and the various data sources that may be required to accomplish re-identification, including

[871] The term does not mean that the adversary's motives are necessarily malicious or adverse to the interests of others. *See, e.g.,* Nat'l Inst. of Standards & Tech., *De-Identification of Personal Information* (2015), *http://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8053.pdf* (using the term ''adversary'').

[872] For these purposes, an ''identified'' dataset is one that directly identifies a natural or non-natural person.

[873] *See* 82 FR 44586, 44593 (Sept. 25, 2017).

[874] *See generally* Fed. Trade Comm'n, *Data Brokers: A Call for Transparency and Accountability* (May 2014), *https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf* (describing the types of products offered and the data sources used by data brokers).

their limitations, the Bureau considered the capacity, incentives, and characteristics of potential adversaries, including those that might attempt re-identification for harm. In particular, a competitor or potential competitor might seek information about a business's expansion strategy or financial condition, including whether it was able to obtain credit approval. As the Bureau explained, some adversaries could possess the resources to use private datasets in addition to publicly available records. However, the Bureau noted the extent to which much of the commercial benefit to be obtained by re-identifying the data would be more readily available from private datasets to which these potential adversaries already have access without the need for recourse to the data. In many cases, information from other datasets could be timelier than that found in the data. Furthermore, some of these potential adversaries might refrain from re-identifying the small business applicant for reputational reasons or because they have agreed to restrictions on using data for these purposes.

Additionally, the Bureau stated that some academics, researchers, and journalists may be interested in re-identifying published data for research purposes. As noted above, however, some private datasets have contractual terms prohibiting their use for re-identification purposes and therefore these persons might be restricted from actually using the data to re-identify applicants. Further, some academics or journalists may be affiliated with organizations that have reputational or institutional interests adverse to re-identification efforts.

The Bureau considered whether parties intending to commit identity theft or financial fraud may have the incentive and capacity to re-identify applicants, but it assessed that the data would be of minimal use for these purposes. In addition, such adversaries are not law abiding and may have easier, albeit illegal, ways to secure data for these purposes than attempting to re-identify application-level data.

Re-identification based on personal knowledge. The NPRM also noted the potential for re-identification based on personal knowledge. Location, as well as demographic and industry information, might well be known to an adversary familiar with an applicant, meaning that they might be able to re-identify an applicant without matching a record to another dataset. The Bureau explained that the personal knowledge possessed by such an adversary would be limited to information about a subset of applicants and related natural persons. Thus, any such re-identification would impact a more limited number of applicants or natural persons than might be re-identified by adversaries possessing sophisticated matching techniques. The Bureau explained that uncertainty over the extent of relevant personal knowledge posed challenges for evaluating how much individual data fields contribute to this re-identification risk. For these reasons, the NPRM generally focused on matching-based risk. However, the Bureau sought comment on how to assess re-identification risk arising from personal knowledge.

Applications that do not result in originations. In its final policy guidance on the disclosure of loan-level HMDA data, the Bureau explained that the risk of re-identification to applicants is significantly lower for applications that do not result in originated loans.[875] A lack of public information about applications significantly reduces the likelihood that an adversary could match the record of a HMDA loan application that was not originated to an identified record in another dataset. In the NPRM, the Bureau stated that it had not identified any publicly available information about applications for business loans. However, unmodified data might still contain data fields that facilitate the re-identification of applicants. For example, census tract and NAICS code data could result in unique combinations that an adversary could use to match to an identified public record, such as a business directory.

Overlap between HMDA and 1071 data generally. The Bureau proposed that some covered applications would also be reported under HMDA.[876] The public loan-level HMDA dataset contains data fields in addition to, or that overlap with, the proposed data fields, and the proposed data would have included data fields not included in the public loan-level HMDA dataset. The Bureau recognized that, in cases of overlap, some data fields may have required additional analysis with respect to risks of harm or sensitivity and re-identification posed by such overlap. The Bureau sought comment on this issue and the implications of potential re-identification risk and potential risk of harm or sensitivity for applications reported under both section 1071 and HMDA.

[875] *See* 84 FR 649, 658 (Jan. 31, 2019); *see also* 82 FR 44586, 44593 n.55 (Sept. 25, 2017).

[876] See the section-by-section analysis of § 1002.104 for additional details.

Comments Received

The Bureau received comments from lenders, trade associations, community groups, a business advocacy group, a software vendor, and several individuals on re-identification risk posed by the publication of unmodified, application-level data. Nearly all of these commenters agreed that re-identification risk, either through matching or via personal knowledge, should be considered by the Bureau when determining whether to modify or delete data for publication.

Many industry commenters and a business advocacy group saw a high risk of data being used to re-identify applicants and related natural persons and that this would disclose harmful or sensitive private information. Some industry and individual commenters agreed that re-identification risk will be higher as a result of data point combinations; several pointed to the combination of NAICS and census tract. One commenter stated that because re-identification risk depends on the distinctness of the data being published and on the ability to match that data to other datasets, the Bureau should consider privacy risk for the overall dataset rather than for each data point. Another stated that unpredictable changes in re-identification technologies may make data that are currently impossible to re-identify susceptible to re-identification in the future. Commenters also stated that businesses in rural areas face particular re-identification risk because of the likelihood that those areas have low populations and a low number of small businesses. Several commenters also saw re-identification risk in rural areas as more relevant to certain products, such as agricultural lending, that are concentrated in such areas. A group of trade associations said that CRA data are not published at the application-level, in part because geography can contribute to the increased risk of re-identification.

In contrast, some commenters, primarily consisting of community groups, asserted that re-identification risk, either through matching or because of personal knowledge, is low. Two commenters stated that the risk is low because much of the information that would be included in the 1071 dataset is already publicly available, either in commercial data sources or as a result of data breaches. Some commenters also stated that there have been no reported incidents of HMDA data, which is similar to 1071 data, being used to re-identify individuals. One said that the effectiveness of modifications and

deletion techniques for HMDA data suggest that similar modifications and deletions will nullify the re-identification risk for 1071 data. The Bureau did not receive comments about its assumption that data on applications that do not result in originations pose lower re-identification risk than data on originated applications.

Current Approach

In the Bureau's preliminary assessment, re-identification risk of small business applicants and their owners is the core privacy risk associated with data publication. While the primary focus of the Bureau's intended privacy analysis is the impact of re-identification risk on personal privacy interests, controlling reidentification risk will naturally mitigate other privacy risks and harms, including commercial privacy risks for small businesses. The prevailing view of commenters was that unmodified application-level data poses re-identification risks that the Bureau should consider when making modification and deletion decisions. The Bureau also agrees with commenters that data point combinations, particularly the combination of NAICS and census tract, pose particular re-identification risks, and it intends to take this into account in making modifications and deletions.

The Bureau agrees that small businesses in small or rural areas may face heightened re-identification risk. However, overall re-identification risk depends on multiple factors. For example, while the overall transaction volume in a rural area may be lower than in an urban area, concentration of certain credit products in rural areas may change how much of an impact low transaction volume has on re-identification risk. Thus, the Bureau does not intend to rely on a categorical determination that geographical area types or particular census tracts will contribute to the risk of re-identification in every circumstance. The Bureau intends to determine whether targeted modification of individual data fields sufficiently mitigates privacy risks from geographical identifiers, rather than relying on wholesale deletion of data from rural areas.

The Bureau agrees that it is difficult to predict how technology will evolve in the future and impact re-identification risk. This is one reason it intends to track developments in the small business lending market, continue to engage with stakeholders, and reassess its privacy approach as necessary. The Bureau intends to preserve flexibility so that its privacy analysis can evolve with changes to privacy risks.

The Bureau assesses that modification and deletion techniques can effectively limit re-identification risk and therefore concludes that completely withholding data—which would be contrary to section 1071's statutory purposes and express disclosure provisions—is not necessary to manage re-identification risk. As noted by commenters, modification and deletion techniques have effectively reduced re-identification risk from HMDA data, and the Bureau anticipates the same result with this data. The existence of some data that matches with existing data sets is not grounds to forego the full privacy analysis of collected data that will allow it to make targeted modification and deletion decisions to protect privacy interests.

For the reasons given above and as discussed in part VIII.B.4.ii below, the Bureau preliminarily views re-identification risk as the most significant privacy risk associated with publishing application-level data—and thus the most important privacy risk to consider in making modification and deletion decisions. Re-identification is a prerequisite to any potential harms or sensitivities that small business applicants or related natural persons may experience from publishing such data. As the risk of re-identification is reduced, the risk of harm caused by disclosing harmful or sensitive information also will be reduced. Further, as discussed below, because almost all the harms and sensitivities to financial institutions result from concerns about small business applicant or related natural person re-identification, preventing such re-identification will also prevent the most serious harms and sensitivities for financial institutions.

ii. Risk of Harm or Sensitivity

Proposed Approach

The NPRM considered whether a re-identified application-level record would disclose information about an applicant, related natural person, or financial institution that is not otherwise public and may be harmful or sensitive. Specifically, the Bureau evaluated whether such data could be used for harmful purposes such as fraud or identity theft or the targeted marketing of products and services that may pose other risks. The NPRM evaluated whether the data could cause competitive harm to small business applicants or to financial institutions. It also evaluated whether certain data fields might be viewed as sensitive if associated with a particular applicant, related natural person, or financial institution. In evaluating the potential sensitivity of a data field, the Bureau considered whether disclosure of the data field could cause dignitary or reputational harm to small business applicants, related natural persons, and financial institutions.

The NPRM explained that some identifiable information about small business lending is already publicly available. Such information is both in public records and in private datasets with varying barriers to access and restrictions on use. The Bureau's analysis accordingly considered the degree to which disclosure would increase this risk relative to the risk that already exists. In general, where a data field was already publicly available, the NPRM saw a reduced risk of harm or sensitivity from its further disclosure.[877]

The Bureau considered whether the data could be used for harmful purposes such as fraud or identity theft or the targeted marketing of products and services that may pose other risks. The Bureau's initial view was that unmodified application-level data would be of minimal use for perpetrating identity theft or financial fraud against applicants or related natural persons. As proposed, application-level data would not include information typically required to open new accounts in the name of a small business's principal owner, such as Social Security number, date of birth, place of birth, passport number, or driver's license number. Additionally, the data would not include information useful to perpetrate existing account fraud, such as account numbers or passwords. The Bureau acknowledged, however, that almost any information relating to a small business could, in theory, be used for these purposes. For example, unmodified data could potentially be used in a phishing attack against an applicant, or for knowledge-based authentication. Some such data, however, may already be available from public and private sources. The Bureau also noted, on the basis of its expertise and analysis, that the publication of HMDA data—which contain many data fields that are similar to data fields that would be disclosed under the proposal—has not resulted in any measurable increase in fraud or identity theft against mortgage applicants.

[877] However, where a data field was already publicly available, disclosing that data field in the data may have enabled the matching of data to other datasets that may not have been controlled by the Bureau, which could have substantially facilitated re-identification or the disclosure of harmful or sensitive information.

The Bureau also considered potential impacts on targeted marketing of products and services. The Bureau explained that although the data could be used to market products and services that would have been beneficial for small businesses—perhaps increasing competition among creditors that could help small businesses receive better terms—they could also be used to target potentially vulnerable small businesses with marketing for products and services that may have posed risks that were not apparent. For example, users might perceive certain data to reveal negative information about an applicant's financial condition or vulnerability to scams relating to debt relief or credit repair. Information about a loan might also be used for a practice known as ''stacking,'' in which creditors may obtain lead lists based on publicly available information and offer follow-on loans or advances that add to the debt burden carried by small businesses. Some creditors might also use the data for deceptive marketing practices. However, the Bureau noted that the utility of the data for predatory marketing practices may be limited by delay between action taken on a loan and data publication.

The Bureau considered whether unmodified data would result in competitive harm to small business applicants or related natural persons by disclosing general information about a small business's use of credit that was not currently available to the general public. The Bureau acknowledged that certain data points in unmodified form could reflect negatively on the financial condition of a business or its owners. The Bureau also considered the potential for competitive harm to financial institutions. As discussed below with respect to the financial institution identifying information that would be reported pursuant to proposed § 1002.109(b), the Bureau proposed to identify the financial institution in the public application-level data. Therefore, the data could reveal general information about a financial institution's lending practices that is not widely available to the general public. As the Bureau explained, data fields such as census tract, NAICS code, credit type, and pricing could disclose information about where a financial institution is doing business, what industries it is doing business with, what kinds of products it is offering, and what kinds of prices it is charging, respectively. Additionally, if a small business applicant were re-identified, a financial institution's competitors could identify the small businesses to which the financial institution is offering or providing credit. A financial institution could then potentially offer credit to a particular small business at a lower price than they currently received. However, the Bureau did not assess that unmodified application-level data would include key inputs for, or be detailed enough, to substantially facilitate reverse-engineering of proprietary lending models. For example, it would not have included information about an applicant's credit history. The NPRM also noted stakeholder concern that data could harm financial institutions by increasing the amount of litigation against them. The Bureau sought comment on this risk.

With respect to feedback that disclosing information about applicants in rural areas could lead them to seek financing elsewhere, the Bureau noted that would not necessarily reduce the risk that someone in the small business's community may ultimately re-identify them because the data would be reported with respect to the location of the business, as discussed in the section-by-section analysis of § 1002.107(a)(13).

In addition to considering whether the disclosure of a data field could lead to financial or other more tangible harms, the Bureau also considered whether the data might be viewed as sensitive. In assessing whether a data field creates a risk of sensitivity, the Bureau evaluated whether its disclosure could lead to dignitary or reputational harm to small business applicants or related natural persons. For example, if re-identified, the data could reveal information that casts a negative light on a small business's financial condition, such as the fact that a loan was denied due to a business's credit characteristics or cashflow.

The Bureau also evaluated whether the disclosure of a data field could cause reputational harm to financial institutions. The Bureau discussed stakeholder concerns that the data could lead users to draw unfounded inferences about discrimination. The Bureau noted that several of the data fields, if disclosed in unmodified form, would help address this concern by serving as control variables. For example, many financial institutions consider a small business's revenue when assessing the risk of extending credit. As a result, disclosing gross annual revenue data would help ensure that data users who are evaluating potential disparities in underwriting or pricing can compare small businesses with similar revenues, thereby controlling for a factor that might provide a reason for some disparities. The Bureau also noted that it does not expect that data alone could generally be used to determine whether a lender is complying with fair lending laws. The Bureau expected that, when regulators conduct fair lending examinations, they would analyze additional information before reaching compliance determinations.

The Bureau also considered general expectations with respect to what information is available to the general public. For example, the Bureau explained that disclosing gross annual revenue in unmodified form could disclose sensitive information because it could reflect the financial condition of a small business or, where a small business is a sole proprietorship, a particular individual. This type of information is typically not available to the general public. The Bureau also acknowledged concerns that some small businesses and their owners would consider seeking credit sensitive, or would consider the disclosure of a banking relationship sensitive because others may draw adverse inferences about the small business's financial condition. These are concerns about sensitivity that would result from the re-identification of the applicant, rather than from the disclosure of particular data fields. The Bureau sought to address these concerns by mitigating the risk of re-identification.

Comments Received

The Bureau received comments in this area from a range of commenters including lenders, trade associations, business advocacy groups, and community groups.

Risk of identity theft or fraud. Some industry and academic commenters stated that the data points may subject small business applicants and related natural persons to an increased risk of fraud or identity theft. Commenters also stated that publication may expose financial institution employees, such as the financial institution contact reported under § 1002.109(b)(3), to fraud or identity theft actions, such as phishing attacks. Another commenter stated that rural applicants will be easily identifiable in data and, as a result, at greater risk of fraud.

Risk of targeted marketing harms. A group of bank trade associations and a business advocacy group asserted that public data could be collected and sold to interested third parties, potentially for targeted marketing purposes. No commenters asserted financial institutions would experience such harms.

Risk of competitive harms. Several industry commenters and a business advocacy group expressed concern that the disclosure of application-level data would pose risks of competitive harm to small business applicants or related natural persons. Some commenters stated that if an applicant is re-identified, competitors will gain non-public insights into financial information directly bearing on that small business's long term financial health and competitive goals. Some commenters noted that larger competitors may be more likely to gain information about the financial health and long-term business goals of small businesses. For example, a lender asserted that larger companies may use the data to outbid smaller competitors. Other commenters stated that data may reveal non-public information about a small business's use of credit, such as financing terms, that competitors may use to their competitive advantage.

Some industry commenters and a business advocacy group stated that small business applicants may experience reduced availability or increased cost if other financial institutions learn of their small business loans or loan terms, which would reduce their ability to obtain liquidity or increase their operating costs as compared to their competitors. These commenters asserted that publication may impose increased compliance costs and litigation risks on financial institutions that are passed on to small business applicants or that cause financial institutions to limit credit to borrowers with higher risk profiles to prevent losses.

Many industry commenters stated that publication will present significant risk of competitive harms to financial institutions. Commenters asserted that application-level data may be used to identify or reverse-engineer proprietary lending information, such as underwriting requirements or pricing models. One commenter asserted that if the pricing information and action taken data points could be used to determine a lender's limits for other credit terms that are not collected under the rule, such as the APR limit, the lender's competitors would be able to undercut or otherwise compete with those terms, for example by offering lower rates. This commenter stated that while lower APRs are generally beneficial for consumers, this may come at the cost of lower quality service. A lender suggested that data points such as gross annual revenue and the time in business may be used to reverse-engineer a financial institution's proprietary lending strategy. Another commenter asserted that data points for private label credit, such as the pricing information or census tracts, are particularly commercially sensitive to financial institutions and there is risk that disclosure of this information will cause competitive harm.

Other industry commenters indicated that competitive harm experienced by financial institutions may have broader impacts on the small business lending market. Some commenters suggested that if public data reveals proprietary commercial lender information, financial institutions may be compelled to engage in anti-competitive behavior, such as price-fixing, that restricts credit or offers less favorable terms, because it will effectively homogenize the market and limit their ability to compete with one another. One asserted that compliance concerns due to publication could result in reduced product availability by financial institutions, as they asserted was seen after publication of HMDA and CRA data.

Some industry and academic commenters stated that competitive harm may particularly impact smaller or rural financial institutions. They asserted that because these lenders have fewer small business customers than larger financial institutions, their customers are at a higher risk of re-identification. As such, it may be easier for the larger competitors of smaller or rural financial institutions to approach their small business applicants to underprice the loans and offer better terms. These commenters stated that smaller and rural financial institutions may have less flexibility to respond to resulting competitive harms because of their size and lower applicant volume.

Risk of reputational harms. An industry commenter and a business advocacy group stated that small business applicants and related natural persons will be subject to reputational risks as a result of publication. For example, one noted that if applicants are re-identified, small business owners may experience harm, discrimination, or stigmatization from disclosure of certain data points, such as race, sex, and ethnicity. Other industry commenters stated that financial institutions may also experience reputational harms. Many commenters stated that risks of reputational harm and frivolous litigation will result from incorrect conclusions about the data drawn by the public or regulators. These commenters asserted that incorrect data conclusions could result from the unique characteristics of small business lending generally, particular credit scenarios common within small business lending, and the fact that the data will not reflect all factors that went into underwriting decisions. For example, some commenters asserted that there is particular risk of misunderstanding with Farm Credit System credit based on how dividends are provided and the legal limitations for such loans. These commenters explained that because statutory provisions for Farm Credit System credit have specific coverage criteria, data may disclose a justified, but disproportionately high, rate of application denial. Additionally, commenters explained that Farm Credit System institutions may appear to charge a higher interest rate to certain borrowers but that the interest rates are offset by dividends based on the borrower's patronage.

A few industry commenters cited potential discrepancies between data points and those that appear in other sources, which could increase the risk of reputational harm and litigation for financial institutions. These commenters said that because data requirements for these other sources are not the same as proposed requirements, but are labeled with the same identifier, the resulting variations could unfairly increase scrutiny or lead to inaccurate conclusions. These commenters were especially concerned about this risk for loans subject to HMDA or CRA. Additionally, some industry commenters stated that financial institutions' reputations for protecting applicants' privacy may be impacted by data publication. Commenters noted that applicants may have concerns about providing information and may feel that conversations with a financial institution are less confidential because certain information is being disclosed to the government. One commenter mentioned that if a financial institution or the Bureau experiences a data breach, the financial institution may not be viewed as trustworthy by applicants.

In contrast, other commenters stated that published data will decrease reputational and litigation risks for financial institutions. According to one commenter, the data will provide evidence of responsible lenders' fair lending practices, which will give them a competitive advantage over less scrupulous financial institutions. Additionally, a few commenters stated that reputational and litigation harm risks from publication can be mitigated by disclaimers, as well as by data modifications and deletions. For example, these commenters stated that any data publication should include a statement for agricultural lending credit types that Farm Credit System entities

can only lend to applicants that are eligible under the Farm Credit Act.

Other harms or sensitivities. Commenters identified three additional harms that were not discussed in the NPRM: physical harms, data security, and harm to applicants' relationship with, or trust in, financial institutions.

A software vendor and several individual commenters stated the Bureau should consider physical harm or personal security threats that could result from publication. For example, a few commenters stated that if an applicant's LGBTQI+ status was revealed, the applicant may face threats to their personal security due to discrimination.

One industry commenter stated small business applicants or related natural persons may be exposed to data breaches because financial institutions will store and transmit data online. Some industry and business advocacy group commenters asserted that a data breach could cause privacy risks for financial institutions, including reputational harm related to litigation. The commenters said this would be true even if the Bureau were the breached entity, and that the Bureau must take action to protect reported data from potential breaches. Some also requested that the Bureau detail the steps it will take to protect data from breach or to indemnify financial institutions impacted by data breaches arising from a breach to the Bureau. One commenter stated that the Bureau should seek comment on its data security safeguards.

Some commenters, mainly from industry, identified potential impacts that privacy risks may have on the relationships between small business applicants and financial institutions. Some commenters stated that the publication may create friction in the lending process due to negative public sentiment. These commenters asserted that, because small business applicants may view the data collection methods as invasive or because financial institutions may feel obligated to reduce tailored credit underwriting to prevent misconceptions about lending practices, financial institutions may not be able to provide customer service at the level currently obtained. Other commenters noted that applicants who are concerned about the privacy or security of this data may be hesitant to seek credit or they might seek credit from more expensive unregulated sources.

Current Approach

As discussed below, the Bureau's preliminary view is that the risk of harm or sensitivity to small businesses and related natural persons is significant and should be considered in its privacy assessment. The Bureau's current intent is to address these risks primarily by controlling for re-identification risk. The Bureau is particularly focused on risks to personal privacy interests. Such interests may involve protected demographic information or information about personal finances that could have reputational impact if disclosed; for example, this might include the reputational impact of a credit denial arising from a personal credit score.[878] The Bureau also intends to consider certain commercial risks of harms and sensitivities to small businesses when modifying or deleting data. The Bureau does not currently intend to consider financial institution privacy interests in its analysis unless there is a compelling privacy risk.

Risk of identity theft or fraud. Based on comments received, the Bureau views any risk of identity theft or fraud for small business applicants or related natural persons resulting from the publication of data to be predicated on the small business applicant or related natural person being re-identified. As to comments that publication of financial institution contact information will subject financial institution employees to identity theft or fraud, such as phishing attempts, consistent with the NPRM, the Bureau plans to exclude from publication the name and business contact information of a person who may be contacted with questions about the financial institution's submission from the public application-level data.

Risk of targeted marketing harms. Targeted marketing harms likewise presuppose that a small business applicant or related natural person is re-identified.

Risk of competitive harms. Potential competitive harms, including information about a small business's long term financial health and competitive goals, are also predicated on re-identification. For example, commenters stating that an applicant's competitors may gain insights into its financial health, competitive strategy, and goals all assumed that the small business applicant is first re-identified.

The Bureau does not view data publication as increasing a financial institution's compliance costs and litigation risks, such that increased costs and risks would result in increased fees, reduction in credit program availability, or reduce credit availability for applicants with weak credit profiles. Historical evidence from HMDA suggests that such impacts will be minimal. Notwithstanding similar contentions prior to the 2015 HMDA Final Rule, the Bureau recently reported that, based on 2021 HMDA data, trends in mortgage origination continued to increase since the HMDA rule became effective in 2018.[879] Based on this experience with HMDA, the Bureau does not anticipate that this final rule will significantly increase the cost of credit products, reduce credit product availability, or result in otherwise unnecessary tightening of underwriting criteria.[880]

The Bureau also disagrees that publication will reveal proprietary lending information, thereby resulting in competitive harm to financial institutions. Unmodified application-level data will not include key inputs for, or be detailed enough, to substantially facilitate the reverse-engineering of proprietary lending models. For example, it will not include applicants' credit score data. Other comments expressing concern that the data collected would provide only an incomplete picture of the financial institution's lending practices confirmed that other key information about underwriting will not be collected. These omissions should prevent competitors from reverse-engineering proprietary lending models and make it unlikely that financial institutions could use the data to engage in anti-competitive behavior like price-fixing.

By the same token, there is no basis for small or rural financial institutions

[878] For example, § 1002.107(a)(11) requires a covered financial institution to report the principal reason or reasons the financial institution denied a covered application. Comment 107(a)(11)–1.ii states that a covered financial institution reports the denial reason as ''credit characteristics of the principal owner(s) or guarantor(s)'' if it denies the application based on an assessment of the principal owner(s) or guarantor(s)'s ability to meet its current or future credit obligations. Examples include principal owner(s) or guarantor(s)'s credit score, history of charge offs, bankruptcy or delinquency, low net worth, limited or insufficient credit history, or history of excessive overdraft. Thus, data about a denial reason may provide personal information about a principal owner's personal financial health that may not otherwise be known to the public.

[879] The 2015 HMDA Final Rule noted that SBREFA SERs and NPRM commenters stated that compliance costs meant that financial institutions would increase price, reduce availability, or exit markets. *See* 80 FR 66127, 66296 (Oct. 28, 2015). But the Bureau's 2021 HMDA Data Point notes that mortgage origination trends have continued to increase since that rule became effective in 2018. Mortgage origination volume has increased from 4.14 million in 2018 to 5.13 million in 2021. Similar increases were seen in application volume. *See* CFPB, *Data Point: 2021 Mortgage Market Activity and Trends* (Sept. 19, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_data-point-mortgage-market-activity-trends_report_2022-09.pdf.*

[880] See part IX.F.4's analysis of small business costs for more information about the magnitude of these effects.

to be at more significant risk of this type of harm. The Bureau acknowledges that the risk of re-identification of small business applicants and related natural persons may be greater in smaller or rural areas, but that does not increase the risk of proprietary lending models being disclosed.

Risk of reputational harms. Reputational harm to small business applicants and related natural persons is also predicated on re-identification.

The Bureau does not agree that publication will increase a responsible financial institution's reputational risk. While the Bureau recognizes that financial institutions may need to defend against some increased litigation about their small business lending practices, it agrees with commenters that publication will help responsible financial institutions defend against such litigation, accordingly making it less likely to occur in the first place. The Bureau similarly agrees with commenters that responsible financial institutions will be able to use the data as evidence of their fair lending compliance, as well as to prevent or counter erroneous claims that the institution is engaging in discriminatory practices. The Bureau has not seen any significant detrimental impact on mortgage applicants' trust in financial institutions, and HMDA-covered mortgage originations have increased since the Bureau's amendments to Regulation C went into effect in 2018.[881] As in the mortgage market, requesting and publishing data from applicants does not have enough reputational impact on financial institutions to impair origination activity.

With respect to reputational risk arising from overlapping databases, the Bureau is finalizing a coverage exception for transactions covered by the Bureau's HMDA rule.[882] In addition, many datasets contain data types that already overlap with HMDA and CRA data. There is accordingly no compelling reason to expect that publishing application-level data will significantly increase whatever risk already exists from HMDA coverage.

As to comments that assert that Farm Credit System products may be incomparable to other credit product types, thereby creating the risk of reputational harm or frivolous litigation, the data will provide sufficient opportunity for Farm Credit System entities to prevent and refute any erroneous conclusions. The Bureau agrees with commenters that this harm can be averted by distinguishing Farm Credit System loans in the dataset. The Farm Credit System is one of the identified types of financial institutions for the data required under § 1002.109(b)(9).[883] As a result, users can filter the data accordingly. Farm Credit System financial institutions can also filter to defend against any conclusions they believe are inaccurate because of comparisons outside the Farm Credit System.

Other harms or sensitivities. The Bureau agrees that the privacy assessment should take account of risks of physical harm and personal security threats to applicants or related natural persons, as well as the potential for data, once available, to be used by third parties to single out or target certain applicants or related natural persons for discriminatory treatment. Re-identification in some circumstances could result in significant risks, including threats of physical or personal harm and discrimination. The risks raised by commenters are supported, for example, by Hate Crime Statistics reported by the Federal Bureau of Investigation (FBI) through its Uniform Crime Reporting Program,[884] and by Equal Employment Opportunity Commission data.[885] The Bureau believes that the risk to personal privacy interests arising from physical harm, personal security threats, and discrimination resulting from information about protected characteristics warrant significant consideration when the Bureau considers modifications or deletions to data.

However, historical evidence indicates that data publication will have little long-term impact to relationships between applicants and financial institutions. The Bureau reported in 2021 that mortgage originations subject to HMDA continued to increase despite the HMDA rule becoming effective in 2018.[886] Based on this and earlier experience with HMDA, the Bureau does not agree that publication will drive small business applicants to seek alternative financing options to avoid disclosure. The HMDA evidence also suggests that any potential increase in costs after this rule becomes effective will not be prohibitive for applicants seeking financing from a regulated financial institution and that market volume will not be substantially impacted.

Finally, the Bureau takes strong measures to mitigate and address any risks to the security of sensitive data it receives, consistent with the guidance and standards set for Federal information security programs. The agency is accordingly committed to protecting the privacy and information security of the data it receives from financial institutions under this rule. In addition, the Bureau does not agree that a financial institution could be held legally liable for the exposure of data due to a breach at a government agency or for reporting data to the Bureau if the institution was legally required to provide the data and did so in accordance with other applicable law.

Based on the record to date, the Bureau intends to consider the risk of harms to small business applicants and related natural persons discussed above in its privacy risk assessment. However, the risks of harms or sensitivities to small businesses and related natural persons discussed by commenters logically assume re-identification already occurred. The harms and sensitivities recognized above clarify the consequences of re-identification and underscore the importance of managing re-identification risk. Additionally, the Bureau's preliminary view is that privacy risks to financial institutions are less significant compared to both personal privacy interests and non-personal commercial privacy risks to small business applicants and related natural persons. Many of the harms attributable to financial institutions

[881] Mortgage origination trends since the HMDA rule became effective in 2018 suggest that any distrust resulting from financial institutions seeking HMDA data has not deterred applicants from continuing to seek credit. *See* CFPB, *Data Point: 2021 Mortgage Market Activity and Trends* (Sept. 19, 2022), *https://files.consumerfinance.gov/f/documents/cfpb_data-point-mortgage-market-activity-trends_report_2022-09.pdf*.

[882] *See* § 1002.104(b)(2).

[883] *See* comment 109(b)(9)–1.vii.

[884] For 2019, the FBI's Uniform Crime Reporting Program reported that in single-bias incidents, 1,492 victims were targeted because of their sexual orientation and 227 victims because of their gender identity. *See* Fed. Bureau of Investigation, *2019 Hate Crimes Statistics, https://ucr.fbi.gov/hate-crime/2019/topic-pages/tables/table-1.xls* (last visited Mar. 20, 2023).

[885] The Equal Employment Opportunity Commission reports that from FY 2014 through FY 2021, approximately $43.5 million dollars of monetary benefits were paid on LGBTQ+-based sex discrimination charges. The amount has increased from $2.2 million to $9.2 million over this period. It also reports that it received 13,546 LGBTQ+-based sex discrimination charges in the same time period, with annual charges increasing from 1,100 in FY 2014 to 1,968 in FY 2021. *https://www.eeoc.gov/data/lgbtq-based-sex-discrimination-charges* (last visited Mar. 20, 2023). *See also* Off. of Mgmt. & Budget, Off. of the Chief Statistician of the U.S., *Recommendations on the Best Practices for the Collection of Sexual Orientation and Gender Identity Data on Federal Statistical Surveys* 8–9.

[886] *Compare* 80 FR 66127, 66296 (Oct. 28, 2015), *with* CFPB, *Data Point: 2021 Mortgage Market Activity and Trends* (Sept. 19, 2022), *https://www.consumerfinance.gov/data-research/research-reports/data-point-2021-mortgage-market-activity-trends/*.

noted by commenters are only likely if small business applicants are re-identified, are not likely to occur based on the history of HMDA data publication, or exist independent of the data and therefore do not result from publication. As a result, measures that the Bureau takes to reduce re-identification risk will also reduce the risk of harms to financial institutions. Thus, the Bureau intends to consider modifying or deleting data to protect a financial institution privacy interest where data publication creates a compelling privacy risk.

5. Privacy-Informed Modification and Deletion

Proposed Approach

Generally. The NPRM stated that where disclosure of an individual data field, alone or in combination with other fields, would pose risks to privacy that were not justified by the benefits of disclosure to 1071's purposes, the Bureau would consider whether it could appropriately balance the privacy risks and disclosure benefits through modification techniques or whether the field should be deleted from the public dataset. The Bureau stated that it also would evaluate the risks and benefits of disclosing a data field in light of modifications or deletions considered for other data fields. Where the Bureau determines that modification of a data field is appropriate, the Bureau stated that its consideration of the available forms of modification for the 1071 data would also be informed by the operational challenges associated with various forms of modification and the need to make application-level data available to the public in a timely manner.

In general, the Bureau stated that deleting or modifying data because the data would disclose general information about a financial institution's lending practices—compared with information that could substantially facilitate, for example, the reverse-engineering of a financial institution's proprietary lending models—would be inconsistent with section 1071, which directly contemplates disclosure of financial institution identity in connection with the public application-level dataset.[887] Each of the data fields prescribed by the statute—with the exception of the application number—could provide some insight into a financial institution's lending practices. If the Bureau were to exclude data on this basis, therefore, it would exclude virtually all of the statutorily required 1071 data points from the public data, frustrating both of the statutory purposes of section 1071.[888] While the Bureau acknowledged financial institutions' concern about the litigation and reputational risks involving 1071 data, the Bureau did not believe that this concern would justify the exclusion of data from public disclosure. One of the statutory purposes of section 1071 is to facilitate enforcement of fair lending laws, which authorize enforcement by parties other than the Bureau.[889] Additionally, section 1071 contemplates that financial institutions would make their own application-level data available to the public, which necessarily entails their identification.[890]

In light of the statutory purposes, the Bureau intended to modify or delete data only as needed under the balancing test prior to public disclosure. The NPRM discussed associated modification techniques with respect to specific data points. Where no specific modification technique was described with respect to a particular data point, the Bureau stated that it had not identified an obvious modification technique other than swapping, suppression, or deletion.

While certain information that directly identifies applicants or related natural persons generally would not be collected under the proposed rule, the Bureau did not accept that this would eliminate privacy risks that would arise from publishing the data in unmodified form. The Bureau also rejected the idea that privacy risks could be adequately resolved through rule coverage. While some re-identification risk could be reduced by increasing the number of applications reported to the Bureau, the Bureau did not believe the effects of doing so are necessarily predictable because re-identification risk depends on the characteristics of the data. Further, the Bureau did not believe that increasing the number of applications would have addressed risks of harm or sensitivity to re-identified applicants or natural persons.

Aggregate data. In the NPRM, the Bureau stated that it did not intend to address privacy risks arising from application-level data by disclosing aggregated data in its place. As required by section 1071, the Bureau proposed in § 1002.110(a) to make available to the public the information submitted to it by financial institutions pursuant to proposed § 1002.109, subject to deletions or modifications made by the Bureau. The Bureau stated that, as authorized by the statute, proposed § 1002.110(b) would have stated that the Bureau may, at its discretion, compile and aggregate information submitted by financial institutions pursuant to proposed § 1002.109, and make any compilations or aggregations of such data publicly available as the Bureau deems appropriate. The Bureau initially anticipated making the data collected under section 1071 available at the application level—with appropriate potential modifications and deletions—rather than providing aggregate data with counts and averages for each data field. The Bureau stated that it may consider releasing aggregated data in the future, after it determined whether narrower modifications or deletions could address privacy risks. The Bureau had received some suggestions to consider ''differential privacy'' techniques,[891] which are typically used in connection with aggregate statistics to reduce the identifiability of more granular data. The Bureau sought comment on whether differential privacy techniques might be appropriate for application-level data.

Recoding. The NPRM identified the Bureau's intention to consider various methods to ''recode'' the proposed data fields as necessary. The Bureau explained that recoding techniques decrease the number of distinct categories for a data field. In this context, recoding would involve providing the value of a data field in a higher-level category that increases the number of records within a given combination. Some data fields like census tract and NAICS code have structures that permit recoding without developing new 1071-specific recoding categories. For instance, if the Bureau were to determine that the re-identification risk presented by the census tract data field does not justify the benefits of unmodified disclosure, the Bureau could instead provide geography at the county level because census tracts are designed to be non-overlapping subdivisions of a county.

The Bureau also stated that it intended to consider recoding via bins or intervals of values for data fields that, in unmodified form, would have continuous values. The Bureau stated that unmodified continuous data fields can be highly identifying, but binning can significantly reduce this risk. It also

[887] *See* ECOA section 704B(f)(2)(B).

[888] *See* ECOA section 704B(a).

[889] *See, e.g.,* ECOA section 706 (providing for civil liability).

[890] *See* ECOA section 704B(f)(2).

[891] Differential privacy is a statistical method designed to protect individuals from reidentification risk. A dataset is said to be differentially private if, by looking at the dataset, one cannot tell whether any individual's data was included in the dataset.

noted the possibility of top- or bottom-coding a data field to prevent extreme—and potentially very re-identifiable—values from being released.

Other techniques. The Bureau stated that it might also consider ''targeted suppression,'' which makes certain values of data points unavailable when a certain combination of values is held by too few records. The Bureau stated that it might consider treating certain values of data points as ''not available'' if the application is the only small business application from a particular census tract. The Bureau explained that targeted suppression can be applied in several ways. One way would be to remove the value of a field that makes the record identifiable. For example, if census tract and NAICS code identify a record, the microdata could delete the value of the NAICS code for any applications that are in cells deemed sensitive. A second approach could leave the census tract and NAICS code but suppress the values of other data points. This method would reduce the potential harm if the record were re-identified. A third approach could be to remove the record from the dataset entirely. The Bureau stated that, in general, suppression is a more common approach for aggregate data than for application-level data.

The Bureau noted that one drawback to targeted suppression is that it complicates data analysis for end users. A data user would be presented with millions of rows, but in certain rows and for certain data points, values would be missing.[892] Another identified drawback is that suppression would need to be done so that the remaining unmodified data do not provide a user with the ability to back out the modified field, sometimes involving complementary suppression or deleting values of other applications to ensure that the missing value cannot be reengineered. The Bureau sought comment on whether targeted suppression techniques could preserve the benefits of publishing application-level data, and, if so, what the Bureau should consider as the minimum cell size to implement targeted suppression.

The Bureau sought comment on other modification techniques, such as ''data swapping'' (sometimes called ''switching''). Data swapping involves finding two records that are similar on several dimensions and swapping the values for other data fields between the two records. In effect, data swapping would require that the Bureau preserve certain data fields while swapping others. The Bureau stated that another set of techniques for addressing privacy risks for continuous data would involve adding ''random noise'' to the reported values. For example, under ''additive noise techniques,'' a random value is added to the existing value of the data field. Under ''multiplicative noise techniques,'' the true value is multiplied by a random value. The Bureau sought comment on whether such techniques would preserve the benefits of publication. The Bureau explained that a drawback to these approaches is that data would be released with values that do not match the true values of the underlying data.[893] Data users would need to take such modifications into account when performing any analyses.

Comments Received

Generally. With regard to how the Bureau stated its intention to assess privacy risks that would inform modification and deletion decisions, several community group commenters, a minority business advocacy group, and several members of Congress urged the Bureau to apply the NPRM's balancing test in favor of public disclosure and to make available a robust dataset. According to some commenters, the fair lending and business and community development purposes of section 1071 militate in favor of data transparency. A number of community and business advocacy group commenters stated that if published application level data are not robust, or if specific data points are not disclosed, the dataset will not adequately reveal whether these statutory purposes of section 1071 are being met. Several commenters asserted that society's interest in tackling discrimination and closing the racial wealth gap supported robust disclosure. A business advocacy group stated that robust 1071 data would promote financial stability in the economy, and cited insufficiently granular HMDA data as contributing to the 2008 subprime financial crisis.

Some community group commenters and a software vendor urged the Bureau not to delete or modify public application-level data because it would undermine the statutory purposes of section 1071. The software vendor stated that modifications or deletions may reduce the utility of the data for no privacy benefit. Several commenters asserted that the Bureau should only modify public 1071 data to protect the privacy interests of small business applicants. A joint letter from community and business advocacy groups agreed with the Bureau's statement that litigation and reputational risks faced by financial institutions do not justify excluding data from public disclosure.

On the other hand, several industry commenters urged the Bureau to make modification and deletion decisions to protect the privacy of financial institutions, applicants, and related natural persons. They stated that protecting these privacy interests was consistent with the statutory purposes of section 1071 because limiting disclosure would increase credit access and lower credit costs to minority-owned and women-owned small businesses.

Several industry, community group, and academic commenters supported modification and deletion of application-level data, stating that it could adequately address privacy risks posed by publication. A trade association asserted that publishing certain data points in an unedited, application-level format would increase the risk of applicant re-identification. Another trade association supported the liberal use of modification and deletion techniques to protect privacy interests of lenders, small business applicants, and related natural persons. Some commenters stated that the lack of reported incidents in which an individual has been re-identified in HMDA data suggests that modifications or deletions can reduce re-identification risks here also.

Some commenters offered views about what data points would be modified or deleted. Several suggested that data modifications or deletions should be consistent with HMDA. According to these commenters, the Bureau should ensure that any data deleted in the HMDA dataset is also deleted in the 1071 dataset, including the unique identifier, the application date, and the action taken date. A software vendor stated that the Bureau should modify data points that reflect gender identity or sexual orientation information, which could result in persons being subject to physical harm. Several individual commenters likewise suggested that LGBTQI+ persons face particular privacy risks. A joint letter from community and business advocacy

[892] Data users would need to understand the method behind the modifications and plan analyses to account for the fact that the suppressed data would necessarily not reflect all small business loans in a given year.

[893] For example, with respect to the amount applied for data field, a recoding technique would release the values of the data field in broad categories, for instance ''$100,000–$150,000.'' In such case, the broader category provides less information but reflects the true value of the underlying data. Noise addition, by contrast, would involve the Bureau manipulating (in a standardized and documented way) the actual values of loan amount. An application's loan amount may be released as $85,000 in the public dataset when the true value was $78,000.

groups stated that if the Bureau modifies 1071 data, it should do so on a loan-by-loan basis because the modification of a particular data field may not be necessary for all records in the dataset.

Aggregate data. The Bureau received no comments about how differential privacy techniques may be applied to application-level data. However, the Bureau did receive comments about aggregating 1071 data. Several industry commenters suggested that the Bureau publish aggregate data, instead of an application-level dataset, to mitigate privacy risks. One stated that aggregate data are sufficient to analyze the business needs and credit access of applicants, including minority-owned and women-owned small businesses. Another said that disclosing aggregate data, as opposed to application-level data, would be consistent with the practices of other agencies. Other industry commenters stated that, while some 1071 data could be disclosed at the application level, the Bureau should aggregate any data points that present re-identification risk.

Recoding. Several community group commenters stated that if the disclosure of 1071 data fields present significant privacy risks, the Bureau should consider binning data or disclosing intervals of values. For example, these commenters stated that when disclosing gross annual revenue data, the Bureau could consider publishing data in $10,000 increments. One stated that binning would be appropriate as long as the modified public 1071 dataset could satisfy the fair lending and business and community development statutory purposes of section 1071.

Other commenters stated that the use of binning should be limited. A community group and a software vendor stated that if the Bureau bins data, it should ensure that the public 1071 dataset remains sufficiently detailed to allow meaningful analysis. To demonstrate this point, the community group asserted that the current CRA system of combining all loans for businesses with revenue under $1 million does not allow for analysis of small businesses within that range. The software vendor cautioned that binning may not always be effective.

Other techniques. With respect to other modification techniques discussed in the NPRM, a community group stated that data swapping and targeted suppression would be appropriate as long as the modified public 1071 dataset could satisfy the fair lending and business and community development statutory purposes of section 1071. The Bureau received no comments about other potential modification techniques.

Current Approach

The Bureau intends to consider modification and deletion techniques as necessary to reduce cognizable privacy risks. The Bureau agrees with comments that a robust public dataset will serve the statutory objectives of section 1071.[894] By extension, a public application-level dataset with less detailed data or that omits certain data points entirely would confer relatively less public benefit. These benefits notwithstanding, in some cases modification and deletion decisions may be appropriate to protect privacy interests. The statute empowers the Bureau to modify or delete data, and the Bureau believes that modifications or deletions may be appropriate in some circumstances to reduce the cognizable privacy risks set forth above.

Modifications or deletions will not necessarily undermine the utility of the published data or will not be futile because they will not mitigate risks. With respect to the effectiveness of modifications and deletion techniques, the Bureau points to the lack of reported incidents in which an individual has been re-identified in public HMDA data, which the Bureau modifies to reduce re-identification risk. The Bureau concludes that targeted modification and deletion decisions can adequately reduce privacy risks while preserving the utility of 1071 data, as is the case with HMDA data. Modifications and deletions may be necessary, for example, in cases where unmodified application-level data will likely lead to re-identification of small business applicants or related natural persons. The Bureau will also consider modifications and deletions to the public 1071 dataset when data fields, individually or in combination with other data, pose cognizable privacy risks, as discussed above.

After obtaining a full year of reported data and conducting a full privacy analysis, the Bureau intends to make modification and deletion decisions tailored for individual data points where appropriate. The Bureau will not delete or modify data solely to align with HMDA practice. Small business lending and mortgage lending are distinct markets which face their own unique privacy risks, and re-identification risk depends on the characteristics of particular data. With respect to comments about modifying or deleting data that may convey the gender identity or sexual orientation of applicants' principal owners or other individuals that own or control applicants, the Bureau views this as sensitive information that implicates important personal privacy interests. While the Bureau is not making modification and deletion decisions about this information prior to conducting the full privacy analysis, it does intend to give significant consideration to personal privacy interests. However, it would not be feasible to make modification and deletion decisions on a loan-by-loan basis, as one comment suggested.

Regarding feedback on specific modification techniques, the Bureau does not intend to publish aggregate data instead of application-level data. Aggregate datasets do not permit the detailed, application-level analyses that best facilitate the fair lending enforcement and business and community development purposes of section 1071. In addition, the Bureau can adequately mitigate privacy risks through targeted modification and deletions of individual data fields—it is not necessary to avoid publication of all application-level data. While the Bureau does not intend to publish aggregate data in place of an application-level dataset, it anticipates releasing select aggregated data before it publishes application-level data.

The Bureau sees recoding, including binning data or disclosing intervals, as an appropriate modification technique to address privacy risks that may be posed by public release of unmodified data. While the Bureau is not making specific modification decisions at this time, it intends to consider recoding data in a targeted manner that preserves the utility of the public dataset. The Bureau also views other modification techniques, including data swapping and targeted suppression, as appropriate tools to address privacy risks. Finalizing the exact tool set, however, will depend on securing a full year of data and will be informed by continued engagement with stakeholders.

When exercising its discretion to modify or delete 1071 data, the Bureau anticipates publishing data in a manner that reduces privacy risks, in particular re-identification risk. If the Bureau determines that it is necessary to modify an individual data point to address a privacy risk, the Bureau intends to consider a range of modification techniques, including, but not limited to, recoding, data swapping, and

[894] The Bureau lacks evidence to assess the comment that published data would promote financial stability. If true, this result would align with the Bureau's authorizing statute whose purpose, in part, is to ''promote the financial stability of the United States by improving accountability and transparency in the financial system.'' Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

targeted suppression. The Bureau intends to engage with stakeholders in the future about these issues, including providing opportunities for additional input as the Bureau considers its privacy analysis further.

6. Preliminary Privacy Assessment of Particular Data Fields

In the NPRM, the Bureau identified certain data fields that it believed would need modification or deletion to appropriately protect privacy interests, while taking account of disclosure benefits: individual contact information at reporting financial institutions; free-form text data, which occurs in a number of data fields; and the unique identifier for each application. Beyond these specific fields, the NPRM explained that the Bureau lacked data under section 1071 or comparable proxies that it could use for its privacy risk assessment. Accordingly, it did not suggest specific modifications and deletions with respect to any other data.

In order to benefit from stakeholder engagement, however, the Bureau did set forth some initial analysis on how it would apply the NPRM's balancing test to the proposed data fields. With respect to each such data field, whether individually or in combination with others, the Bureau sought comments on: (1) whether there are additional benefits of unmodified public disclosure in light of the purposes of the statute; (2) whether disclosure in unmodified form would reveal additional information that might be considered harmful or sensitive by an applicant, related natural person, or financial institution; and (3) whether disclosure in unmodified form would significantly contribute to the risk that an applicant or related natural person might be re-identified. The Bureau also sought comment on modification techniques it could use, and whether deletion would be appropriate. Where no specific technique was described with respect to particular data points, the Bureau did not identify any obvious technique besides potentially swapping, suppression, or deletion.

The Bureau received feedback on this initial analysis from a range of commenters, including industry and community group commenters. The Bureau has taken this feedback into consideration to refine its analysis of the qualitative risks associated with disclosing particular data fields in unmodified form, although, consistent with the above analysis, the Bureau's assessment remains preliminary.[895]

Overall, with the exceptions noted with respect to unique identifier, free-form text, and individual contact information, for all other finalized data points, the Bureau intends to further consider whether modification techniques may be appropriate when it analyzes reported data and conducts its full privacy analysis. In doing so, the Bureau intends to take into account existing feedback, as well as conducting ongoing engagement, about potential modifications as it examines what modifications or deletions may be appropriate for these fields. In addition, the Bureau is mindful of the statutory purposes of section 1071 and will only modify or delete data to advance a privacy interest.

i. Unique Identifier

Proposed § 1002.107(a)(1) would have required financial institutions to collect and report an alphanumeric identifier, starting with the legal entity identifier of the financial institution, unique within the financial institution to the specific covered application, and which can be used to identify and retrieve the specific file or files corresponding to the application for or extension of credit. As discussed in the section-by-section analysis of § 1002.107(a)(1), the Bureau is finalizing this data point substantially as proposed.

In the NPRM, the Bureau stated that disclosing the unique identifier in the 1071 data in unmodified form by itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. Section 1071 prohibits financial institutions from including in 1071 records certain personally identifiable information that directly identifies a natural person applicant or someone connected with the applicant.[896] In addition, the Bureau proposed to prohibit financial institutions from reporting information that would directly identify a small business. For these reasons, the Bureau did not expect that the unique identifier would be considered harmful or sensitive.

With respect to re-identification risk, the NPRM noted that although publicly available datasets do not presently include the unique identifier data field, financial institution legal entity identifiers are publicly available, and the Bureau was aware of rare instances in which a loan number was included in UCC filings. In addition, the Bureau noted that many jurisdictions publicly disclose real estate transaction records in an identified form, and the Bureau stated that many financial institutions may include loan numbers on these publicly recorded documents.[897]

The Bureau stated that inclusion of the proposed unique identifier, rather than application or loan numbers, would limit the possibility of using an application or loan number to match 1071 data to those publicly recorded documents, thus reducing risk of re-identification. However, the Bureau acknowledged that there is a risk that, after financial institutions begin to report data under section 1071, they may replace the loan numbers currently assigned to small business loans with the unique identifier and, if they do, the unique identifier could be included on publicly recorded documents. Considering the uniqueness of the identifiers, the Bureau reasoned that this data field on a publicly recorded document could be used to match a 1071 record to an identified public record directly and reliably.

In light of these potential re-identification risks, the Bureau stated that it did not intend to publish the unique identifier data field in unmodified form. The Bureau sought comment on whether there are modifications to the unique identifier data field that would appropriately balance identified privacy risks and disclosure benefits. The Bureau stated that it was considering the feasibility of disclosing a separate unique identifier that the Bureau could create. The Bureau also considered deleting the data field from the public application-level data, but sought comment on whether such deletion would create challenges for users of the data and, if so, how the Bureau could address those challenges other than by creating a separate unique identifier. The Bureau sought comment on this analysis as well as its intent not to publish the unique identifier in unmodified form.

An academic research and policy organization agreed with the Bureau's initial analysis, noting that public HMDA data do not include a unique identifier. Several industry commenters stated that, because lenders are allowed to use their own internal account numbers and therefore the unique identifier may include a loan number or account number, the data point in combination with the financial

[895] The Bureau sought and received feedback about several data points that it did not propose. As it is not adopting those data points, it does not address privacy risks or modification techniques associated with reporting them.

[896] ECOA section 704B(e)(3).

[897] *See* 82 FR 44586, 44599 (Sept. 25, 2017); *see also* 84 FR 649, 660 (Jan. 31, 2019).

institution's name provides substantial opportunity for fraud. Because of the privacy risks discussed above, most of these commenters supported the Bureau's suggestion not to publish the unmodified unique identifier field. A CDFI lender stated that the Bureau should consider publishing a modified identifier or a separate one created by the Bureau.

After considering these comments, the Bureau intends not to publish the unique identifier data field in an unmodified form. Although it has not yet conducted a full re-identification analysis for the 1071 data, the Bureau agrees with the re-identification risks raised by commenters. The universal loan identifier for HMDA data, which is similar to the unique identifier, is not published because of the re-identification risk that it poses.[898] While HMDA publication practices are not dispositive here, the Bureau draws upon its experience implementing HMDA and Regulation C where appropriate, and it does so here.

At this time, the Bureau has not decided whether to publish public application-level data without any unique identifier information, disclose instead a separate unique identifier created by the Bureau for this purpose, or employ some other modification. The Bureau will consider what modification or deletion techniques may be appropriate when it analyzes application-level data and conducts its full privacy analysis.

ii. Application Date

Proposed § 1002.107(a)(2) would have required financial institutions to collect and report the date the covered application was received by the financial institution or the date shown on a paper or electronic application form. As discussed in the section-by-section analysis of § 1002.107(a)(2), the Bureau is finalizing this data point with modifications such that financial institutions must collect and report the date the covered application was received or shown on a paper or electronic application form.

The NPRM stated that, by itself, disclosing application date in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The Bureau noted that an adversary such as a competitor may conceivably find it helpful to understand when a business is seeking credit. In addition, marketers and creditors could use this information to target products to entities recently in the market for credit, either to deploy new funds or to refinance out of a current loan. However, the Bureau did not believe that disclosing the application date would otherwise disclose sensitive information about a small business or its owner. The Bureau also reasoned that any utility of this data field for such purposes would be curtailed by the time to publication.

The Bureau was not able to identify publicly available datasets that include data fields an adversary could directly match to the application date field. However, the Bureau acknowledged that an adversary may be able to infer a likely origination date based on typical time lags between application, credit decision, and origination, potentially enabling matching to other datasets that record these later dates. The Bureau stated that, if it determined that application date should be modified, it may consider disclosing the application date at a higher level; for example, disclosing the month and year but not the specific date. In light of the potential re-identification risk arising from this data field, the Bureau sought comment on whether there are other specific modifications it should consider, and whether it should consider deletion outright.

Several commenters provided feedback on the Bureau's analysis. In supporting disclosure of the application date field, a community group stated that it would promote understanding of small business lending. However, an academic research and policy organization asserted that disclosure of application date would pose re-identification risk to applicants and noted that HMDA does not disclose application date. This commenter, along with a group of trade associations, urged the Bureau not to publish the application date field to ensure consistency between 1071 and HMDA.

As discussed in part VIII.B.3 above, the Bureau views the disclosure of application date as having significant benefits. This preliminary assessment is consistent with feedback that publication of application date would promote understanding about small business lending. The Bureau's preliminary assessment is that the application date field does not pose re-identification risks such that the Bureau should modify or delete it before publication. Commenters supporting such modification or deletion did not provide additional evidence of re-identification risk that would alter the partial privacy analysis described above. The Bureau also preliminarily assesses that this unmodified data field would present limited privacy risk if re-identification occurred.

iii. Application Method and Application Recipient

Proposed § 1002.107(a)(3) would have required financial institutions to collect and report the means by which the applicant submitted the covered application directly or indirectly to the financial institution. A financial institution would have reported whether the applicant submitted the application in person, by telephone, by mail, or online. Proposed § 1002.107(a)(4) would have required financial institutions to collect and report whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application directly or indirectly to the financial institution. As discussed in the section-by-section analyses of § 1002.107(a)(3) and (4), the Bureau is finalizing these data points as proposed, with certain modifications to related commentary.

In the NPRM, the Bureau stated that disclosing application method and whether the application was submitted directly or indirectly, in unmodified form, would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. The Bureau reasoned that the application method is likely to be of relatively limited utility to an adversary because it conveys little information about a natural person or a business's financial condition. While adversaries interested in targeted marketing could direct future marketing efforts to a business using the same application channel, the Bureau noted that marketing firms already possess strategic information about methods for establishing contact. Unmodified disclosure of application method and whether the application was submitted indirectly may reveal information that financial institutions regard as harmful or sensitive, but the Bureau did not believe that disclosure would permit the reverse-engineering of a financial institution's proprietary lending models.

The Bureau was not able to identify publicly available datasets that include data fields an adversary could directly match to the application method or application recipient data fields. While the Bureau's HMDA data and the Government-Sponsored Enterprises loan-level datasets include acquisition channel information in loan-level data, the Bureau stated that these datasets do

[898] *See* 84 FR 649, 660 (Jan. 31, 2019).

not identify applicants or related natural persons. However, the Bureau sought comment on whether there are other identifiable application/loan-level datasets that include this information or whether HMDA data or the Government-Sponsored Enterprises loan-level datasets could be matched to other identifiable datasets.

The Bureau received two comments from trade associations on this analysis. These questioned whether publishing the application method and application recipient fields would provide disclosure benefits related to section 1071's statutory purposes. One stated that lenders' methods for receiving applications are strategic business decisions and disclosing this information will cause financial institutions to suffer commercial harm.

As discussed above in part VIII.B.3, the Bureau views these data fields as having significant disclosure benefits. The Bureau does not see disclosure causing significant commercial harm to financial institutions. Disclosure of application method and application recipient data would not permit the reverse-engineering of proprietary lending models. Accordingly, the Bureau preliminarily assesses that disclosing these data fields in unmodified form would present limited privacy risk if re-identification occurred.

iv. Credit Type

Proposed § 1002.107(a)(5) would have required financial institutions to collect and report to the Bureau certain information about the type of credit applied for or originated. The proposal would have required financial institutions to report three categories of information that together constitute the type of credit. First, the proposal would have required financial institutions to report the type of credit product. Second, the proposal would have required financial institutions to report the type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction had been originated. Third, the proposal would have required financial institutions to report the length of the loan term, in months, if applicable. As discussed in the section-by-section analysis of § 1002.107(a)(5), the Bureau is finalizing this data point as proposed, with revisions to the related commentary.

The NPRM stated that data on type of credit product, type of guarantee, and loan term could disclose information that may be harmful or sensitive to applicants or related natural persons. It also stated that a business's competitors could use these data fields—in conjunction with the loan amount and pricing data fields—to draw inferences about the business's financial condition based on whether the business obtained credit on favorable or unfavorable terms. Type of guarantee data could indicate heightened credit risk for the applicant.[899] Credit type data also could be used for targeted marketing of products and services that may pose risks.

The Bureau further stated that disclosure of these data fields in unmodified form may reveal information that financial institutions regard as harmful or sensitive, such as the types of products they offer or the government programs in which they participate. However, the Bureau did not expect disclosure of these data fields to permit the reverse-engineering of proprietary lending models. Furthermore, the Bureau stated that general information about the types of credit a financial institution is offering is already widely available.

The Bureau was aware that certain identified datasets include application-level information on the type of credit product, type of guarantee, or loan term. Government lending programs, such as the SBA's 7(a) and 504 programs, publish loan-level data that indicate the term of the loan and whether the loan is a term loan or a line of credit. In some States, UCC filings may include some information related to the type of collateral. In the NPRM, the Bureau stated that the existing public availability of this information decreased the potential harm or sensitivity of disclosing information about the type of credit product, type of guarantee, and loan term in the 1071 data. By the same token, however, the Bureau recognized that an adversary could use these other datasets, combined with other fields, to match a section 1071 record to an identified publicly available record.

If it determined that modifications were ultimately needed, the Bureau identified a number of possible approaches. The Bureau could disclose ''Federal guarantee'' instead of disclosing the specific program. Similarly, the Bureau could recode loan term data into bins—for example, using intervals of two or five years.

The Bureau received feedback from two community group commenters. One stated that publication of credit type data would promote understanding of small business lending. The other stated that combining loans from different Federal government guarantee programs into a single category for publication would not reduce the utility of 1071 data. The commenter also stated that if the Bureau recodes length of the loan term data into bins, the Bureau should test those bins to ensure that the recoded data are useful to users.

Based on its earlier analysis and from the comments received, the Bureau assesses that disclosing credit type data in unmodified form may present significant privacy risks if re-identification occurred. For example, the Bureau believes that these data could result in non-personal commercial privacy risks to small businesses, including revealing sensitive financial information or facilitating problematic targeted marketing. However, the Bureau does not identify any compelling privacy risks to financial institutions.

v. Credit Purpose

Proposed § 1002.107(a)(6) would have required financial institutions to collect and report the purpose or purposes of the credit applied for or originated. As discussed in the section-by-section analysis of § 1002.107(a)(6), the Bureau is finalizing this data point with modifications.

The NPRM stated that disclosing credit purpose in unmodified form by itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. It noted that information about credit purpose could be useful to adversaries such as a small business's competitors, potential acquirers, or new market entrants, since it contains information about a business's strategy and performance, such as whether a business is expanding. Even so, this information would generally not be detailed enough to cause competitive harm, and its competitive value would likely be mitigated by time to publication.

The Bureau did not identify publicly available datasets that include data fields an adversary could directly match to the credit purpose data fields in unmodified form in the public application-level data with respect to an applicant or related natural person. The Bureau stated that identified public datasets pertaining to small business loans generally do not contain information about the purpose of the credit. Therefore, the Bureau reasoned that an adversary would have difficulty

[899] For example, the ''SBA guarantee—7(a) program'' data field is intended for businesses that have been unsuccessfully applying for credit or have had some other difficulty in accessing credit.

using the credit purpose data fields to match a section 1071 record to an identified publicly available record accurately.

The Bureau stated that disclosure of credit purpose in unmodified form may also reveal information that financial institutions regard as harmful or sensitive, such as information that a financial institution offers credit that is used for certain purposes. However, the Bureau did not identify reasons that disclosure would permit reverse-engineering of proprietary lending models.

Several lenders and one trade association provided feedback. These commenters generally stated that credit purpose data created privacy risks for small business applicants. For example, one commenter stated that if re-identification occurred, credit purpose data could reveal confidential commercial information, such as plans for business acquisitions or expansions. As discussed in the NPRM, the Bureau acknowledges that credit purpose data contains information about a business's strategy and performance. However, the Bureau does not view this information as posing a significant risk of harm because of its relative lack of detail and the delay between the date of action taken on a loan and the publication of 1071 data. Commenters did not offer evidence to the contrary. Commenters also did not offer evidence that indicates that this data point presents significant re-identification risks.

Accordingly, the Bureau preliminarily assesses that disclosing credit purpose data in unmodified form would present limited privacy risk.

vi. Amount Applied For

Proposed § 1002.107(a)(7) would have required financial institutions to collect and report to the Bureau the initial amount of credit or the initial credit limit requested by the applicant. As discussed in the section-by-section analysis of § 1002.107(a)(7), the Bureau is finalizing the amount applied for data point as proposed.

The NPRM stated that disclosing this data field in unmodified form would likely disclose information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. Business owners might view details about the amount applied for as sensitive, particularly where they are concerned about the risk of being re-identified as an applicant for credit. The Bureau also noted that were re-identification to occur, the amount applied for could lead to targeted marketing of products or services that pose risks because it could help lenders target small businesses that received less credit than they requested with offers for loans at higher rates or fees. The Bureau stated that the amount applied for is generally not included in other publicly available data, so it would likely not be useful to adversaries seeking to match 1071 data with other publicly available data. However, the Bureau believed that amount applied for would be useful to an adversary in other ways. For example, a significant shortfall between the amount applied for and the amount approved could be used either by an applicant's competitor or by a consumer to infer that the business has a relatively weak financial position. With information on whether or not a business is granted a loan, an adversary might gain insight into the scale of a business's objectives based on the amount applied for or approved. The Bureau also noted that the relative scarcity of this information at present would also increase its value to adversaries. As an additional consideration, the Bureau saw no reason that disclosure would permit the reverse-engineering of proprietary lending models.

The Bureau received comments from several industry commenters and a community group. A group of trade associations stated that if a small business applicant is re-identified, disclosing the amount applied for could reveal information about the financial status of that small business that could harm its prospects for credit. Several industry commenters expressed concern that data about the amount applied for would create privacy risks for small business applicants by revealing confidential information, such as plans for business acquisitions or expansions. Another commenter stated that disclosing the amount applied for can create privacy risks for financial institutions. This commenter noted that the amounts applicants apply for can be arbitrary and, therefore, comparing these amounts to any amounts approved could be misleading and not a reliable metric for whether credit demand is met.

The Bureau stated that if it determined that the amount applied for should be modified, it may consider recoding the data into bins. For example, the Bureau could recode the amount applied for into bins of $25,000. In response, a community group stated that the Bureau could recode the amount applied for into bins that use the mid-point of $10,000 intervals. As noted by the commenter, HMDA utilizes this technique, and, according to the commenter, it would be sufficient for privacy purposes while producing more accurate data.

After reviewing these comments, the Bureau assesses that disclosing this data field may create some privacy risk where small business applicants and related natural persons face re-identification risk that could reveal non-public commercial information, such as an application for credit or business acquisition or expansion plans. Further, to the extent that this data point, combined with the amount approved or originated data point, indicates business difficulties, this could impact the reputational interests of small businesses and their owners. The Bureau also assesses that in some circumstances disclosing amount applied for could disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. Comments asserting privacy risks for financial institutions, however, provided no compelling evidence of privacy risk to alter the NPRM analysis on point.

vii. Amount Approved or Originated

Proposed § 1002.107(a)(8) would have required financial institutions to collect and report to the Bureau: (i) for an application for a closed-end credit transaction that is approved but not accepted, the amount approved by the financial institution; or (ii) for a closed-end credit transaction that is originated, the amount of credit originated; or (iii) for an application for an open-end credit transaction that is originated or approved but not accepted, the amount of the credit limit approved. As discussed in the section-by-section analysis of § 1002.107(8), the Bureau is finalizing the amount approved or originated data point as proposed.

The NPRM stated that disclosing this data in unmodified form would likely disclose information about an applicant or related natural person that might be harmful or sensitive if such person were re-identified, or that might be harmful or sensitive to an identified financial institution. The Bureau stated that information about the amount approved or originated could be useful to potential adversaries. For example, these data fields would provide creditors some insight into competitors' lending practices, particularly when combined with other data points such as gross annual revenue, number of workers, time in business, and pricing. Likewise, these data might allow creditors to make general inferences about the relative risk appetites of their competitors. However, the Bureau did not see any reason that disclosure

would permit the reverse-engineering of proprietary lending models.

The Bureau stated that it had identified publicly available datasets that include data fields an adversary could directly match to the amount approved or originated data fields in unmodified form. Credit amount approved or originated is often widely available in public datasets, such as loan-level data for the SBA 7(a) and 504 programs, as well as property records and UCC filings. The Bureau accordingly stated that adversaries would be able to match the amount of credit approved or originated to an existing public record. The Bureau further stated that if it determined that the amount approved or originated should be modified, it may consider recoding.

The Bureau received comments from several industry and community group commenters. The community groups generally supported publishing these data fields. Several industry commenters disagreed. Two such commenters stated that if re-identification occurred, the amount approved or originated could harm small business applicants by disclosing information about business expansions or acquisitions. A community group stated that the Bureau could recode the amount applied for into bins that use the mid-point of $10,000 intervals. As the commenter noted, HMDA utilizes this technique and, according to the commenter, it would be sufficient for privacy purposes while producing more accurate data.

After reviewing these comments, the Bureau preliminarily assesses that disclosing amount approved or originated data in unmodified form may present significant privacy risk if re-identification occurred. In some circumstances disclosing amount approved or originated could disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. For example, because amount approved or originated was found in publicly available datasets, in combination with information about the amount applied for, this data could facilitate targeted marketing of higher interest or predatory credit products. This combination of data could also have reputational impacts on small business applicants and related natural persons. The Bureau does not see any reason, however, that this data field will create compelling privacy risks for financial institutions.

viii. Type of Action Taken and Denial Reasons

Proposed § 1002.107(a)(9) and (11) would have required financial institutions to collect and report to the Bureau the action taken by the financial institution on the covered application, and for denied applications, the principal reason or reasons the financial institution denied the covered application. As discussed in the section-by-section analysis of § 1002.107(a)(9) and (11), the Bureau is finalizing these data points as proposed.

The NPRM stated that reasons for denial data could be harmful or sensitive for applicants or related natural persons. However, the Bureau did not believe disclosing the fact that credit was sought, in and of itself, likely would be harmful or sensitive to small businesses because credit is so widely used by small businesses. Further, the harm or sensitivity of disclosing information that credit was originated is mitigated by the publication of originated loan details in other databases such as UCC filings. Additionally, the Bureau did not assess that disclosure of action taken would permit the reverse-engineering of proprietary lending models.

The Bureau had not identified publicly available datasets that include data fields an adversary could directly match to these data fields in unmodified form. At a category level, however, the Bureau noted that these data fields could tell adversaries which records it may be possible to match against databases that include originated loans. The Bureau stated that most of these data fields included in this data point are not found in publicly available records that contain the identity of an applicant; the only data field that would be consistently available would be for originated loans. Without such an identified publicly available record to match with, attempting to re-identify an applicant by matching a 1071 record using these data fields likely would be difficult. However, the Bureau stated that adversaries may be able to use other data fields, such as census tract, NAICS code, and identified public information, such as business directories, to determine the identity of an applicant or related natural person. Thus, if applicants and related natural persons could be re-identified, an adversary could learn information about application denials for these businesses and use this information for a variety of purposes.

The Bureau sought comment on this analysis, specifically in light of potential harm and sensitivity arising from the disclosure of application denials and the reasons for denial, whether there are specific modification techniques that should be considered, and whether modifying these data fields by grouping or deleting these data fields would appropriately balance the privacy risks and benefits of disclosure, in light of the purposes of section 1071.

Community group commenters stated that the Bureau should publish data about action taken, including whether the loan was approved or denied or whether it was withdrawn or left incomplete. One stated their opposition to deleting action taken categories such as ''denied,'' ''incomplete,'' or ''approved but not accepted,'' stating that such data are fundamental to the fair lending purpose of the statute. Several stated that publishing data on denial reasons would promote fair lending and business and community development objectives by helping lenders and policymakers assess whether creditors are denied credit for legitimate reasons. An industry commenter said that action taken data may also be misleading in the context of agricultural loans because not all creditworthy applicants are eligible for loans through the Farm Credit System.

Other trade associations and a lender commented that disclosure of action taken could cause commercial or competitive harms to applicants and related natural persons. These commenters specifically noted that data about the action taken could reveal information about a business's financial status, or acquisition or expansion plans. Other commenters stated that including denial reasons in 1071 data, without including contextual information surrounding individual credit decisions, would result in unjustified reputational or litigation harm to smaller financial institutions, which originate a lower loan volume—possibly resulting in more pronounced statistical aberrations that could be erroneously interpreted as discrimination.

In response to the Bureau's request for comment about whether these data should be modified or deleted from the public dataset, a community group stated that the Bureau should not modify or delete these fields because they are fundamental to the fair lending purposes of the statute. The commenter further noted that for decades, and without adverse consequences, HMDA has included information on whether an application for credit was originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. This commenter stated that if the Bureau found it necessary to

modify this data field, a higher level of disclosure that included reasons of denial by category of business and for groupings of census tracts could achieve important fair lending and community development objectives.

As discussed above in part VIII.B.3, the Bureau views these data fields as having significant disclosure benefits. Commenters did not offer compelling evidence that disclosure of action taken, in and of itself, would reveal information about a small business applicant's financial status or strategic plans also lacked evidentiary support.[900] If re-identification were to occur, however, information about an application for credit being denied could have detrimental impacts to applicants or related natural persons when personal credit qualifications are used in making credit decisions, including personal embarrassment. Likewise, re-identification could cause non-personal commercial harm to small businesses. Accordingly, the Bureau preliminarily assesses that disclosing these data fields in unmodified form may present significant privacy risk if re-identification occurred.

ix. Action Taken Date

Proposed § 1002.107(a)(10) would have required financial institutions to collect and report the date of the action taken by the financial institution. As discussed in the section-by-section analysis of § 1002.107(10), the Bureau is finalizing this data point as proposed.

The Bureau stated that disclosing action taken date in the 1071 data in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The NPRM noted that publicly available datasets include data fields an adversary could directly match to the action taken date data field in unmodified form in the public application-level data with respect to an applicant or related natural person. Public availability of this data depends on the type of action taken. The approval date of originated loans is widely available in SBA 7(a), 504, and other program loan-level records that identify borrowers, and the date of executed agreements, which could be closely related to the action taken date, is often available for property records and UCC filings. For originated loans, therefore, the action taken date would substantially facilitate matching with publicly available datasets that identify borrowers. The Bureau also stated that action taken date may be less useful in re-identifying applicants of loans that were not originated because the action taken date for such loans is rarely publicly available.

The Bureau stated that if it ultimately determined that the action taken date should be modified for publication, it may consider disclosing at a higher level, such as month instead of a specific date. The Bureau sought comment on this analysis, including about whether there are specific modifications it should consider, and whether deletion would better balance the risks and benefits of disclosure.

In response, a group of trade associations stated that the Bureau should not disclose the action taken date, noting that this information is not published in HMDA data. This commenter expressed a concern that publishing the action taken date when the same data point is deleted or modified in HMDA public data would constitute inconsistent treatment without adequate explanation. The Bureau disagrees that it should omit action taken date from the public 1071 data simply to ensure consistency between this final rule and HMDA. Commenters did not provide additional evidence related to re-identification risk.

Commenters did not provide additional evidence related to re-identification risk that would alter the initial assessment provided in the NPRM. In addition, the Bureau preliminarily assesses that the action taken date would present limited privacy risk if re-identification occurred. This data field presents minimal, if any, personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. The Bureau also does not believe publication of these data would result in non-personal commercial privacy risks to small businesses being disclosed. The Bureau also identifies no compelling privacy risks to financial institutions.

x. Pricing Information

Proposed § 1002.107(a)(12) would have required financial institutions to collect and report to the Bureau the following information, where applicable, regarding the pricing of a covered credit transaction that is originated, or approved but not accepted: (i) the interest rate; (ii) total origination charges; (iii) broker fees; (iv) initial annual charges; (v) additional costs for merchant cash advances or other sales-based financing; and (vi) prepayment penalties. As discussed in the section-by-section analysis of § 1002.107(a)(12), the Bureau is finalizing the pricing information data point largely as proposed.

The NPRM stated that information about the interest rates and fees charged in connection with credit represents basic information about the features of a product generally and would present low risk of harm or sensitivity. It further noted that disclosure of pricing data in unmodified form may reveal information that some applicants or related natural persons may regard as harmful or sensitive, such as a reflection of their perceived credit risk. However, the Bureau also reported that it had received feedback during the SBREFA process that multiple factors contribute to pricing for small business credit. While the Bureau further stated that disclosure of pricing data in unmodified form may also reveal information that financial institutions regard as harmful or sensitive, the NPRM did not identify evidence that disclosure of pricing information would permit the reverse-engineering of proprietary lending models.

The NPRM also noted that publicly available datasets include data fields an adversary could directly match to the pricing data fields in unmodified form. Identified data about the interest rate and fees charged for a given loan are available from a limited number of publicly available datasets, such as data for the SBA 7(a) and 504 programs. The Bureau further stated that, if it were to determine that pricing data should be modified, it may consider recoding the pricing information data fields into bins, such as interest rates bins of 0.25 percentage points or origination fee bins of $500; and it also noted that it could consider top-coding pricing data.

The Bureau received feedback from a range of commenters. Community groups and some others generally agreed that publishing pricing information would serve the objectives of section 1071. These commenters saw pricing information as necessary to monitor loan affordability and assess lending in underserved communities. A software vendor stated that publishing pricing information will improve competition and pricing efficiency by allowing applicants to compare credit costs offered by financial institutions. However, industry commenters stated that pricing information would have limited benefits. Two lenders stated that

[900] When the Bureau previously assessed whether to include action taken and denial reasons in HMDA loan-level public data, it concluded that modification was unnecessary 84 FR 649, 658 (Jan. 31, 2019). The Bureau articulated its decision that ''action taken and reasons for denial'' would be disclosed without modification.

pricing information is not meaningful because it is based on a complex set of factors that is unique to each transaction. A trade association stated that pricing information in small business lending would have little benefit compared to loan pricing data in HMDA because, unlike consumer mortgage data reported in HMDA, commercial data that would be reported in the 1071 dataset is not standardized or uniform. Others said that pricing information has a high risk of being misinterpreted.

Several lenders also stated that small businesses would have privacy concerns if pricing information on their loans was made public. Two industry commenters stated that pricing information would create re-identification risk, particularly in smaller and rural areas. Another stated that farm loans present risks because such credit may be extended in small markets with few customers which could increase the possibility of re-identification of small business applicants or related natural persons. Several other industry commenters said that if re-identification were to occur, the publication of pricing data information would create competitive risks for small businesses. One said that this risk is particularly high in smaller communities where it is possible to use published information to reveal pricing information about individuals. Others stated that privacy risks are especially potent for sole proprietorships because those entities' pricing may be largely based on owners' individual credit performance and personal information. A group of trade associations commented that pricing information was the most sensitive data point and it could reveal sensitive competitive information that would place businesses at a substantial competitive disadvantage. Regarding non-personal commercial harms to small business applicants, some industry commenters aid that disclosing pricing information in 1071 data would cause some financial institutions to limit their lending to reduce reputational or litigation risk.

Other commenters addressed the risk of harm or sensitivity to financial institutions. Some industry commenters stated that publishing pricing data will create competitive risks for financial institutions by revealing pricing models for small business loans, potentially allowing competitors to undercut pricing. Two agricultural lenders commented that rural financial institutions in markets with few customers face unique risks and that they may lose customers to larger financial institutions or online lenders that have larger customer bases and thus lower re-identification risk. Several other industry commenters stated that publishing pricing information would carry reputational and competitive risks for financial institutions. Some commenters were concerned that pricing information would not capture the full context of credit decisions, risking misconceptions about the underlying rationale for pricing and creating illusory disparities in credit terms. A bank trade association stated that comparing pricing information between different types of financial institutions can be misleading and may result in reputational harm because certain lenders like credit unions and farm credit system lenders receive tax or funding advantages to offer lower interest rates. Other commenters noted the risk of reputational harm from patronage dividends in agricultural lending not being accounted for in disclosed pricing. Other commenters asserted that disclosure of pricing information in 1071 data could create litigation risk for financial institutions. Several commenters said that if regulators utilize pricing information to analyze for fair lending without taking into account all variables that went into underwriting, incorrect analyses could result in unwarranted allegations of discrimination. A bank said that litigation risk based on these misconceptions may be particularly high for smaller banks that originate fewer loans because the lower volume could result in greater variation in pricing information.

The Bureau also sought comment on whether pricing information, if published, should be modified, and if so, what modification or deletion techniques would preserve the benefits of the public application-level data. A number of lenders and trade associations stated that pricing information should not be published at all because of privacy risks. Other commenters suggested modifications. A trade association stated that published pricing information should be limited to interest rates and origination fees. This commenter also supported disclosing pricing information in bins to protect privacy without harming data utility. In contrast, a community group opposed recoding interest rates or origination fees because that might mask lending disparities, thereby hindering fair lending enforcement.

As discussed in part VIII.B.3, the Bureau views pricing information as having significant disclosure benefits. In light of the re-identification risks discussed above, the Bureau appreciates commenters' concerns that if re-identification were to occur, the disclosure of pricing information in the public application-level data could pose significant risk to sole proprietors for whom underwriting could be based on personal credit performance. The Bureau also recognizes that re-identification, if it occurred, could exacerbate privacy risks, including personal privacy risks, presented by other data fields in the dataset. Additionally, re-identification could create a risk of non-personal commercial harms for applicants, particularly in small or rural communities when combined with other data fields like census tract or NAICS code. The Bureau acknowledges commenters' concerns about potential risk of harm or sensitivity to financial institutions, including reputation and litigation risks resulting from possible misinterpretations of published pricing information. However, the Bureau does not view privacy risks to financial institutions as compelling enough to justify exclusion of the data field. As discussed in part VIII.B.4, by mitigating re-identification risk, other potential risks and harms, including those faced by financial institutions, will also be mitigated.

The Bureau preliminarily assesses that some modification techniques may be appropriate when publishing pricing information. Potential modifications that the Bureau could consider include binning data or top-coding pricing data fields. However, the Bureau is mindful that modifying pricing information too much could mask discriminatory pricing practices, thus hindering fair lending analyses. Similarly, such modifications could hinder identification of community development needs and opportunities.

xi. Census Tract

Proposed § 1002.107(a)(13) would have required financial institutions to collect and report the census tract containing the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or if this information is unknown, the tract containing the address or location of the main office or headquarters of the applicant; or if this information is also unknown, the tract containing another address or location associated with the applicant. In addition to reporting the census tract, the financial institution would have been required to indicate which one of these three types of addresses or locations the census tract is based on. As discussed above in the section-by-section analysis of

§ 1002.107(a)(13), the Bureau is finalizing this data point as proposed.

The NPRM observed that the census tract itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The Bureau acknowledged that for sole proprietors, the main office is often a home address, but it noted that the applicant's actual street address would not be reported to the Bureau. The Bureau also noted that small businesses commonly make their locations available in the normal course of business—for example, to reach prospective customers.

The Bureau stated that if the address reflects where the proceeds of the credit will be or would have been principally applied, disclosing the census tract may reveal some information about an applicant's business strategy, particularly if paired with the loan purpose data field. For example, the Bureau stated that the data could indicate that a small business is pursuing or was pursuing an expansion to a particular location. However, the Bureau believed the value of this information to a small business's competitors is likely mitigated by the time to publication. The Bureau stated that disclosure of the census tract in unmodified form may also reveal information that financial institutions regard as harmful or sensitive, such as a financial institution's trade area. However, the Bureau did not conclude that disclosure would permit the reverse-engineering of a financial institution's proprietary lending models.

The Bureau identified publicly available datasets that include data fields an adversary could directly match to the census tract data field in unmodified form in the public application-level data with respect to an applicant or related natural person. The Bureau expected that, in most cases, the census tract that financial institutions would report to the Bureau would be based on the address or location of the main office or headquarters of the applicant, either because that is where the proceeds of the credit will be applied, or because the financial institution does not know the location or address where the proceeds of the credit will be applied but does know the applicant's main office or headquarters address. The Bureau also observed that, for many small businesses, this address or location is likely to be publicly available from sources such as the business's website and review websites. Information about a business's location is also likely available from loan-level data for public loan programs as well as from private datasets, such as from data brokers. Therefore, in many cases, the Bureau expected that an adversary could use the census tract data fields, combined with other fields, to match a section 1071 record to an identified publicly available record. The Bureau also sought comment on whether disclosing county, State, or some other geographic identifier—rather than the census tract—would affect the benefits of disclosure, the potential for harm or sensitivity, and the potential for re-identification of applicants or related natural persons.

A range of commenters provided feedback on the Bureau's analysis. Community group commenters saw the publication of this data as important to both the fair lending and business and community development purposes of section 1071. Some said that because there are currently no comprehensive data on the capital access problems faced by marginalized communities, census tract data would provide insight into small business credit challenges at the intersection of race, sex, ethnicity, and geography. Other community groups and a business advocacy group expressed support for publishing census tract data, stating that including demographic and geographic data could positively impact the reduction of economic inequality and generally would encourage lending to underserved markets via specific policy making.

A number of lenders, along with a trade association and a community group, expressed concern that publication of census tract data would pose significant re-identification risk for applicants, especially in smaller or rural communities with low levels of lending. Other industry commenters said that the unmodified publication of census tract data combined with other data points, in particular NAICS code data, would pose significant re-identification risk.

While some community groups expressly supported the unmodified disclosure of census tract data, others suggested specific modification techniques. One commenter suggested that the Bureau consider switching records for similarly situated applicants between nearby census tracts to protect the privacy of applicants in smaller geographic areas while preserving data utility. With respect to the Bureau's suggestion to consider disclosing a broader location category, at least one trade association expressed support for disclosing data at the State level. Meanwhile, a community group generally opposed disclosure limited to the county- or State-level, arguing that it would frustrate the purposes of section 1071. But this commenter did suggest that the Bureau consider combining and aggregating adjacent census tracts in rural areas with low levels of lending.

As discussed above in part VIII.B.3, the Bureau views the disclosure of census tract as having significant benefits. Further, disclosing census tract data on its own would present limited privacy risk. Application-level census tract by itself would likely disclose minimal, if any, information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. In addition, the Bureau does not discern evidence of compelling privacy risks for financial institutions. However, the Bureau appreciates the potential re-identification risks to applicants or related natural persons posed by the combination of census tract data and other data fields, such as NAICS code. With respect to privacy risks raised by commenters, as discussed above, the Bureau has identified publicly available datasets that include data fields an adversary could directly match to certain census tract data. Accordingly, the Bureau assesses that census tract data, combined with other data fields such as NAICS code, could be used to match to an identified publicly available record, particularly in rural areas, thereby potentially re-identifying a small business applicant or its ownership. Re-identification could in turn exacerbate privacy risks, including harm or sensitivity risks, presented by other data fields in the dataset.

Considering this privacy risk, the Bureau's preliminary assessment is that some modification techniques may be appropriate. Application-level census tract would likely disclose minimal, if any, information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. In addition, the Bureau does not discern evidence of a compelling privacy risks for financial institutions. However, the Bureau appreciates the potential re-identification risks to applicants or related natural persons posed by the combination of census tract data and other data fields such as NAICS code, and recognizes that there may be significant geographic variation in the likelihood of re-identification risk from census tract alone. The Bureau is mindful that modifying census tract data, like disclosing a broader location category such as county or State, while reducing re-identification risk to applicants and related natural persons,

could also reduce the utility of the 1071 dataset.

xii. Gross Annual Revenue

Proposed § 1002.107(a)(14) would have required financial institutions to collect and report to the Bureau the gross annual revenue of the applicant for the preceding full fiscal year prior to when the information is collected. As discussed in the section-by-section analysis of § 1002.107(a)(14), the Bureau is finalizing this data point substantively as proposed.

The NPRM stated that disclosing gross annual revenue in unmodified form would likely disclose information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. The data field could reflect the financial condition of a small business or its ownership. The Bureau stated that competitors of the small business, other commercial entities, creditors, researchers, or persons with criminal intent all may have an interest in using these data to monitor the size or performance of an applicant that may be a rival, partner, or target of inquiry, investigation, or illegal activity. With respect to the risk of harm or sensitivity to financial institutions, the NPRM acknowledged that other creditors might use gross annual revenue data to learn more about the types of small businesses with which their competitors do business. However, the Bureau did not identify evidence that disclosure would permit reverse-engineering of proprietary lending models.

The Bureau also noted that publicly available datasets include data fields an adversary could directly match to this data field in unmodified form. This availability is not widespread. Gross annual revenue data are available from private databases. They are also available for New York State's women- and minority-owned business certification program, but those data are recoded into bins. The Bureau stated that if it determined that gross annual revenue data should be modified, it may consider recoding this data into bins, for example in ranges of $25,000, or top-coding the data to mask particularly high values, thereby reducing the identifiability of application data from small businesses with especially high gross annual revenue.

Commenters did not provide additional evidence related to re-identification risk. However, community groups and trade associations commented on modifying this field prior to publication. Several community groups and a CDFI lender generally favored the Bureau publishing unmodified gross annual revenue data to maintain its utility. One such commenter opposed modification here, stating that aggregation of data by revenue size would limit the usefulness of the data to all stakeholders, including technical assistance providers who can help small businesses apply for loans, as well as parties seeking to identify and respond to discriminatory lending patterns. Other community groups and a trade association expressed support for publishing gross annual revenue data in bins to mitigate privacy risks for applicants. These community groups stated that modified data must still be detailed enough to permit meaningful analysis, and they criticized the current CRA system of identifying all loans to businesses with revenue under $1 million as not allowing for such analysis. One commenter suggested that if the Bureau decided to modify the gross annual revenue data field it should select the mid-point and recode the data in bins of $10,000 increments. They also expressed support for top-coding provided that it did not mask any significant differences in data for larger small businesses, and suggested that the Bureau conduct testing within the first year of data to assess whether the modification was appropriate.

As discussed above in part VIII.B.3, the Bureau views disclosure of gross annual revenue data as having significant disclosure benefits. After reviewing comments, the Bureau preliminarily assesses that if re-identification were to occur, disclosing gross annual revenue data in unmodified form may present significant privacy risk to small business applicants and related natural persons. The Bureau also preliminarily assesses that modifications to this field can be made while preserving the utility of the data for statutory purposes. The Bureau will continue to consider feedback about potential modification techniques, such as binning at smaller intervals and conducting testing before top-coding.

xiii. NAICS Code

Proposed § 1002.107(a)(15) would have required financial institutions to collect and report to the Bureau a 6-digit NAICS code. As discussed above in the section-by-section analysis of § 1002.107(a)(15), the Bureau is modifying how NAICS code is reported. Under the final rule, financial institutions must collect and report a 3-digit NAICS subsector code. Using only 3-digit NAICS subsector codes will decrease the risk of re-identification to applicants and owners while adhering to the purposes of section 1071.

The NPRM stated that publishing 6-digit NAICS codes in unmodified form by itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. Information about a small business's industry is likely apparent to anyone interacting with it. The Bureau noted that disclosure of 6-digit codes in unmodified form may reveal information that financial institutions regard as harmful or sensitive, such as the industries with which the financial institution does business, but it did not discern that such disclosure would permit reverse-engineering of proprietary lending models.

The Bureau acknowledged that 6-digit codes were likely to produce unique instances in the data, especially if combined with unmodified census tract data. It noted the existence of 73,057 census tracts and 1,057 6-digit NAICS codes.[901] With over 77 million resulting combinations, there would likely be many instances of this data forming unique combinations. The NPRM stated that if the Bureau modified 6-digit codes for publication, it would consider disclosing 2-, 3-, or 4-digit codes to reduce re-identification risk while maintaining data utility.

Community group commenters supported disclosing 6-digit NAICS codes to support the fair lending purpose of the statute. Many industry commenters expressed concern that such codes, particularly in small or rural communities where only a limited number of businesses share certain NAICS codes, would create significant re-identification risks.

Several commenters expressed support for modifying the 6-digit NAICS code in the public application-level data. One commenter stated that the NAICS code should be truncated to general categories. Several industry commenters expressed specific support for disclosing a 2-digit NAICS code, and another supported a 4-digit modification, stating it would provide sufficient information while mitigating re-identification risk.

As discussed above in part VIII.B.3, the Bureau views disclosure of a NAICS code as having significant disclosure benefits. In addition, the Bureau's shift to requiring collection and reporting of a 3-digit code will significantly reduce re-identification risk while preserving

[901] *See* 2010 Census Tallies; Off. of Mgmt. & Budget, *North American Industry Classification System (NAICS) Updates for 2022,* 86 FR 35350, 35352 (July 2, 2021).

the utility of the dataset. This shift acknowledges privacy concerns raised by some commenters, reducing the risk of cognizable privacy harms.

Overall, the Bureau preliminarily assesses that published 3-digit codes by themselves present limited privacy risk. It is unlikely that publication of these data would disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. The Bureau also does not see evidence of non-personal commercial privacy risks to small businesses, or of any compelling privacy risk to financial institutions. However, the Bureau appreciates that there is a heightened risk of re-identification when a NAICS code is combined with other data fields, such as census tract.

xiv. Number of Workers

Proposed § 1002.107(a)(16) would have required financial institutions to collect and report to the Bureau the number of non-owners working for the applicant. In the final rule, however, a financial institution complies with § 1002.107(a)(16) by reporting in ranges. The Bureau is adopting this change in response to concerns expressed by commenters about the complexity of providing an exact number.

The NPRM stated that disclosing number of workers in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. Additionally, the Bureau did not see disclosure being harmful or sensitive to financial institutions. Financial institutions may use such data to learn more about the types of small businesses with which their competitors do business, but the Bureau did not see evidence that disclosure would permit reverse-engineering of proprietary lending models.

The Bureau noted that information about the number of workers is likely to be publicly available for many businesses. For example, State registries of businesses may include information about a business's number of workers, and private databases also commonly include this information. This decreases any potential sensitivity or harm of disclosing this data point in the application-level data, and also the direct utility of the data to potential adversaries. However, these data sources also mean that in some cases an adversary could use number of workers, combined with other fields, to match an identified publicly available record. Data on a business's number of workers could easily produce unique combinations when combined with other data fields, particularly for businesses with higher numbers of workers. The NPRM further stated that the Bureau would consider modification options, including recoding and top-coding.

Several community group commenters and a group of State banking regulators supported unmodified disclosure of this data as important to the fair lending purposes of section 1071. However, an industry commenter stated that the data point was not useful for achieving any of the statutory purposes, particularly given the difficulties in counting seasonal and part-time employees. Several industry commenters stated that publishing the number of workers without modification could create privacy risks. These commenters generally asserted that the data point should not be published because the exact number of workers could be used to re-identify applicants and would reveal sensitive commercial information about the applicant's competitive strategy or business plan. Some of these commenters also expressed concern that these data are susceptible to misinterpretation and inaccuracy, particularly for seasonal or cyclical businesses that experience routine variations in employee volume over the course of a calendar year. Several commenters expressed support for modifying the public number of workers data field by recoding the data into bins. One commenter stated that the bins would need to be developed such that they do not obscure differences in smaller businesses.

As discussed above in part VIII.B.3, the Bureau views disclosure of the number of workers to have significant disclosure benefits. In addition, the Bureau's decision to have financial institutions report this data in ranges will reduce the risk of re-identification for applicants or related natural persons. In turn, that lowers the risk that applicants or related natural persons are subject to competitive harms, such as the disclosure of their proprietary business information. Further, although the Bureau has identified publicly available datasets that include number of workers, these data vary over time and are difficult to align across multiple datasets. Reporting in ranges will also help address concerns about data inaccuracy and variance.

The Bureau preliminarily assesses that disclosing unmodified application-level number of workers data in ranges would present limited privacy risk if re-identification occurred. It is unlikely that publication of this data would disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified; it is also unlikely that publication would result in non-personal commercial privacy risks to small businesses or compelling privacy risks to financial institutions.

xv. Time in Business

Proposed § 1002.107(a)(17) would have required financial institutions to collect and report to the Bureau the time the applicant has been in business, described in whole years, as relied on or collected by the financial institution. As discussed in the section-by-section analysis of § 1002.107(a)(17), however, the final rule requires a financial institution to report this data in whole years only if it collects or otherwise obtains that information as part of its procedures for evaluating credit applications. Otherwise, the financial institution reports whether the applicant has been in existence for less or more than two years. This change responds to commenter concerns about complexity in collecting this data.

The NPRM explained that disclosing time in business in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The Bureau did not see evidence that disclosure would permit the reverse-engineering of proprietary lending models. In addition, information about time in business was likely to be publicly available for many businesses in public registration filings and other sources, decreasing any potential harm or sensitivity from publishing this data. The Bureau noted that these same data sources could enable an adversary to directly match the time in business data field in unmodified form, particularly when combined with other fields.

The Bureau stated that if it were to modify the time in business data field, it may consider recoding time in business into bins—for example, using two- or five-year intervals. It would also consider top-coding time in business at a value such as 25 years, given that larger values are more likely to be unique. The Bureau specifically sought comment on what intervals the Bureau should use if it were to recode time in business into bins and what value the Bureau should use if it were to top-code this data field.

Several community group commenters and a group of State banking regulators supported

unmodified disclosure of time in business in the dataset to facilitate the fair lending purpose of the statute. A few industry commenters expressed concern that publication of time in business data could create re-identification risks for small business applicants and reputational harm for financial institutions. In particular, one commenter agreed that time in business data could be combined with other data points to re-identify small business applicants. With respect to potential modification options, a trade association and a community group expressed support for either binning or top-coding. The community group noted, however, that a bin that ranged from two to five years may be too long. The commenter also stated that a top-code of 25 years may be reasonable but urged the Bureau to conduct further analysis after it received the first year's data.

As discussed in part VIII.B.3, the Bureau views disclosure of time in business as having significant benefits. The Bureau also preliminary assesses that the availability of this data in existing datasets decreases potential harm or sensitivity of disclosure if re-identification occurs, but also increases the risk of re-identification risk. The Bureau will consider whether binning, top-coding, or other modification techniques may be appropriate when it analyzes application-level data and conducts its full privacy analysis. Commenters did not explain how the disclosure of the applicant's time in business could lead to reputational harms to financial institutions.

xvi. Business Ownership Status

Proposed § 1002.107(a)(18) and (19) would have required financial institutions to collect and report to the Bureau whether the applicant is a minority-owned business or a women-owned business and whether minority-owned business status or women-owned business status is being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). As discussed in the section-by-section analysis of § 1002.107(a)(18), the Bureau is finalizing these data points with modifications. Specifically, it is finalizing proposed § 1002.107(a)(18) and (19) as final § 1002.107(a)(18). In addition to the minority-owned and women-owned business statuses, the final rule requires financial institutions to collect and report LGBTQI+-owned business status.

The NPRM stated that publishing demographic ownership status in unmodified form would have likely disclosed minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. While some applicants or related natural persons may regard this information as harmful or sensitive, the Bureau believed this information generally would present low risk of harm or sensitivity. The Bureau also believed that this information already may be available to the general public and would have relatively limited utility for adversaries if an applicant or related natural person were re-identified.

However, the Bureau noted that in many cases an adversary could have used women-owned or minority-owned business status, in combination with other data, to match a section 1071 record to an identified publicly available record. The Bureau identified several sources that could have been used for such matching. Women- and minority-ownership is likely to be publicly available for many businesses that publicly register or certify with the SBA or State or local authorities as women- or minority-owned. Businesses' websites may also provide this information, and private commercial databases also include or estimate this information.

The Bureau did not receive any comments on this aspect of its privacy analysis. This lack of engagement suggests that the NPRM generally correctly assessed the privacy impacts that disclosing women-owned and minority-owned business statuses in the data in unmodified form would have for an applicant or related natural person if such person were re-identified. It also suggests the Bureau generally correctly surmised there would be minimal, if any, harms or sensitivities to financial institutions.

However, the Bureau received comments from several industry and individual commenters on the Bureau's request for comment in proposed § 1002.107(a)(20) about whether the Bureau should require financial institutions to ask separate questions regarding the sex, sexual orientation, and gender identity, of principal owners. As discussed below in part VIII.B.6.xvii, a few commenters urged the Bureau to not collect or publish data on sexual orientation and gender identity of principal owners. The commenters noted the significant risk of harm to small business applicants and related natural persons, due to the particularly sensitive nature of this information if re-identification occurred.

The Bureau acknowledges that an individual's LGBTQI+ status likely is sensitive personal information that could pose personal privacy risks as well as non-personal commercial privacy risks. If re-identification occurred, its disclosure could pose risks to privacy interests of small business owners. Accordingly, while the Bureau views disclosure of business ownership status as having significant disclosure benefits, the Bureau preliminarily assesses that disclosing this data may present significant privacy risks if re-identification occurred. That is particularly so as to LGBTQI+-owned business status; in contrast, women-owned and minority-owned business status information would present relatively limited privacy risk. The Bureau does not see evidence that LGBTQI+-owned status poses compelling privacy risks to financial institutions.

xvii. Number and Demographic Status of Principal Owners

Proposed § 1002.107(a)(20) would have required a financial institution to collect and report to the Bureau the ethnicity, race, and sex of the applicant's principal owners; whether ethnicity and race were being collected by the financial institution on the basis of visual observation and/or surname analysis; and whether ethnicity, race, or sex were being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). Proposed § 1002.107(a)(21) would have required that financial institutions collect and report to the Bureau the number of an applicant's principal owners. As discussed in the section-by-section analyses of § 1002.107(a)(19) and (20), the Bureau is finalizing the ethnicity, race, and sex of principal owners and number of principal owners data points with several modifications, including renumbering the sections, changing how financial institutions are required to inquire about the principal owners sex, and removing the requirement that a financial institution report whether the ethnicity and race of an applicant's principal owners was collected on the basis of visual observation and/or surname analysis.

The NPRM stated that, in general, disclosing the ethnicity, race, and sex of an applicant's principal owners in unmodified form would likely have disclosed minimal, if any, information about an applicant or related individual that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. As noted similarly above for the data fields on women-owned and minority-owned business statuses, while some applicants or

related natural persons may regard this information as harmful or sensitive, this information generally would present low risk of harm or sensitivity. The Bureau also noted that this information may be already available to the general public, and that this information would have relatively limited utility for adversaries if an applicant or related natural person were re-identified.

The Bureau identified publicly available datasets that include data fields an adversary could directly match to the ethnicity, race, and sex of the applicant's principal owner(s) data fields in unmodified form. For example, certain State business registries, including those required to access women-owned and minority-owned business programs, provide this information. Other public record databases, such as the SBA's 8(a) program and the Paycheck Protection Program, also include ethnicity, race, and sex data alongside the borrower's name. In many cases, therefore, the Bureau stated that an adversary could use the ethnicity, race, and sex of the applicant's principal owners, combined with other fields, to directly or indirectly match a section 1071 record to an identified publicly available record.

As discussed in the section-by-section analysis of § 1002.107(a)(19), the Bureau proposed that financial institutions would report sex as described in proposed comment 107(a)(20)–8, which would have permitted an applicant to self-describe a principal owner's sex by selecting the ''I prefer to self-describe'' response option on a paper or electronic form or by providing additional information for an oral application, with the financial institution reporting the response using free-form text. In the NPRM, the Bureau stated intention to exclude free-form text from public application-level data. However, the Bureau sought comment on whether there were additional specific modifications it should consider with regard to applicants who choose to self-describe their principal owners' sex. The Bureau also sought comment on whether, if finalized, disclosure of sex, sexual orientation, or gender identity could cause heightened sensitivity or risk of harm and any specific modifications the Bureau should consider if such data points were included in the final rule.

Many community group and minority business advocacy group commenters supported disaggregated disclosure of ethnicity, race, and sex of principal owners, and underscored its significance in achieving the fair lending purpose of section 1071. Some of these commenters stated that publication of disaggregated data would facilitate development of policy solutions for issues of financial inequality as it relates to ethnicity, race, and sex. A few trade associations expressed concerns about publishing information collected on the basis of visual observation or surname.

Some industry commenters expressed concerns that ethnicity, race, and sex data would create significant privacy risks for small business applicants, particularly in smaller or rural communities. Other industry and individual commenters cautioned the Bureau against collecting and publishing the sexual orientation and gender identity of principal owners. Specifically, these commenters noted the significant risk of harm to small business applicants, due to the particularly sensitive personal nature of this information if re-identification occurred.

Some trade associations noted concerns that publishing ethnicity, race, and sex information, particularly where collected based on visual observation or surname, will present the risk of harm to financial institutions. Two such commenters asserted that financial institutions faced the potential for reputational or litigation risks if the ethnicity, race, or sex data are published because of potential conflicts with State or Federal privacy laws. One commenter stated that asking for this information without proper privacy precautions may expose the financial institution to legal risk under certain State privacy laws, such as the California Consumer Protection Act, that protect against disclosure of ethnicity and race information. Two others noted that State privacy laws may conflict with the requirement to obtain ethnicity and race data based on visual observation. These commenters also stated that the perceived intrusiveness from the acquisition of these data and the knowledge that it would become public could cause competitive and reputational harm to financial institutions as institutions that do not protect their customers' privacy. For example, one commenter asserted that visual observation collection may reduce trust in the financial institution and increase the applicant's apprehension regarding their privacy. As to whether the Bureau should publish the unmodified, applicant-level data on the number of principal owners, several industry commenters opposed the publication of these data, should it be finalized. The commenters stated that publication of the number of principal owners could facilitate re-identification, particularly in small or rural areas.

As discussed above in part VIII.B.3, the Bureau views disclosure of these data to have significant benefits. Commenters did not provide additional evidence related to re-identification risk that would alter the NPRM's partial privacy analysis. The current availability of these data in existing databases likely limits the risk of harm or sensitivity, although it may amplify re-identification risk. Comments that the disclosure of ethnicity, race, and sex data present a risk of reputational or litigation harm to financial institutions because it may be based on visual observation or surname are moot because no visual observation requirement is in the final rule. Commenters did not explain with sufficient detail how the final rule will increase a financial institution's litigation risks due to conflicts with State or Federal privacy laws. To the extent that asking for an applicant's principal owners' ethnicity, race, or sex must be done with proper privacy protocols in place, it seems likely that a financial institution could comply with both this final rule and other privacy requirements.

Accordingly, the Bureau preliminarily assesses that disclosure in unmodified form may increase re-identification risk and presents significant risk of harm or sensitivity if re-identification occurred. The possibility of significant privacy risk primarily results from the fact that sex data will be reported as free-form text, which as discussed in part VIII.B.6.xix below, the Bureau preliminarily assesses it will include, in some form, in the public data. The disclosure of information about the ethnicity and race of principal owners generally will present lesser risk. The Bureau does not discern evidence of compelling privacy risks to financial institutions.

xviii. Financial Institution Identifying Information

Proposed § 1002.109(b) would have required a financial institution to provide the Bureau with certain information with its submission of its small business lending application register: (1) its name; (2) its headquarters address; (3) the name and business contact information of a person who may be contacted with questions about the financial institution's submission; (4) its Federal prudential regulator, if applicable; (5) its Federal Taxpayer Identification Number; (6) its LEI; (7) its RSSD ID, if applicable; (8) parent and top-parent entity information, if applicable; (9) the type of

financial institution that it is, indicated by selecting the appropriate type or types of institution from the list provided or entering free-form text; [902] and (10) whether the financial institution is voluntarily reporting covered applications for covered credit transactions. As discussed above in the section-by-section analysis of § 1002.109(b), the Bureau is generally finalizing this data point as proposed, with certain modifications.

Regulation C requires financial institutions to report similar information when submitting their loan-level HMDA data. Regulation C also requires financial institutions to report the calendar year of submission and the total number of entries in their loan-level HMDA data. Regulation C does not require financial institutions to submit their headquarters address, RSSD ID, or financial institution type or indicate whether they are reporting data voluntarily. With the exception of contact information for a person who can be reached about the financial institution's submission, the information financial institutions are required to submit with their HMDA submissions under § 1003.5(a)(3) is publicly available through the FFIEC website.

Financial institution identifying information other than individual contact information. In the NPRM, the Bureau stated its intention to disclose the financial institution identifying information data fields in unmodified form, other than the name and business contact information of a person who may be contacted with questions about the submission. The Bureau stated that disclosing financial institution identifying information in the 1071 data in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. While some businesses might view their identification as an applicant as harmful or sensitive, revealing the name of the financial institution would not significantly increase such risks. In addition, the Bureau reasoned that this information is already largely available from other identified public records, such as UCC filings. For the same reason, revealing the name of the financial institution would not significantly increase risk of fraud or identity theft. The Bureau stated that disclosing financial institution identifying information in the data in unmodified form would not, by itself, reveal information that is harmful or sensitive, given financial institutions' commercial interests. Additionally, other public records, such as public HMDA data, tax records, and commercial databases disclose Federal Taxpayer Identification number, RSSD ID, and LEI.[903] Disclosing financial institution identifying information in unmodified form may reveal information that financial institutions regard as harmful or sensitive, but the Bureau did not discern evidence that it would permit reverse-engineering of proprietary lending models. The Bureau acknowledged, however, that this information could, in some circumstances, lead to reputational risks and increased costs for financial institutions, which might be passed on to their customers in the form of increased costs or decreased access to credit.

The NPRM noted that the Bureau had received feedback that publishing financial institution identifying information could increase re-identification risk of applicants and related natural persons. This included feedback that customers of captive wholesale finance companies with applicant bases limited to franchises or licensees of a particular distributor or manufacturer would face unique re-identification risks because, in many instances, these applicants may be the financial institution's only customer in a particular State, or one of only a very small number of customers in the State, heightening the privacy concerns for publication of data tied to these financial institutions. The NPRM also noted that the Bureau had identified publicly available datasets that include data fields an adversary could directly match to financial institution identifying information data fields in unmodified form. Therefore, in many cases, the Bureau reasoned that an adversary could use identifying financial institution data fields, combined with other section 1071 data fields, to match a section 1071 record to an identified public record.

With respect to concerns about wholesale finance companies, the Bureau acknowledged that financial institution identifying information in unmodified form in the public application-level data could, in combination with other data fields like census tract, NAICS codes, and credit type or purpose, facilitate re-identification of applicants that have a common name, without requiring that adversaries match 1071 records to other identified datasets. Under proposed § 1002.104(b), which the Bureau has finalized, trade credit and other transactions would be excluded from the scope of covered credit transactions. The Bureau indicated that this might eliminate some transactions involving such lenders. The Bureau sought comment on the circumstances under which a transaction involving a captive wholesale finance company would be covered by the proposal notwithstanding the exemption. To the extent there are such transactions, the Bureau also sought comment on the instances in which captive wholesale finance companies lend *exclusively* to businesses that are publicly branded in a way that can be easily matched to the identity of the financial institution. The Bureau sought comment on whether a final rule could include certain categories of financial institution types that would allow the Bureau to easily identify such financial institutions in the unmodified 1071 dataset without an application-level analysis. Finally, the Bureau sought comment on whether there are particular modification techniques that would reduce re-identification risks and risks of harm or sensitivity for applicants and related natural persons who might be re-identified in the public application-level data.

In the NPRM, the Bureau stated its intention to publish financial institution identifying information, other than individual contact information, as reported and without modification. The Bureau stated that risks to privacy interests from the disclosure of this data in unmodified form would be justified by the benefits of disclosure for section 1071's purposes. While the Bureau did not conduct a uniqueness analysis, it stated that disclosure of financial institution identifying information would very likely substantially facilitate the re-identification of applicants or related natural persons. If such persons were re-identified, the Bureau stated that disclosure of other data fields would likely create a risk of harm or sensitivity. In addition, the Bureau stated that the disclosure of other proposed data fields in combination with a financial institution name likely would reveal information that may be harmful or sensitive to financial institutions. The Bureau nonetheless stated that these risks to privacy would be justified by the benefits of disclosure in light of section 1071's purposes.

[902] Part VIII.B.6.xix further discusses the disclosure of free-form text field information.

[903] The FFIEC publishes transmittal sheet information, including LEI and Federal Taxpayer Identification number, on its website. Fed. Fin. Insts. Examination Council, *Public Transmittal Sheet—Schema, https://ffiec.cfpb.gov/documentation/2020/public-ts-schema/* (last visited Mar. 20, 2023).

The Bureau sought comment on this analysis and its stated intention to disclose these fields without modification in the public application-level data. The Bureau received feedback on this proposed analysis from trade association and community group commenters. Two community group commenters generally supported the Bureau's proposal to disclose unmodified financial institution identifying information, other than individual contact information. A trade association opposed the proposal. This commenter urged the Bureau to withhold all financial institution identifying information data fields because, whether or not it is available elsewhere, this information would create privacy risks for financial institutions, including risks involving identity theft and data security. With respect to the Bureau's request for comment about whether these proposed data fields would pose risks to captive wholesale companies and their customers, this commenter urged the Bureau to provide additional protections for this market segment to mitigate re-identification risk.

The Bureau acknowledges that publication of financial institution identifying information may reveal information that may be harmful or sensitive to financial institutions, leading to reputational risks and increased costs. However, feedback received by the Bureau does not explain how these data would pose previously unconsidered identity theft or data security risks. Separately, the Bureau acknowledges feedback that the proposed data fields may pose special risks to captive wholesale companies and their customers. It intends to consider what additional modifications or deletions may be appropriate to protect the privacy interests of these entities.

As explained in the NPRM, this data point could potentially increase re-identification risk and commenters did not provide additional evidence related to re-identification risk that would alter the partial privacy analysis described above. However, the Bureau preliminarily assesses that disclosing the financial institution identifying information data fields in unmodified form, other than data fields containing the information for the financial institution's point of contact, would present limited risk of harm or sensitivity if re-identification occurred. The Bureau believes that it is unlikely that publication of this data would disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. The Bureau does not believe this data will result in significant non-personal commercial risks to small businesses. The disclosure of this data field does not pose compelling privacy risks to financial institutions. The Bureau will continue to give consideration to the scenario involving captive wholesale companies and their customers as it conducts its full privacy analysis.

Individual contact information. Proposed § 1002.109(b)(1)(iii) would have required financial institutions to report the name and business contact information of a person who may be contacted with questions about the financial institution's submission. As discussed above in the section-by-section analysis of § 1002.109(b)(1)(iii), the Bureau is finalizing this data point largely as proposed, but with certain modifications. In contrast to the other financial institution identifying information described above, in the NPRM the Bureau stated its intention to delete this data field from the publicly available data.

The Bureau stated that disclosing individual contact information in the data in unmodified form would likely not disclose any information about an applicant or related natural person if such person were re-identified. However, the Bureau stated that disclosing the name and contact information of natural persons designated by the financial institution would disclose information that may be harmful or sensitive to the identified financial institutions and their employees. Financial institutions have a legitimate interest in protecting the identities of their employees from the public, consistent with their job functions, and persons identified for purposes of questions about the financial institution's submission to the Bureau might not necessarily be responsible for engaging with the general public.

The Bureau considered whether modification other than by excluding individual contact information would appropriately balance identified privacy risks and disclosure benefits. Because disclosure of this data field in unmodified form would not promote the purposes of section 1071 and would likely reveal information that would be harmful or sensitive to a financial institution and its employees, the Bureau did not identify any such alternative. Accordingly, the Bureau stated that deleting individual contact information would appropriately balance the privacy risks and disclosure benefits of this data field.

The Bureau received feedback from one trade association commenter, which supported the Bureau's analysis. The Bureau accordingly determines that the publication of the name and business contact information of a person who may be contacted by the Bureau or other regulators with questions about the financial institution's submission has minimal, if any, disclosure benefits. Moreover, the Bureau concludes that the publication of this information presents significant privacy risks because it may be harmful or sensitive to identified financial institutions and their employees. Accordingly, the Bureau is announcing its intention not to publish the name and business contact information of a person who may be contacted by the Bureau or other regulators with questions about the financial institution's submission.

xix. Free-Form Text

The Bureau proposed to require financial institutions to use free-form text to report certain data where they are reporting information that is not included in a list provided for the data fields. Under proposed § 1002.107(a)(5), (6), (11), (12), and (20), free-form text could be used in reporting credit type (product and guarantee information); credit purpose; denial reasons; pricing (the interest rate index used); and principal owners' ethnicity, race, and sex.[904] Financial institutions also would have had flexibility in describing certain identifying information provided under proposed § 1002.109(b). Free-form text used to report principal owners' ethnicity, race, and sex would have been completed based on information provided by applicants; all other free-form text would have been completed by the financial institution. As discussed above in the section-by-section analyses for particular data points within § 1002.107(a), the Bureau is finalizing these data points with certain modifications. The free-form text aspect of § 1002.109(b) is being finalized as proposed.

The Bureau explained that use of free-form text would allow the reporting of any information, including information that may be harmful or sensitive to applicants, related natural persons, and possibly the interests of financial institutions. The Bureau stated that such information might also create a significant risk of re-identification for applicants or related natural persons. Given the amount of data expected to be reported each year, the Bureau stated that it would not be feasible for it to

[904] Proposed § 1002.107(a)(20) is being finalized as § 1002.107(a)(19).

review free-form text before publishing the application-level data. Under the balancing test described in the NPRM, therefore, the Bureau initially assessed that deleting free-form text from the public application-level data (other than with respect to the financial institution identifying information described in part VIII.B.6.xviii above) would appropriately balance the benefits of disclosure with the risks to the privacy interests of applicants, related natural persons, and financial institutions.

Several industry commenters generally supported deleting free-form text from the public application-level data. A bank noted that public the HMDA data do not include free-form text fields. A group of trade associations stated that deleting this information would appropriately balance privacy risks and disclosure benefits. In contrast, a CDFI lender urged the Bureau to publish free-form text fields arguing that such fields would include important information. This commenter suggested that the Bureau could adequately mitigate the risk that the free-form text would contain sensitive or harmful information by including a disclaimer on the data collection form that free-form text may be published.

The Bureau reiterates that HMDA publication practices do not dictate decisions in this rule and that consistency between public section 1071 data and public HMDA data may not be appropriate in every instance. As an additional matter, the Bureau believes that a general disclaimer that free-form text may be published would not adequately mitigate those privacy risks. Among other considerations, because financial institutions will supply the content of most free-form text fields, applicants and related natural persons have no direct control over what information appears in those fields. Therefore, a disclaimer would provide applicants or related natural persons limited ability to mitigate their privacy risks.

The Bureau agrees that certain free-form text fields may contain information that has some disclosure benefits. In particular, free-form text for the ethnicity, race, and sex data may contain information that is important to the statutory purposes of section 1071. As discussed in the section-by-section analysis of § 1002.107(a)(19), the Bureau is finalizing a requirement whereby applicants will indicate principal owners' sex via a write-in option. While the Bureau cannot feasibly review for privacy risks all free-form text fields supplied by all financial institutions reporting data, the Bureau expects to review the free-form text provided by applicants regarding principal owners' sex. The Bureau anticipates that this free-form text will permit identification of certain response categories appropriate for publication, based on the Bureau's assessment of privacy risks. Similarly, the Bureau may be able to review ethnicity and race free-form text, where it is provided, to discern response categories that may be appropriate for publication.

The Bureau recognizes, however, that free-form text fields may present significant privacy risks if re-identification occurred. Such privacy risks would not be mitigated in the absence of pre-publication review. Accordingly, the Bureau is announcing its intention to delete free-form text from the public application-level data, other than with respect to ethnicity, race, and sex of principal owners described in part VIII.B.6.xvii and the financial institution identifying information described in part VIII.B.6.xviii. The Bureau will continue to consider whether modification techniques may be appropriate for the data fields for ethnicity, race, and sex of principal owners and certain financial institution identifying information.

IX. Dodd-Frank Act Section 1022(b)(2) Analysis

The Bureau has considered the potential benefits, costs, and impacts of the final rule. The Bureau requested comment on the preliminary discussion presented below, as well as submissions of additional data that could inform the Bureau's consideration of the benefits, costs, and impacts of the proposed rule. In developing the rule, the Bureau has consulted or offered to consult with the prudential regulators (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency), the Department of Agriculture, the Department of Housing and Urban Development, the Department of Justice, the Department of the Treasury, the Economic Development Administration, the Farm Credit Administration, the Federal Trade Commission, the Financial Crimes Enforcement Network, and the Small Business Administration regarding, among other things, consistency with any prudential, market, or systemic objectives administered by such agencies.

In the Dodd-Frank Act, which was enacted ''[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system,'' Congress directed the Bureau to adopt regulations governing the collection of small business lending data. Under section 1071 of that Act, covered financial institutions must compile, maintain, and submit certain specified data points regarding applications for credit for women-owned, minority-owned, and small businesses, along with ''any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].'' Under the final rule, covered financial institutions are required to collect and report the following data points: (1) a unique identifier, (2) application date, (3) application method, (4) application recipient, (5) credit type, (6) credit purpose, (7) amount applied for, (8) amount approved or originated, (9) action taken, (10) action taken date, (11) denial reasons, (12) pricing information, (13) census tract, (14) gross annual revenue, (15) NAICS code, (16) number of workers, (17) time in business, (18) minority-owned business status, women-owned business status, and LGBTQI+-owned business status, (19) ethnicity, race, and sex of principal owners, and (20) the number of principal owners.

Under the final rule, financial institutions will be required to report data on small business credit applications under section 1071 if they originated at least 100 covered credit transactions in each of the two preceding calendar years. The Bureau is defining an application as an oral or written request for a covered credit transaction that is made in accordance with the procedures used by a financial institution for the type of credit requested, with some exceptions. Loans, lines of credit, credit cards, and merchant cash advances (including such credit transactions for agricultural purposes) all fall within the transactional scope of this final rule. The Bureau is excluding trade credit, transactions that are reportable under the Home Mortgage Disclosure Act of 1975 (HMDA),[905] insurance premium financing, public utilities credit, securities credit, and incidental credit. Factoring, leases, and consumer-designated credit that is used for business or agricultural purposes are also not covered credit transactions. In addition, the Bureau has made clear that purchases of originated covered credit transactions are not reportable. For purposes of the final rule, a business is a small business if its gross annual revenue for its preceding fiscal year is $5 million or less.

[905] 12 U.S.C. 2801 *et seq.*

A. Statement of Need

Congress directed the Bureau to adopt regulations governing the collection of small business lending data. Specifically, section 1071 of the Dodd-Frank Act amended ECOA to require financial institutions to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses. Congress enacted section 1071 for the purpose of facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. The Bureau is issuing this final rule to implement the section 1071 mandate.

Small businesses play a key role in fostering community development and fueling economic growth both nationally and in their local communities.[906] However, comprehensive data on loans to small businesses currently are limited. The largest sources of information on lending by depository institutions (*i.e.,* banks, savings associations, and credit unions) are the FFIEC and NCUA Call Reports and reporting under the CRA. Under the FFIEC Call Report and CRA reporting requirements, small loans to businesses of any size are used in whole or in part as a proxy for loans to small businesses. The FFIEC Call Report captures banks' and savings associations' total outstanding number and amount of small loans to businesses (that is, loans originated under $1 million to businesses of any size; small loans to farms are those originated under $500,000) by institution.[907] The CRA currently requires banks and savings associations with assets over a specified threshold ($1.384 billion as of 2022) [908] to report data on loans to businesses with origination amounts of $1 million or less; reporters are asked to indicate whether the borrower's gross annual revenue is $1 million or less, if they have that information.[909] Under the CRA, banks and savings associations currently report aggregate numbers and values of originations at an institution level and at various geographic levels. The NCUA Call Report captures credit unions' total originations, but not applications, on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size.[910] Some federally-funded loan programs, such as the SBA's 7(a) or 504 programs and the CDFI Fund require reporting of loan-level data, but only for loans that received support under those programs. Nondepository institutions do not report small business lending applications under any of these reporting regimes. There are no similar sources of information about lending to small businesses by nondepository institutions.

There are also a variety of non-governmental data sources, issued by both private and nonprofit entities, that cover small businesses and/or the small business financing market. These include datasets and surveys published by commercial data and analytics firms, credit reporting agencies, trade associations, community groups, and academic institutions. See part II.B for additional information on these sources. While these non-public sources of data on small businesses may provide a useful supplement to existing Federal sources of small business lending data, these private and nonprofit sources often do not have lending information, may rely on unverified research based on public internet sources, and/or narrowly limit use cases for parties accessing data. Further, commercial datasets are generally not free to public users and can be costly, raising equity issues for stakeholders who cannot afford access.

Under the final rule, covered financial institutions are required to compile, maintain, and submit data regarding the ethnicity, race, and sex of the principal owners of the business and whether the business is women-owned, minority-owned, or LGBTQI+-owned. No other source of data comprehensively collects this type of protected demographic information on small business loan applications.

Section 1071 requires financial institutions to report detailed application-level data to the Bureau, and for the Bureau to generally make it available to the public on an annual basis (subject to any deletions or modifications that the Bureau determines would advance a privacy interest). Such information will constitute a public good that illuminates the lending activities of financial institutions and the small business lending market in general. In particular, the public provision of application-level data, subject to any deletions or modifications that the Bureau determines would appropriately protect privacy interests, will: (1) provide communities, governmental entities, and financial institutions additional information to help identify business and community development needs and opportunities of small businesses and (2) allow members of the public, public officials, and other stakeholders to better assess compliance with antidiscrimination statutes.

First, the data made public pursuant to the final rule and the Bureau's subsequent privacy analysis will provide information that could help to improve credit outcomes in the small business lending market, furthering the community development purpose of the rule. As discussed above, market-wide data on small business credit transactions are currently limited. Neither the public nor private sectors provide extensive data on credit products or terms. Small business owners have access to very little information on typical rates or products offered by different lenders. As a result of the data that will be made public pursuant to the final rule and subject to modification and deletion decisions by the Bureau, community development groups and commercial services will be able to provide better information to small businesses. For example, a commercial provider could provide small businesses with information on what products lenders typically offer and at what rates. These data will allow small business owners to more easily compare credit terms and evaluate credit alternatives; without these data, small business owners are limited in their ability to shop for the credit product that best suits their needs at the best price. By engaging in more informed shopping, small business owners may achieve better credit outcomes.

Furthermore, communities will use data to identify gaps in access to credit and capital for small businesses. Financial institutions can analyze data to understand small business lending market conditions and determine how best to provide credit to borrowers. Currently, financial institutions are not able to conduct very granular or

[906] *See generally* White Paper.

[907] *See* FFIEC Call Report at Schedule RC–C Part II.

[908] *See* Fed. Fin. Insts. Examination Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (2022), *https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.*

[909] *See* 2015 FFIEC CRA Guide at 11, 13. Small business loans are defined for CRA purposes as loans whose original amounts are $1 million or less and that were reported on the institution's Call Report or Thrift Financial Report (TFR) as either ''Loans secured by nonfarm or nonresidential real estate'' or ''Commercial and industrial loans.'' Small farm loans are defined for CRA purposes as loans whose origination amounts are $500,000 or less and were reported as either ''Loans to finance agricultural production and other loans to farmers'' or ''Loans secured by farmland.''

[910] *See* Nat'l Credit Union Admin., *Call Report Form 5300* (June 2020), *https://www.ncua.gov/files/publications/regulations/form-5300-june-2020.pdf.*

comprehensive analyses because the data on small business lending are limited. The data made public pursuant to the final rule and subsequent privacy analysis will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other covered financial institutions. The data will help enable institutions to identify potentially profitable opportunities to extend credit. They will additionally allow governmental entities to better develop targeted lending programs, loan funds, small business incubators, and other community-driven initiatives. Small business owners, as a result, could benefit from increased credit availability.

Second, while data made public pursuant to the final rule and subsequent privacy analysis may not constitute conclusive evidence of credit discrimination on its own, the data will enable members of the public, regulators, and other stakeholders to better identify lending patterns consistent with noncompliance with antidiscrimination statutes. As described above, there are currently no application-level data comprehensive enough or that contain the demographic information required by the final rule to enable the public to conduct these kinds of analyses. The data made public pursuant to the final rule and subsequent privacy analysis will be comprehensive and contain the necessary data fields for such analysis. Users will be able to examine whether, for example, a lender denies applications from women-owned, minority-owned, or LGBTQI+-owned businesses at higher rates than those that are not or whether these businesses are charged higher prices. This kind of transparency can place appropriate pressure on covered financial institutions to ensure that their credit lending practices comply with relevant laws. Additionally, data collected under the final rule will contain the data fields that allow users to conduct more accurate fair lending analyses by comparing applications for credit products with similar characteristics.

B. Baseline for the Consideration of Costs and Benefits

In evaluating the benefits, costs, and impacts of the final rule, the Bureau takes as a baseline the current legal framework governing financial markets, *i.e.,* the current state of the world before the Bureau's rule implementing section 1071. Under this baseline, the Bureau assumes that institutions are complying with regulations that they are currently subject to, including reporting data under HMDA, CRA, and any State commercial financing disclosure laws.[911] The Bureau believes that such a baseline will also provide the public with better information about the benefits and costs of this rule.

The Bureau received no comments regarding its choice of baseline for its section 1022(b)(2) analysis.

C. Basic Approach of the Bureau's Consideration of Benefits and Costs and Data Limitations

Pursuant to section 1022(b)(2)(A) of the Dodd-Frank Act,[912] in prescribing a rule under the Federal consumer financial laws (which include ECOA and title X of the Dodd-Frank Act), the Bureau is required to consider the potential benefits and costs to ''consumers'' and ''covered persons,'' including the potential reduction of access by consumers to consumer financial products or services resulting from such rule, and the impact of final rules on covered persons as described under section 1026 of the Dodd-Frank Act[913] (*i.e.,* depository institutions and credit unions with $10 billion or less in total assets), and the impact on consumers in rural areas.

The Dodd-Frank Act defines the term ''consumer'' as an individual or someone acting on behalf of an individual, while a ''covered person'' is one who engages in offering or providing a ''consumer financial product or service,'' which means a financial product or service that is provided to consumers primarily for ''personal, family, or household purposes.''[914] In the rulemaking implementing section 1071, however, the only parties directly affected by the rule are small businesses (rather than individual consumers) and the financial institutions from whom they seek credit (rather than covered persons). Accordingly, a section 1022(b)(2)(A) analysis that considers only the costs and benefits to individual consumers and to covered persons would not meaningfully capture the costs and benefits of the rule.

[911] *See, e.g.,* N.Y. S.898 (signed Jan. 6, 2021) (amending S.5470–B), *https://legislation.nysenate.gov/pdf/bills/2021/s898*; Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*; Virginia H. 1027 (enacted Apr. 11, 2022), *https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0516*; Utah S.B. 183 (enacted Mar. 24, 2022), *https://le.utah.gov/~2022/bills/static/SB0183.html.*

[912] 12 U.S.C. 5512(b)(2)(A).

[913] 12 U.S.C. 5516.

[914] 12 U.S.C. 5481(4) through (6).

Below, the Bureau conducts the statutorily required analysis with respect to the rule's effects on consumers and covered persons. Additionally, the Bureau is electing to conduct this same analysis with respect to small businesses and the financial institutions required to compile, maintain, and submit data under the final rule. This discussion relies on data that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources. However, as discussed further below, the data limit the Bureau's ability to quantify the potential costs, benefits, and impacts of the final rule.

1. Analysis With Respect to Consumers and Covered Persons

The final rule implements a data collection regime in which certain covered financial institutions must compile, maintain, and submit data with respect to applications for credit for small businesses. The rule will not directly impact consumers or consumers in rural areas, as those terms are defined by the Dodd-Frank Act. However, some consumers will be directly impacted in their separate capacity as sole owners of small businesses covered by the rule. Some covered persons, including some that are depository institutions or credit unions with $10 billion or less in total assets, will be directly affected by the rule not in their capacity as covered persons (*i.e.,* as offerors or providers of consumer financial products or services) but in their separate capacity as financial institutions that offer small business credit covered by the rule. The costs, benefits, and impact of the rule on those entities are discussed below.

2. Costs to Covered Financial Institutions

The final rule establishes which financial institutions, applicants, transactions, and data points are covered by its requirements. In order to precisely quantify the costs to covered financial institutions, the Bureau would need representative data on the operational costs that financial institutions would incur to gather and report 1071 data, one-time costs for financial institutions to update or create reporting infrastructure to implement the final rule, and information on the level of complexity of financial institutions' business models and compliance systems. Currently, the Bureau does not believe that data on section 1071 reporting costs with this level of granularity are systematically available from any source. The Bureau has made reasonable efforts to gather data on section 1071 reporting costs.

Through outreach efforts with industry, community groups, and other regulatory agencies, the Bureau has obtained some information about potential ongoing operational and one-time compliance costs, and the discussion below uses this information to quantify certain costs of the final rule. Throughout the section 1022 discussion in the NPRM, the Bureau also solicited feedback about data or methodologies that would enable it to more precisely estimate the benefits, costs, and impacts of the proposed rule. The Bureau has reviewed these comments and considered the information provided by the commenters. The Bureau believes that the discussion herein constitutes the most comprehensive assessment to date of the costs of section 1071 reporting by financial institutions, as well as the most accurate estimates of costs given available information. However, the Bureau recognizes that these estimations may not fully quantify the costs to each covered financial institution, especially given the wide variation of section 1071 reporting costs among financial institutions.

The Bureau categorizes costs required to comply with the final rule into ''one-time'' and ''ongoing'' costs. ''One-time'' costs refer to expenses that the financial institution will incur initially and only once to implement changes required in order to comply with the requirements of this rule. ''Ongoing'' costs are expenses incurred as a result of the ongoing reporting requirements of the rule, accrued on an annual basis. In considering the costs and impacts of the rule, the Bureau has engaged in a series of efforts to estimate the cost of compliance by covered entities. The Bureau conducted a One-Time Cost Survey, discussed in more detail in part IX.E.1 below, to learn about the one-time implementation costs associated with implementing section 1071 and adapted ongoing cost calculations from previous rulemaking efforts. The Bureau evaluated the one-time costs of implementing the procedures necessary and the ongoing costs of annually reporting under the rule in part IX.F.3 below. The discussion below provides details on the Bureau's approach in performing these institution-level analyses. The Bureau realizes that costs vary by institution due to many factors, such as size, operational structure, and product complexity, and that this variance exists on a continuum that is impossible to fully represent. In order to conduct a cost consideration that is both practical and meaningful in light of these challenges, the Bureau has chosen an approach that focuses on three representative types of financial institutions. For each type, the Bureau has produced reasonable estimates of the costs of compliance given the limitations of the available data. Part IX.F.3 below provides additional details on this approach.

3. Costs to Small Businesses

The Bureau has elected to estimate the costs to small businesses in addition to those for covered financial institutions. The Bureau expects the direct costs of the final rule to small businesses will be negligible. Therefore, the Bureau focuses its analysis on whether and how the Bureau expects financial institutions to pass on the costs of compliance with the final rule to small businesses and any possible effects on the availability or terms of small business credit. The Bureau relies on economic theory to understand the potential for costs to financial institutions to be passed on to small businesses. Further, the Bureau describes feedback received through the One-Time Cost Survey process, the SBREFA process, and comments from the NPRM process on how creditors might react to increased compliance costs due to the final rule.

4. Benefits to Small Businesses and Covered Financial Institutions

Quantifying benefits to small businesses presents substantial challenges. As discussed above, Congress enacted section 1071 for the purpose of facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. The Bureau is unable to readily quantify any of these benefits with precision, both because the Bureau does not have the data to quantify all benefits and because the Bureau is not able to assess completely how effective the implementation of section 1071 will be in achieving those benefits. The Bureau believes that its final rule appropriately implements the statutory mandate of section 1071 to effectuate the section's stated purposes. As discussed further below, as a data reporting rule, most provisions of the final rule will benefit small businesses in indirect ways, rather than directly. Nevertheless, the Bureau believes that the impact of enhanced transparency will substantially benefit small businesses. For example, the final rule will facilitate the detection (and thus remediation) of discrimination; promote public and private investment in certain underserved markets; and promote competitive markets. Quantifying and monetizing these benefits would require identifying all possible uses of data collected under this rule, establishing causal links to the resulting public benefits, and then quantifying the magnitude of these benefits.

Similar issues arise in attempting to quantify the benefits to covered financial institutions. Certain benefits to covered financial institutions are difficult to quantify. For example, the Bureau believes that the data collected under this rule will reduce the compliance burden of fair lending reviews for lower risk financial institutions by reducing the ''false positive'' rates during fair lending prioritization by regulators. That is, by providing more comprehensive application-level data about a covered institution's lending to small businesses, regulators will be able to better identify fair lending risks and, as such, more efficiently prioritize their fair lending examinations and enforcement activities. The Bureau also believes that data made public pursuant to the final rule will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other covered financial institutions and to identify potentially profitable opportunities to extend credit. The Bureau believes that such benefits to financial institutions could be substantial. However, quantifying them would require data that are currently unavailable.

In light of these data limitations, the discussion below generally provides a qualitative consideration of the benefits and impacts of the final rule. General economic principles, together with the limited data available, provide insight into these benefits and impacts. Where possible, the Bureau makes quantitative estimates based on these principles and the data that are available. Quantifying these benefits is difficult because the size of each effect cannot be known in advance. Given the number of small business credit transactions and the size of the small business credit market, however, small changes in behavior can have substantial aggregate effects.

5. General Comments on the Impact Analyses in the Proposed Rulemaking

Throughout the Dodd-Frank Act section 1022 discussion in the NPRM,[915] the Bureau solicited feedback that would enable it to estimate the benefits, costs, and impacts of the

[915] *See* 86 FR 56356, 56540–64 (Oct. 8, 2021).

proposed regulation more precisely. The Bureau, for example, solicited comments on its methodology for estimating one-time and ongoing costs, the estimates of the specific costs themselves, and any information that would help it better quantify the benefits and potential impacts on small businesses and covered financial institutions. Many commenters made general statements, while several provided comments specific to certain methodologies or estimates. In this section, the Bureau describes the comments more generally, while in subsequent sections, it discusses comments specific to those sections.

Commenters offered general remarks on the quality of the Bureau's one-time and ongoing cost estimates. Several community groups described the Bureau's estimates as ''well-considered'' or described the costs of the proposed rule as being outweighed by the benefits. In contrast, some industry commenters and an office of a Federal agency generally asserted that the Bureau's cost estimates were too low. The Bureau has reviewed its estimates and considered the information provided by the commenters. In the sections below, the Bureau describes specific comments related to each section of benefits, costs, and the potential impact on small entities. The methodology described in the sections below for the final rule is the same methodology that the Bureau used in the NPRM unless otherwise noted.

D. Coverage of the Final Rule

1. Coverage in General

The final rule provides that financial institutions (both depository and nondepository) that meet all the other criteria for a ''financial institution'' in § 1002.105(a) would only be required to collect and report section 1071 data if they originated at least 100 covered credit transactions in each of the two preceding calendar years. See final § 1002.105(b).

As discussed above, market-wide data on small business lending are currently limited. The Bureau is unaware of any comprehensive data available on small business originations for all financial institutions, which are needed in order to precisely identify all institutions covered by the rule. To estimate coverage of the final rule, the Bureau uses publicly available data for financial institutions divided into two groups: depository (*i.e.,* banks, savings associations, and credit unions) and nondepository institutions.

To estimate coverage of depository institutions, the Bureau relies on NCUA Call Reports to estimate coverage for credit unions, including for those that are not federally insured, and FFIEC Call Reports and the CRA data to estimate coverage for banks and savings associations. For the purposes of the analysis in this section of part IX, the Bureau estimates the number of depository institutions that would have been required to report small business lending data in 2019, based on the estimated number of originations of covered products for each institution in 2017 and 2018.[916] The Bureau accounts for mergers and acquisitions between 2017 and 2019 by assuming that any depository institutions that merged in those years report as one institution.

As discussed above, the NCUA Call Report captures the number and dollar value of originations on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size. For the purposes of estimating the impacts of the final rule, the Bureau uses the annual number of originated commercial loans to members reported by credit unions as a proxy for the annual number of originated covered credit transactions under the rule.[917] These are the best data available for estimating the number of credit unions that may be covered by the final rule. However, the Bureau acknowledges that the true number of covered credit unions may be different than what is presented here. For example, this proxy would overestimate the number of credit unions that will be covered if some commercial loans to members are not covered because the member is taking out a loan for a business considered large under the definition of a small business in the final rule. Alternatively, this proxy would underestimate the number of credit unions covered by the final rule if credit unions originate a substantial number of covered credit transactions with origination values under $50,000.

The FFIEC Call Report captures banks' and savings associations' outstanding number and amount of small loans to businesses (*i.e.,* loans originated under $1 million to businesses of any size; small loans to farms are those originated under $500,000). The CRA requires banks and savings associations with assets over a specified threshold ($1.384 billion as of 2022) [918] to report loans to businesses in original amounts of $1 million or less. For the purposes of estimating the impacts of the final rule, the Bureau follows the convention of using small loans to businesses as a proxy for loans to small businesses and small loans to farms as a proxy for loans to small farms. These are the best data available for estimating the number of banks and savings associations that may be covered by the final rule. However, the Bureau acknowledges that the true number of covered banks and savings associations may be different than what is presented here. For example, this proxy would overestimate the number of banks and savings associations covered by the rule if a significant number of small loans to businesses and farms are to businesses or farms that are considered large under the definition of a small business in the final rule. Alternatively, this proxy would underestimate the number of banks and savings associations covered by the rule if a significant number of businesses and farms that are small under the final rule take out loans that are larger than $1 million for businesses or $500,000 for farms.

Although banks and savings associations reporting under the CRA are required to report the number of originations of small loans to businesses and farms, the Bureau is not aware of any comprehensive dataset that contains originations made by banks and savings associations below the CRA reporting threshold. To fill this gap, the Bureau simulated plausible values for the annual number and dollar value of originations for each bank and savings association that falls below the CRA reporting threshold for 2017, 2018, and 2019.[919] The Bureau generated simulated originations in order to account for the uncertainty around the exact number and value of originations

[916] The Bureau uses 2019 instead of 2020 or 2021 in order to estimate coverage during, or based on, a year unaffected by COVID–19 pandemic conditions.

[917] For this analysis, the Bureau includes all types of commercial loans to members except construction and development loans and loans secured by multifamily residential property. This includes loans secured by farmland; loans secured by owner-occupied, non-farm, non-residential property; loans secured by non-owner occupied, non-farm, non-residential property; loans to finance agricultural production and other loans to farmers; commercial and industrial loans; unsecured commercial loans; and unsecured revolving lines of credit for commercial purposes.

[918] *See* Fed. Fin. Insts. Examination Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (2022), *https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.*

[919] Based on FFIEC Call Report data as of December 2019, of the 5,177 banks and savings associations that existed in 2019, only about 11 percent were required to report under CRA. That is, only about 11 percent of banks and savings associations had assets below $1.284 billion, the CRA reporting threshold in 2019. *See* Fed. Fin. Insts. Examination Council, *2019 Reporting Criteria, https://www.ffiec.gov/cra/reporter19.htm* (last visited Mar. 20, 2023).

for these banks and savings associations. To simulate these values, the Bureau assumes that these banks have the same relationship between outstanding and originated small loans to businesses and farms as banks and savings associations above the CRA reporting threshold. First, the Bureau estimated the relationship between originated and outstanding numbers and balances of small loans to businesses and farms for CRA reporters. Then the Bureau used this estimate, together with the outstanding numbers and balances of small loans to businesses and farms of non-CRA reporters, to simulate these plausible values of originations. The Bureau has documented this methodology in more detail in its *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rule* released concurrently with this final rule.[920]

Based on 2019 data from FFIEC and NCUA Call Reports and the CRA data, using the methodology described above, the Bureau estimates that the number of depository institutions that will be required to report under the final rule is between approximately 1,800 and 2,000, as shown in Table 3 below. The Bureau estimates that between 1,700 and 1,900 banks and savings associations and about 100 credit unions will be required to report under the final rule. These ranges represent 95 percent confidence intervals over the number of credit unions, banks and savings associations that will be covered under the final rule. The Bureau presents this range to reflect the uncertainty associated with the estimates and notes that the uncertainty is driven by the lack of data on originations by banks and savings associations below the CRA reporting threshold.

TABLE 3—ESTIMATED DEPOSITORY INSTITUTION COVERAGE

[As of 2019]

Coverage category	Estimated coverage
Institutions Subject to 1071 Reporting	1,800–2,000 depository institutions (17%–19% of all depository institutions).
Banks and Savings Associations (SAs) Subject to Reporting	1,700–1,900 banks and SAs (33%–36% of all banks and SAs).
Credit Unions Subject to Reporting	100 credit unions (2% of all credit unions).
Share of Total Small Business Credit by Depository Institutions (Number of Loans Originated) Captured.	94.2%–95.1%.
Share of Total Small Business Credit by Depository Institutions (Dollar Value of Loans Originated) Captured.	81.0%–83.0%.

For nondepositories, the Bureau estimates that about 620 nondepository institutions will be covered by the final rule: about 140 nondepository CDFIs; about 70 merchant cash advance providers; about 30 online lenders; about 240 commercial finance companies; about 70 governmental lending entities; and 71 Farm Credit System members.[921] See part II.D above for more detail on how the Bureau arrived at these estimates.

Comments on the estimates of coverage of the proposed rule. In the NPRM, the Bureau sought comment on whether there are additional data sources that could provide better estimates of coverage and on the methods used to estimate coverage. Two trade associations commented that the Bureau substantially underestimates the coverage of credit unions because it does not account for small business loans under $50,000. The Bureau acknowledges this limitation of the estimation methodology, as discussed above, but did not receive any information upon which to base better coverage estimates for credit unions for purposes of the final rule.

2. Coverage Based on Tiered Compliance Dates

The final rule provides that the initial compliance date for covered financial institutions will occur in three tiers; a covered financial institution will determine its compliance date tier based on the number of covered credit transactions that it originated in each of the calendar years 2022 and 2023.[922] In this section, the Bureau presents estimates of the share of covered financial institutions that will report in each tier.

The Bureau uses the estimates of originations of covered products by depository institutions in 2017 and 2018, discussed above, to estimate how many covered depository institutions will report in each tier. A covered depository institution is expected to report in Tier 1 if it originated at least 2,500 covered credit transactions in each of 2017 and 2018. A covered depository institution is expected to report in Tier 2 if it originated at least 500 covered credit transactions in each of 2017 and 2018 and was not required to report in Tier 1. A covered depository institution is expected to report in Tier 3 if it originated at least 100 covered credit transactions in each of 2017 and 2018 and was not required to report in Tier 1 or Tier 2. The Bureau also estimates the percent of covered applications from 2019 that are received by depository institutions in each tier.

Table 4, below, presents estimates of percentages of covered banks and credit unions that will report in each tier. The Bureau estimates that most covered banks, savings associations, and credit unions will not be required to report until Tier 3, as seen in the first two rows

[920] This document is available at *https://www.consumerfinance.gov/data-research/research-reports/supplemental-estimation-methodology-institutional-coverage-market-level-cost-estimates-small-business-lending-rulemaking/*.

[921] The Bureau provides estimates for the majority of nondepository institutions but knows an exact number of members of the Farm Credit System. To estimate the number of Farm Credit System members, the Bureau considers the Young, Beginning, and Small Farmers Reports for all Farm Credit System members as of December 31, 2019. The reports can be found at *https://reports.fca.gov/CRS/* (last visited Mar. 20, 2023). A Farm Credit System is covered if it reported more than 100 total number of loans on its Young, Beginning, and Small Farmers Report in 2019.

[922] A covered financial institution is in Tier 1, as specified by final § 1002.114(b)(1), if it has at least 2,500 originations of covered credit transactions in each of 2022 and 2023, with a compliance date of October 1, 2024. A covered financial institution is in Tier 2, as specified by final § 1002.114(b)(2), if it has at least 500 originations in each of 2022 and 2023 (but isn't in Tier 1) with a compliance date of April 1, 2025. A covered financial institution is in Tier 3, as specified by final § 1002.114(b)(3) and (4), if it has at least 100 originations in each of 2022 and 2023 (but isn't in Tiers 1 or 2), with a compliance date of January 1, 2026. Financial institutions that do not fall into any of the compliance tiers based on 2022 and 2023 originations, but that originate 100 more covered credit transactions in subsequent years, would comply beginning January 1, 2026 at the earliest.

of the table. However, the next two rows show that most applications to banks and savings associations (and overall) for covered products in the first reporting year will be received by the 5 percent to 6 percent of covered banks and savings associations that are expected to report in Tier 1.

TABLE 4—ESTIMATED DEPOSITORY INSTITUTION COVERAGE BY COMPLIANCE TIER[923]

Coverage category	Tier 1	Tier 2	Tier 3
Percent Covered Banks and SAs Reporting in Tier.	5%–6% of covered banks and SAs.	17%–19% of covered banks and SAs.	75%–77% of covered banks and SAs.
Percent Covered Credit Unions Reporting in Tier.	0% of covered credit unions ..	13% of covered credit unions	87% of covered credit unions.
Percent of Covered Small Business Credit Applications by Banks and SAs Captured in Tier.	90%–92% of covered bank and SA applications.	4%–5% of covered bank and SA applications.	4%–5% of covered bank and SA applications.
Percent of Covered Small Business Credit Applications by Credit Unions Captured in Tier.	0% of covered credit union applications.	55% of covered credit union applications.	46% of covered credit union applications.

As discussed above, the Bureau is unaware of any institution-level data of originations for nondepository institutions that would allow for precise estimates of when these institutions are expected to report. Consistent with assumptions made below to generate market-level estimates, the Bureau assumes that online lenders and merchant cash advance providers each originate 2,000 covered credit transactions per year and all other nondepository institutions originate 200 loans per year. These assumptions imply that all online lenders and merchant cash advance providers would be required to report in Tier 2 and all other nondepository institutions would be required to report in Tier 3.

E. Methodology for Generating Cost Estimates

The Bureau used its 2015 HMDA final rule estimates as the basis for its review of 1071 data collection and reporting tasks that would impose one-time and ongoing costs. In developing its ongoing cost methodology to estimate the impacts of its 2015 HMDA final rule, the Bureau used interviews with financial institutions to understand the processes of complying with a regulation that requires collecting and reporting credit application data and to generate estimates of how changes to the reporting requirements would impact the ongoing costs of collecting and reporting mortgage application data.[924] To analyze the potential impacts of this final rule, the Bureau adapted its methodology from its 2015 HMDA rulemaking activities to the small business lending market. The methodology described below to estimate costs of the final rule is the same as the methodology used in the NPRM unless otherwise noted.

The Bureau expects that the tasks required for data collection, checking for accuracy, and reporting under the final rule will be similar to those under the 2015 HMDA final rule. The similarities in data collection and reporting tasks allowed the Bureau to leverage its previous rulemaking experience in its analysis of the impacts of this final rule. Outreach to industry, as well as feedback during the SBREFA process and in NPRM comments, validated this approach in general. The Bureau received no comments objecting to its use of the 2015 HMDA final rule impacts estimates as the basis for its methodology for the final rule implementing section 1071.

However, there are significant differences between the home mortgage and small business lending markets. For example, small business lending is generally less automated, and has a wider variety of products, smaller volumes, and smaller credit amounts. The Bureau used the SBREFA process, NPRM comments, research using publicly available information, and the Bureau's general expertise regarding the small business lending market to determine how these differences would change the tasks required for data collection, checking for accuracy, and reporting under the final rule.

During the 2015 HMDA rulemaking process, the Bureau identified seven key aspects or dimensions of compliance costs with a data collection and reporting rule: (1) the reporting system used; (2) the degree of system integration; (3) the degree of system automation; (4) the tools for geocoding; (5) the tools for performing completeness checks; (6) the tools for performing edits; and (7) the compliance program. The Bureau assumes that financial institutions will set up their section 1071 reporting in a manner similar to how HMDA reporting was implemented.[925] As discussed in more detail below, this approach was generally supported by the SBREFA process and NPRM commenters.

The Bureau found during the HMDA rulemaking process that, generally, the complexity of a financial institution's approach across key aspects or dimensions was consistent—that is, a financial institution generally would not use less complex approaches on some dimensions and more complex approaches on others.[926] This allowed the Bureau to classify financial institutions, including depository institutions and nondepository institutions, into three broad types according to the overall level of complexity of their compliance operations. Using very similar assumptions to those used in the 2015 HMDA rulemaking, the Bureau's estimation of the costs of this final rule also assumes that complexity across key aspects or dimensions of a financial institution's small business lending data collection and reporting system is consistent.

Table 5, below, summarizes the typical approach to those seven key aspects or dimensions of compliance costs across three representative types of financial institutions based on level of complexity in compliance operations. Financial institutions that are Type A have the lowest level of complexity in

[923] To estimate applications, the Bureau assumes that depository institutions with that originate 1,000 or more covered credit transactions per year receive 3 applications per origination and depository institutions that originate fewer than 1,000 covered credit transactions per year receive 2 applications per origination.

[924] *Home Mortgage Disclosure (Regulation C),* 80 FR 66128, 66269 (Oct. 28, 2015).

[925] For example, the Bureau assumes that financial institutions will integrate their small business data management system with their other data systems the same way that similar institutions integrated their HMDA management system.

[926] 80 FR 66128, 66269 (Oct. 28, 2015).

compliance operations, while Type B and Type C have the middle and highest levels of complexity, respectively.

TABLE 5—TYPICAL APPROACH TO CERTAIN ASPECTS/DIMENSIONS OF COMPLIANCE COSTS BASED ON LEVEL OF COMPLEXITY FOR TYPES OF FINANCIAL INSTITUTIONS

Aspect/dimension of compliance costs	Typical approach by low complexity financial institutions (Type A FIs)	Typical approach by medium complexity financial institutions (Type B FIs)	Typical approach by high complexity financial institutions (Type C FIs)
Data storage system used	Store data in Excel	Use LOS and SBL DMS	Use multiple LOS, FI's central SoR, SBL DMS.
Degree of system integration	(None)	Have forward integration (LOS to SBL DMS).	Have backward and forward integration.
Degree of system automation	Highly manual process for entering and checking data.	Use manual edit checks	Have high automation (only verifying edits manually).
Tools for geocoding	Use FFIEC tool (manual)	Use batch processing	Use batch processing with multiple sources.
Tools for completeness checks	Conduct manual checks and rely on CFPB quality/validity checks.	Use LOS, which includes completeness checks.	Use multiple stages of checks.
Tools for edits	Use CFPB edits only	Use CFPB and customized edits	Use CFPB and customized edits run multiple times.
Compliance program	Have a joint compliance and audit office.	Have basic internal and external accuracy audit.	Have in-depth accuracy and fair lending audit.

Note: LOS is "Loan Origination System"; SoR is "System of Record"; SBL DMS is "Small Business Lending Data Management System." [927]

During the rulemaking process for the 2015 HMDA final rule, the Bureau found that the number of loan applications received was largely correlated with overall complexity of financial institutions' compliance operations.[928] The Bureau used this observation of financial institution practices under the previous HMDA rulemaking work, in addition to early outreach to financial institutions and data from Call Reports and publicly available data from the CDFI Fund, to generate assumptions about the annual number of small business lending applications for covered credit transactions processed by each type of financial institution. These assumptions adapt the volume assumptions from the mortgage lending context to address the fact that financial institutions typically process fewer small business credit applications than mortgage applications. The Bureau assumes that Type A FIs receive fewer than 300 applications per year, Type B FIs receive between 300 and 2,000 applications per year, and Type C FIs receive more than 2,000 applications per year. The Bureau assumes that, for Type A and B FIs, one out of two small business applications will result in an origination. Thus, the Bureau assumes that Type A FIs originate fewer than 150 covered credit transactions per year and Type B FIs originate between 150 and 999 covered credit transactions per year. The Bureau assumes that Type C FIs originate one out of three small business applications and at least 1,000 covered credit transactions per year.[929] As described in the comment review below, these methodology assumptions were generally supported by the SBREFA process and comments on the NPRM.

The Bureau understands that costs vary by financial institution due to many factors, such as size, operational structure, and product complexity, and that this variance exists on a continuum that is impossible to fully represent. Due to data limitations, the Bureau is unable to capture many of the ways in which costs vary by institution, and therefore uses these representative financial institutions with the above assumptions for its analysis. In order to aggregate costs to a market level, the Bureau must map financial institutions onto its types using discrete volume categories.

For the hiring costs discussion in part IX.F.3.i and ongoing costs discussion in part IX.F.3.ii below, the Bureau discusses costs in the context of representative institutions for ease of exposition. The Bureau assumes that a representative Type A FI receives 100 small business credit applications per year, a representative Type B FI receives 400 small business credit applications per year, and a representative Type C FI receives 6,000 small business credit applications per year. The Bureau further assumes that a representative Type A FI originates 50 covered credit transactions per year,[930] a representative Type B FI originates 200 covered credit transactions per year, and a representative Type C FI originates 2,000 covered credit transactions per year.

1. Methodology for Estimating One-Time Costs of Implementation of the Final Rule

The one-time cost estimation methodology for the final rule described in this section is the same methodology that the Bureau used in the NPRM unless otherwise noted. The primary differences are the addition of hiring costs, in response to comments, and changes in the wages to reflect the most recent data.

The Bureau has identified the following nine categories of one-time costs that will likely be incurred by financial institutions to develop the infrastructure to collect and report data under the final rule:

1. Preparation/planning
2. Updating computer systems
3. Testing/validating systems
4. Developing forms/applications

[927] The Bureau expects the development of a market for small business data management systems, similar to HMDA management systems, that financial institutions will license or purchase from third parties.

[928] 80 FR 66128, 66270 (Oct. 28, 2015).

[929] The Bureau chose the 1:2 and 1:3 application to origination ratios based on two sources of information. First see Biz2Credit, *Small Business Loan Approval Rates Rebounded in May 2020: Biz2Credit Small Business Lending Index* (May 2020), *https://cdn.biz2credit.com/appfiles/biz2credit/pdf/report-may-2020.pdf,* which shows that, in December of 2019, large banks approved small business loans at a rate of 27.5 percent, while small banks and credit unions had approval rates of 49.9 percent and 40.1 percent. Additionally, the Bureau's supervisory data supports a 33 percent approval rate as a conservative measure among these estimates for complex financial institutions (Type C FIs).

[930] The Bureau discusses a representative Type A FI that will not be covered by the final rule to make the final estimates easier to compare with those in the NPRM and to highlight what the costs of the rule would have been for a financial institution that is not covered by the final rule.

5. Training staff and third parties (such as brokers)
6. Developing policies/procedures
7. Legal/compliance review
8. Post-implementation review of compliance policies and procedures
9. Hiring costs [931]

Pre-NPRM outreach with financial institutions has informed the Bureau's understanding of one-time costs. Financial institutions will likely have to spend time and resources understanding the final rule, developing the required policies and procedures for their employees to follow, and engaging a legal team to review their draft policies and procedures. Additionally, financial institutions may require new equipment, such as new computer systems that can store and check the required data points; new or revised application forms or related materials to collect any data required under the final rule that they do not currently collect, including minority-owned, women-owned, and LGBTQI+-owned business statuses and the ethnicity, race, and sex of applicants' principal owners, and to provide any related disclosures required by the rule. Some financial institutions mentioned that they may store, check, and report data using third-party providers such as Fiserv, Jack Henry, LaserPro, or Fidelity Information Systems, while others may use more manual methods of data storage, checking, and reporting using software applications such as Microsoft Excel. Financial institutions will also engage in a one-time training of all small business lending staff to ensure that employees understand the new policies and procedures. After all new policies and procedures have been implemented and systems/equipment deployed, financial institutions will likely undertake a final internal review to ensure that all the requirements of the final rule have been satisfied.

The Bureau presented one-time cost categories 1 through 8 in the SBREFA Outline and during the SBREFA process in 2020.[932] The small entity representatives generally confirmed that these eight categories listed above accurately capture the components of one-time costs. Small entity representatives did not mention hiring costs during the SBREFA process. The Bureau added the hiring costs category after receiving comments in response to the NPRM.

The Bureau also conducted a survey in 2020 regarding one-time implementation costs for section 1071 compliance targeted at financial institutions who extend small business credit.[933] The Bureau developed the survey instrument based on guidance from industry on the potential types of one-time costs institutions might incur if required to report under a rule implementing section 1071 and tested the survey instrument on a small set of financial institutions, incorporating their feedback prior to implementation. The Bureau worked with several major industry trade associations to recruit their members to respond to the survey. A total of 105 financial institutions responded to the survey.

Estimates from survey respondents form the basis of the Bureau's estimates for one-time costs in assessing the impact of this final rule. The survey was broadly designed to ask about the one-time costs of reporting data under a regime that only included mandatory data points, used a reporting structure similar to HMDA, used the Regulation B definition of an ''application,'' and used the respondent's own internal small business definition. The survey was divided into three sections: Respondent Information, One-Time Costs, and the Cost of Credit to Small Entities.

In the Respondent Information section, the Bureau obtained basic information about the respondent, including information on the type of institution, its size, and its volume of small business lending. (The Bureau did not, however, obtain the actual name or other directly identifying information about respondents.) The One-Time Costs section of the survey measured the total hours, staff costs, and non-salary expenses associated with the different tasks comprising one-time costs. Using the reported costs of each task, the Bureau estimated the total one-time cost for each respondent. The Cost of Credit to Small Entities section dealt with the respondent's anticipated response to the increased compliance costs of being covered by a rule implementing section 1071 in order to understand the potential impacts of the rule on its small business lending activity, including any anticipated potential changes to underwriting standards, volume, prices, product mix, or market participation.

To estimate one-time costs, the Bureau needs information on a financial institution's one-time costs by category and number of originations. Of the 105 total respondents, 49 answered these questions. The Bureau refers to these respondents as the ''cost estimation sample.'' Of these respondents, 42 (86 percent) self-reported that they were a depository institution (bank, saving association, or credit union). The remaining seven (14 percent) were nondepository institutions. Table 6 presents the self-reported asset size of the 42 depository institution respondents in the cost estimation sample.[934]

TABLE 6—ASSET SIZES OF DEPOSITORY INSTITUTIONS IN ONE-TIME COST ESTIMATION SAMPLE

Asset category	Count	Percent of sample
Less than $250 million	9	21.43
$250 million to $500 million	9	21.43
$500 million to $1 billion	7	16.67
$1 billion to $10 billion	8	19.05
$10 billion to $500 billion	9	21.43

For the purposes of estimating one-time costs, the Bureau distinguishes between depository institutions and nondepository institutions. The majority of nondepository institutions are not currently subject to any similar data reporting requirements, with the notable exception of nondepository CDFIs. The Bureau anticipates that covered financial institutions that are not currently subject to data reporting requirements will need to make more changes to their existing business operations in order to comply with the requirements of the final rule. This

[931] The Bureau added this category after the NPRM and did not ask about it in the survey.

[932] SBREFA Outline at 49–52.

[933] The One-Time Cost Survey was released on July 22, 2020; the response period closed on October 16, 2020. The OMB control number for this collection is 3170–0032.

[934] Nondepository institutions also reported assets. The Bureau separately reports asset category for depository institutions because asset sizes are not as comparable between depositories and nondepositories. The Bureau does not report asset sizes for nondepository respondents because there were too few respondents to report separately without risking re-identification of respondents.

expectation is confirmed by the higher estimated one-time costs for nondepository institutions relative to depository institutions from the survey and discussed in part IX.F.3.i.

The Bureau categorizes depository institution respondents in the cost estimation sample into four groups according to the respondents' self-reported total originations. The first group contains the two depository institutions that reported fewer than 25 originations; the Bureau assumes these institutions would not report under the final rule. The second group contains ten depository institutions that reported between 25 and 149 originations.[935] The Bureau categorizes these as Type A DIs (that is, a DI that is a Type A FI as defined above.) The third group contains the 19 depository institutions that reported between 150 and 999 originations. The Bureau categorizes these as Type B DIs. The final group contains the 11 depository institutions that reported 1,000 or more originations. The Bureau categorizes these as Type C DIs.

There are not enough nondepository institutions in the cost estimation sample to separate nondepository institutions into Types A, B, and C and obtain meaningful estimates. Instead, the Bureau is relying on the assumption that nondepository institutions (referred to as Non-DIs for purposes of this analysis) will incur the same one-time costs regardless of the complexity of existing business operations, CDFI status, or coverage by State commercial financing laws.

The Bureau estimated the one-time costs for each of the four categories of financial institutions (Type A DI, Type B DI, Type C DI, and Non-DI) using the following methodology.

For each of the first eight categories of one-time costs, the Bureau asked financial institutions to estimate and report the total number of hours that junior, mid-level, and senior staff would spend on each task, along with any additional non-salary expenses. If a respondent did not provide estimates for any component (*i.e.,* staff hours or non-salary expenses) of any category, it is not counted as part of the cost estimation sample. If a respondent provided estimates for some components but did not provide an estimate for a particular component (*e.g.,* non-salary expenses for preparation/planning) then the Bureau assumed that the respondent estimated zero for that component.

The Bureau asked survey respondents to report the average hourly wage for junior, mid-level, and senior/executive staff involved in the one-time cost categories. However, for the purposes of estimating one-time costs, the Bureau assumes a constant wage across financial institutions for each level of staff. The Bureau has updated the wages for the final rule from the wages used in the NPRM. For junior staff, the Bureau uses $15.64, the 10th percentile hourly wage estimate for ''loan officers'' according to the 2021 Occupational Employment Statistics compiled by the Bureau of Labor Statistics.[936] For mid-level staff, the Bureau uses $38.74, the estimated mean hourly wage estimate for ''loan officers.'' For senior staff, the Bureau used $66.50, the 90th percentile hourly wage estimate for ''loan officers.'' To account for non-monetary compensation, the Bureau also scaled these hourly wages up by 43 percent.[937] The Bureau assumes a total hourly compensation of $22.37 for junior staff, as compared to $28.76, the mean of the junior wages reported by respondents to the survey. The Bureau assumes a total hourly compensation of $55.40 for mid-level staff, as compared to $48.94, the mean of the mid-level wages reported by respondents. The Bureau assumes a total hourly compensation of $95.10, as compared to $90.19, the mean of the senior/executive wages reported by respondents.

For each respondent in the cost estimation sample, the Bureau calculates the cost of each one-time cost category as the sum of the junior wage multiplied by the reported junior hours, the mid-level wage multiplied by the reported mid-level hours, and the senior wage multiplied by the reported senior-level hours and the reported non-salary expenses. The total cost of the first eight categories that the Bureau calculates for each respondent is the sum of the costs across all eight categories.

After calculating the total costs of the first eight categories for each respondent, the Bureau identifies outliers within the four groups of financial institutions (Type A DI, Type B DI, Type C DI, and Non-DI) using the interquartile range method, a standard outlier identification method. For each group of financial institutions, an observation is considered an outlier if the estimated total cost is greater than $1.5 * (P_{75} - P_{25}) + P_{75}$ or less than $P_{25} - 1.5 * (P_{75} - P_{25})$ where P_{75} and P_{25} are the 75th and 25th percentiles, respectively, of total costs within that group. Using this method, the Bureau identified one outlier in each Type A DI, Type B DI, and Type C DI group and no outliers in the Non-DI group.

In addition to the total estimated one-time costs, the Bureau is interested in the hours, non-salary expenses, and total costs associated with each of the different one-time cost categories. For each group, the Bureau estimates each component of one-time costs by taking the mean of the estimated component within the group, after excluding outliers. For example, the estimated number of junior hours required by Type A DIs to update computer systems is the mean number of junior hours reported by the nine Type A DIs that were in the cost estimation sample, excluding one outlier. The Bureau estimated the cost associated with each category as the sum of the junior wage multiplied by the estimated junior hours, the mid-level wage multiplied by the estimated mid-level hours, and the senior-level wage multiplied by the estimated senior hours, and the estimated non-salary expenses.

The Bureau did not include one-time hiring costs in the estimates for the NPRM. In response to comments, the Bureau estimates hiring costs for the final rule estimates. To estimate hiring costs, the Bureau assumes that, prior to implementing the final rule, current staff at a covered financial institution will not have extra capacity to take on new tasks. This assumption implies that each institution will need to hire at least one new employee. The Bureau anticipates that institutions will rearrange tasks across new and existing employees so that the new employees alone will not conduct all work associated with the final rule.

The Bureau assumes that a covered financial institution will need to hire enough full-time equivalent workers (FTEs) to cover the estimated number of staff hours necessary to comply with the final rule on an annual, ongoing basis. In part IX.E.2 below, the Bureau describes how it estimates the ongoing costs to comply with the rule, including the number of hours of staff time an institution needs per application. The Bureau assumes that an FTE will work

[935] The Bureau acknowledges that it uses information collected from institutions that will not be covered by the final rule to estimate the costs of implementing the rule. The Bureau uses these observations to maintain a large enough sample size.

[936] *See* U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Occupational Employment and Wage Statistics* (May 2021), *https://www.bls.gov/oes/current/oes132072.htm.*

[937] The June 2022 Employer Costs for Employee Compensation from the Bureau of Labor Statistics documents that wages and salaries are, on average, about 70 percent of employee compensation for private industry workers. The Bureau inflates the hourly wage to account for 100 percent of employee compensation ((100/70) − 1) * 100 = 43 percent). *See* U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Employer Costs for Employee Compensation* (June 2022), *https://www.bls.gov/news.release/archives/eci_07292022.pdf.*

about 2,080 hours each year (40 hours per week × 52 weeks = 2,080). The Bureau calculates that the total number of FTEs that a covered financial institution will need to hire as the number of hours per application multiplied by the estimated number of applications received per year divided by 2,080, rounded up to the next full FTE. For example, if an institution receives 500 applications per year and spends one hour on each application, it will need to hire one FTE ((1 * 500)/2080 = 0.24, which is round up to the next full FTE, *i.e.,* 1). In part IX.F.3.i, the Bureau also confirms that the estimated additional staff can cover the estimated staff hours required for implementing other one-time changes.

The Bureau calculates the hiring costs using the estimated cost-per-hire of $4,425, estimated by the Society for Human Resource Management.[938] This estimated cost includes advertising fees, recruiter pay and benefits, and employee referrals, among other categories. For each covered financial institution, the estimated hiring cost is $4,425 multiplied by the estimated new FTEs. The estimated total one-time costs are the sum of the estimated hiring costs and the other one-time costs for that institution discussed above.

Comments on the one-time cost methodology of the proposed rulemaking. In the NPRM, the Bureau sought comment on the methods used for estimating one-time costs of implementation. Many industry commenters provided information on the categories of costs that they expect to incur to develop the infrastructure to collect and report data under the proposed rule. In general, the costs these commenters discussed fall in the original eight one-time cost categories listed. Many of these commenters responded to the NPRM that they would incur costs associated with hiring new staff. The Bureau's one-time and ongoing cost methodologies account for the costs associated with paying staff to implement the final rule. The Bureau agrees, however, that the one-time cost methodology outlined in the NPRM could have more fulsomely accounted for the initial cost of hiring new staff to perform these tasks. As described above, the Bureau added hiring costs to one-time cost estimates in response to these comments. Except for hiring costs, commenters did not provide any additional one-time cost categories.

Two trade associations asserted that the Bureau's estimates of one-time costs are too low because the estimates are based on insufficient data for nondepository lenders and, in particular, merchant cash advance providers. The Bureau acknowledges that the scarcity of data for nondepositories pose a challenge when estimating the costs, benefits, and impacts of the final rule. This is particularly true for nondepositories that are not currently subject to a data reporting regime. Through outreach efforts with nondepository institutions and trade associations, the SBREFA process, and the one-time cost survey, the Bureau obtained information about the costs for nondepositories of complying with the final rule. Throughout the section 1022 discussion in the proposed rule, the Bureau also solicited feedback about data and methodologies that would enable it to more precisely estimate the costs of the proposed. The Bureau has reviewed these comments, considered the information provided by the commenters, and adjusted the methodology as described above.

2. Methodology for Estimating Ongoing Costs of Implementation of the Final Rule

The Bureau identified 15 specific data collection and reporting activities that would impose ongoing costs. Table 7 presents the full list of 15 activities. Activities 1 through 3 can broadly be described as data collection activities: these tasks are required to intake data and transfer it to the financial institution's small business data entry system. Activities 4 through 10 are related to reporting and resubmission: these tasks are required to collect required data, conduct internal checks, and report data consistent with the final rule. Activities 11 through 13 are related to compliance and internal audits: employee training, and internal and external auditing procedures required to ensure data consistency and reporting in compliance with the rule. Finally, activities 14 and 15 are related to small business lending examinations by regulators: these tasks will be undertaken to prepare for and assist during regulatory compliance examinations. For the sake of this analysis, the Bureau assumes that all covered financial institutions will be subject to regulatory compliance examinations and thus incur costs related to activities 14 and 15.

TABLE 7—1071 DATA COLLECTION AND REPORTING ACTIVITIES IMPOSING ONGOING COSTS

Number	Activity
1	Transcribing data.
2	Resolving reportability questions.
3	Transferring to Data Entry System, Loan Origination System, or other data storage system.
4	Geocoding data.
5	Standard annual edit and internal checks.
6	Researching questions.
7	Resolving question responses.
8	Checking post-submission edits.
9	Filing post-submission documents.
10	Small business data reporting/geocoding software.
11	Training.
12	Internal audit.
13	External audit.
14	Exam preparation.
15	Exam assistance.

Table 8 provides an example of how the Bureau calculates ongoing compliance costs associated with each compliance task. The table shows the calculation for each activity and notes whether the task would be a ''variable

[938] *See* Soc'y for Hum. Res. Mgmt., *SHRM Customized Talent Acquisition Benchmarking Report,* at 11 (2017), *https://www.shrm.org/ResourcesAndTools/business-solutions/Documents/Talent-Acquisition-Report-All-Industries-All-FTEs.pdf.*

cost,'' which would depend on the number of applications the institution receives, or a ''fixed cost'' that does not depend on the number of applications. Table 8 shows these calculations for a Type A FI, or the institution with the least amount of complexity. Table 9 below summarizes the activities whose calculation differs by institution complexity and shows the calculations for Type B FIs and Type C FIs (where they differ from those for a Type A FI).

TABLE 8—ONGOING COMPLIANCE COST CALCULATIONS FOR A TYPE A FI

Number	Activity	Calculation	Type [939]
1	Transcribing data	Hourly compensation × hours per app. × applications	Variable.
2	Resolving reportability questions	Hourly compensation × hours per app. with question × applications with questions	Variable.
3	Transfer to Data Entry System	Hourly compensation × hours per app. × applications	Variable.
4	Complete geocoding data	Hourly compensation × hours per app. × applications	Variable.
5	Standard annual edit and internal checks	Hourly compensation × hours spent on edits and checks	Fixed.
6	Researching questions	Hourly compensation × hours per app. with question × applications with questions	Variable.
7	Resolving question responses	Hourly compensation × hours per app. with question × applications with questions	Variable.
8	Checking post-submission edits	Hourly compensation × hours checking post-submission edits per application	Variable.
9	Filing post-submission documents	Hourly compensation × hours filing post-submission docs	Fixed.
10	Small business data reporting/geocoding software.	Uses free geocoding software	Fixed.
11	Training	Hourly compensation × hours of training per year × number of loan officers	Fixed.
12	Internal audit	No internal audit conducted by financial institution staff	Fixed.
13	External audit	One external audit per year	Fixed.
14	Exam preparation	Hourly compensation × hours spent on examination preparation	Fixed.
15	Exam assistance	Hourly compensation × hours spent on examination assistance	Fixed.

Many of the activities in Table 8 require time spent by loan officers and other financial institution employees. To account for time costs, the calculation uses the hourly compensation of a loan officer multiplied by the amount of time required for the activity. The Bureau uses a mean hourly wage of $38.74 for loan officers, based on data from the Bureau of Labor Statistics.[940] To account for non-monetary compensation, the Bureau scales this hourly wage by 43 percent to arrive at a total hourly compensation of $55.40 for use in these calculations.[941] The Bureau uses assumptions from its 2015 HMDA final rule analysis, updated to reflect differences between mortgage lending and small business lending, to estimate time spent on ''ongoing tasks.'' [942] As an example of a time calculation, the Bureau estimates that transcribing the required data points would require approximately 11 minutes per application for a Type A FI. The calculation multiplied the number of minutes by the number of applications and the hourly compensation to arrive at the total cost, on an annual basis, of transcribing data. As another example, the Bureau estimates that ongoing training for loan officers to comply with a financial institution's 1071 policies and procedures would take about two hours per loan officer per year. The cost calculation multiplies the number of hours by the number of loan officers and by the hourly compensation.

To arrive at the amount of time required per application for each of the 15 tasks covered financial institutions would conduct to collect, check, and report 1071 data, the Bureau begins with the assumptions made for each task for the 35 data points under the 2015 HMDA final rule and then adjusts these required times relative to the number of data points required under the final rule. The final rule requires covered financial institutions to collect 20 data points for each covered application. Several of these data points have multiple components. For example, the credit type data point has three subcomponents: the product type, the type of guarantee, and the term. The data points for pricing information and the ethnicity, race, and sex of principal owners also have multiple subcomponents.

Some activity costs in Table 8 depend on the number of applications. It is important to differentiate between these variable costs and fixed costs because the type of cost impacts whether and to what extent covered institutions might be expected to pass on their costs to small business loan applicants in the form of higher interest rates or fees (discussed in more detail in part IX.F.4 below). Data collection, reporting, and submission activities such as geocoding data, standard annual edits and internal checks, researching questions, and resolving question responses are variable costs. All other activities are fixed cost because they do not depend on the overall number of applications being processed. An example of a fixed cost calculation is exam preparation, where the hourly compensation is multiplied by the number of total hours required by loan officers to prepare for 1071-related compliance examinations.

Table 9 shows where and how the Bureau assumes Type B FIs and Type C FIs differ from Type A FIs in its ongoing cost methodology. Type B FIs and Type C FIs use more automated procedures, which result in different cost calculations. For example, for Type B FIs and Type C FIs, transferring data to the data entry system and geocoding applications are done automatically by business application data management software licensed annually by the financial institution. The relevant address is submitted for geocoding via batch processing, rather than done manually for each application. The additional ongoing geocoding costs reflect the time spent by loan officers on ''problem'' applications—that is, a percentage of overall applications that the geocoding software misses—rather than time spent on all applications. However, Type B FIs and Type C FIs have the additional ongoing cost of a

[939] In this table, the term ''variable'' means the compliance cost depends on the number of applications. The term ''fixed'' means the compliance cost does not depend on the number of applications (even if there are other factors upon which it may vary).

[940] These data reflect the mean hourly wage for ''loan officers'' according to the 2021 Occupational Employment Statistics compiled by the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Occupational Employment and Wages* (May 2021), *https://www.bls.gov/oes/current/oes132072.htm*.

[941] The June 2022 Employer Costs for Employee Compensation from the Bureau of Labor Statistics documents that wages and salaries are, on average, about 70 percent of employee compensation for private industry workers. The Bureau inflates the hourly wage to account for 100 percent of employee compensation ((100/70) − 1) * 100 = 43 percent). U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Employer Costs for Employee Compensation* (June 2022), *https://www.bls.gov/news.release/archives/eci_07292022.pdf*.

[942] *Home Mortgage Disclosure (Regulation C),* 80 FR 66128 (Oct. 28, 2015). Some differences, for example, are reflected in the number of applications, the number of data points per application, and the number of loan officers for the representative institutions.

subscription to a geocoding software or service as well as a data management software that represents an annual fixed cost of reporting 1071 data. This is an additional ongoing cost that less complex Type A FIs (that are covered financial institutions) will not incur. The Bureau expects that Type A FIs will use free geocoding software available from the FFIEC or the Bureau, which may include a new batch function that could be developed by either the FFIEC or the Bureau.

Additionally, audit procedures differ between the three representative institution types. The Bureau expects a Type A FI would not conduct an internal audit but would pay for an annual external audit. A Type B FI would be expected to conduct a simple internal audit for data checks and also pay for an external audit on an annual basis. Type C FIs would have a sophisticated internal audit process in lieu of an external audit.

TABLE 9—DIFFERENCES IN ONGOING COST CALCULATIONS FOR TYPE B FIS AND TYPE C FIS VERSUS TYPE A FIS

Number	Activity	Difference for a Type B FI	Difference for a Type C FI
3	Transfer to Data Entry System	No employee time cost. Automatically transferred by data management software purchased/licensed.	No employee time cost. Automatically transferred by data management software purchased/licensed.
4	Complete geocoding data	Cost of time per application unable to be geocoded by software.	Few applications that require manual attention. Completed by third-party software vendor.
10	Small business data reporting/geocoding software.	Uses geocoding software and/or data management software that requires annual subscription.	Uses geocoding software and/or data management software that requires annual subscription.
12	Internal Audit	Hourly compensation × hours spent on internal audit	Hourly compensation × hours spent on internal audit.
13	External Audit	Yearly fixed expense on external audit	Only an extensive internal audit and no expenses on external audits.

Table 10 below shows major assumptions that the Bureau makes for each activity for each type of financial institution. Table 10 provides the total number of hours the Bureau assumes are required for each task that requires labor.[943] For example, the Bureau assumes that transcribing data for 100 applications will require 19 hours of labor. The table also shows the assumed fixed cost of software and audits, as well as areas where the Bureau assumes there will be cost savings due to technology. In several cases, the activity does not apply to financial institutions of a certain type, and are therefore not displayed.

TABLE 10—MAJOR ASSUMPTIONS FOR THE REPRESENTATIVE TYPE A FIS, TYPE B FIS, AND TYPE C FIS[944]

Number	Activity	Type A FI	Type B FI	Type C FI
1	Transcribing data	19 hours total	38 hours total	571 hours total.
2	Resolving reportability questions	11 hours total	23 hours total	34 hours total.
3	Transfer to 1071 data management software.	19 hours total	N/A	N/A.
4	Complete geocoding data	7 hours total; reduction in time cost relative to HMDA for software with batch processing.	10 hours total (0.5 hours per "problem" loan × 5% of loans that are "problem").	N/A.
5	Standard annual edit and internal checks.	18 hours total; reduction for online submission platform.	357 hours total; reduction for online submission platform.	741 hours total; reduction for online submission platform.
6	Researching questions	6 hours total	11 hours total	17 hours total.
7	Resolving question responses	1 hour total	1 hour total	1 hour total.
8	Checking post-submission edits	1 hour total	5 hours total	18 hours total.
9	Filing post-submission documents	<1 hour total	<1 hour total	<1 hour total.
10	1071 data management system/geocoding software.	N/A	$8,000	$13,271.
11	Training	24 hours total	120 hours total	800 hours total.
12	Internal audit	N/A	8 hours total	2,304 hours total.
13	External audit	$3,500	$5,000	N/A.
14	Exam preparation	<1 hour total	80 hours total	480 hours total.
15	Exam assistance	2 hours total	12 hours total	80 hours total.

Comments on the ongoing cost methodology of the proposed rulemaking. In the NPRM, the Bureau sought comment on the Bureau's proposed methods to estimate the ongoing costs of the small business lending rule. Many industry commenters described categories of ongoing costs that fell within the categories of ongoing cost activities set forth in the NPRM. Commenters, for example, described needing to transcribe data from the application, train employees, conduct external audits, or prepare for exams. Given the volume of comments affirming these existing categories, the Bureau has retained those existing categories of ongoing cost activities.

Some commenters suggested other categories of ongoing costs not considered by the Bureau in the NPRM. A credit union and a trade association suggested that more time was needed per application to explain to customers the new collection requirements; a bank said more time was needed to explain the requirements to collect ethnicity, race, and sex information. The Bureau believes that its one-time costs categories of ''developing forms and applications'' and ''developing policies and procedures'' already account for these types of costs and any remaining ongoing cost of explaining collection requirements will be minimal. The commenters also did not provide specific estimates for these categories of ongoing costs.

A joint trade association letter described how the rule has the potential to create a new ongoing cost of retaining

[943] Compared to the assumptions in the Bureau's proposal, this table includes additional time assumptions due to the collection of the business's LGBTQI+-owned status.

[944] The representative Type A, Type B, and Type C FIs are assumed to receive, respectively, 100, 400 and 6,000 applications.

the records. These comments focused on the information technology infrastructure associated with the retention of records. The Bureau believes that these costs are best described as one-time costs and are captured in the ''updating computer systems'' category of its one-time costs estimation. The Bureau thus has not included these as additional categories of ongoing costs.

Comments on one-time and ongoing cost estimates based on levels of financial institution complexity. The Bureau received several comments related to its approach to defining complexity and using complexity categories in its one-time and ongoing cost estimation. Several smaller banks and credit unions explained that many of their processes related to collecting, checking, and reporting data to the Bureau under the proposed rule would largely be manual. The Bureau believes that its Type A institution category already takes into account the various manual processes described by these commenters and decided against adding additional categories of complexity.

3. Methodology for Generating Market-Level Estimates of One-Time and Ongoing Costs

To generate market-level cost estimates, the Bureau relies on the estimates of the volume of small business lending originations described in part IX.D above. As with institutional coverage, the Bureau separates market-level cost estimates into estimates for depository institutions and for nondepository institutions. The methodology described below for the final rule is the same methodology that the Bureau used in the NPRM.

For depository institutions, the Bureau estimates which institutions of those that existed at the end of 2019 would likely be covered or not covered by the final rule. For this analysis, the Bureau uses 2019 to represent the first year of coverage. An institution would be required to report data on applications received in 2019 if it originated at least 100 covered originations in each of the preceding two years (*i.e.,* 2017 and 2018). If two depository institutions merged between the end of 2017 and the end of 2019, the Bureau assumes that those institutions would report as one entity. The Bureau then categorizes each institution as a Type A DI, Type B DI, or Type C DI based on its originations in 2019. Depository institutions with 0 to 149 covered originations in 2019 are categorized as Type A. Depository institutions with 150 to 999 covered originations are categorized as Type B. Depository institutions with 1,000 or more covered originations are categorized as Type C. For each depository institution, the Bureau assigns the appropriate estimated one-time cost (including hiring cost as a function of estimated applications), ongoing fixed cost, ongoing variable cost per application, and applications per origination estimates associated with its institution type. The estimated number of annual applications for each institution is the estimated number of originations multiplied by the assumed number of applications per origination for that institution type. The annual ongoing cost for each institution is the ongoing fixed cost plus the ongoing variable cost per application multiplied by the estimated number of applications. The one-time hiring cost for each institution is the estimated number of applications multiplied by the annual staff hours per application divided by 2,080, rounded up to the next full FTE, multiplied by the cost-per-hire.

To generate market-level estimates, the Bureau first calculates the estimated one-time costs, including hiring costs, and annual ongoing costs for each depository institution covered by the rule based on the estimated number of originations for that institution in 2019. The Bureau then sums these costs over the covered depository institutions to find market-level statistics of total costs. As with coverage estimates, the Bureau presents a range for market-level estimates. The range reflects the uncertainty associated with the estimate of costs for banks and savings associations below the CRA reporting threshold. The Bureau has documented how it calculates these ranges in its *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rulemaking.*[945]

The Bureau is unaware of institution-level data on originations by nondepository institutions that are comprehensive enough to estimate costs using the same method as that for depository institutions. Therefore, to generate market-level estimates for nondepository institutions, the Bureau relies on the estimates discussed above and several key assumptions. The Bureau assumes that online lenders and merchant cash advance providers are Type C FIs because they generally have more automated systems and originate more loans. The Bureau assumes that the remaining nondepository institutions are Type B FIs. The Bureau assumes that each nondepository receives the same number of applications as the representative institution for each type, as described above. Hence, the Bureau assumes that online lenders and merchant cash advance providers each receive 6,000 applications per year and all other nondepository institutions receive 400 applications per year. As explained above, the Bureau also assumes that all nondepository institutions have the same one-time costs.

[945] *See https://www.consumerfinance.gov/data-research/research-reports/supplemental-estimation-methodology-institutional-coverage-market-level-cost-estimates-small-business-lending-rulemaking/.*

F. Potential Benefits and Costs to Covered Financial Institutions and Small Businesses

The benefits of the final rule to covered financial institutions and small businesses described in this section are largely the same as the benefits discussed in the NPRM. The discussions have been updated to reflect policy differences between the NPRM and final rule.

1. Benefits to Small Businesses

The final rule will benefit small businesses by collecting data that further the two statutory purposes of section 1071. Those purposes are to facilitate the enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. Some of the benefits to small businesses discussed below stem from the public release of the data collected under the rule. As discussed in more detail in part VIII.B.1, the Bureau intends to exercise its discretion under ECOA section 704B(e)(4) to delete or modify data collected under section 1071 which are or will be available to the public where it determines that such deletion or modification appropriately protects privacy interests. The discussion below considers the benefits of releasing unmodified data, but the Bureau acknowledges that the benefits derived from public disclosure may be lower if modifications or deletions are made.

Data collected and reported under the final rule will be the largest and most comprehensive dataset in the United States on credit availability for small businesses. These data will provide important insight into lending patterns in the small business lending market. Visibility into those patterns should provide important benefits for facilitating fair lending enforcement and enabling identification of community development needs and opportunities.

The data could lead to a more efficient use of government resources in enforcing fair lending laws through more efficient prioritization of fair lending examinations and investigations. The public nature of the dataset will allow for members of the public to review the dataset (subject to modification and deletion decisions by the Bureau) for possible violations of antidiscrimination statutes. The increased transparency will benefit women-owned, minority-owned, and LGBTQI+-owned small businesses directly, in the form of remediation in the event that lenders ultimately are found to have violated fair lending laws, and indirectly, with increased access to credit resulting from the increased transparency as to the lending practices of financial institutions.

Important to the fair lending benefit of the small business lending dataset is the action taken data point. Existing datasets that collect transaction-level data only contain data on originated small business loans. Application-level data, including the action taken data point, will allow users to construct approval or denial rates, for example, for particular financial institutions. Such analyses could indicate whether, for example, women-owned, minority-owned, or LGBTQI+-owned small businesses are being discouraged or denied credit at higher rates than other small businesses, which would warrant further exploration.

Also important are several data fields on the pricing of covered credit transactions that are originated or approved but not accepted. Data users will be able to examine, for example, whether women-owned, minority-owned, or LGBTQI+-owned small businesses are charged higher interest rates, or face higher origination charges or initial annual charges than similarly situated businesses that are not women-owned, minority-owned, or LGBTQI+-owned. The final rule also requires information on prepayment penalties, which can be an important aspect of the total costs of credit for small business owners.[946] Users will be able to examine whether women-owned, minority-owned, or LGBTQI+-owned small businesses are more likely to face prepayment penalties on extended credit.

Several data points included in the final rule will contribute to more accurate fair lending analyses by allowing users to compare credit products with similar characteristics. For example, differences in the risk of extending credit likely lead to differences in approval rates and prices for covered credit transactions based on credit amount applied for and approved, all three aspects of credit type (type of credit product, types of guarantees, and loan term), and credit purpose. Many creditors also consider characteristics about the small business, such as industry, gross annual revenue, or time in business, during their underwriting or pricing processes. Supply and demand for small business credit also varies over time and by location, so the inclusion of census tract, application date, and action taken date could lead to more accurate analyses. More accurate screening for fair lending risk will, for example, reduce the false positive rate observed during fair lending prioritization and increase the efficiency of fair lending reviews.

Communities may use these data to identify gaps in access to credit for small businesses. Identifying those gaps can fuel community development, in partnership with creditors and governmental entities through the development of targeted lending programs, loan funds, small business incubators, and other community-driven initiatives to support small businesses.

Creditors will likely use the data to understand small business lending market conditions more effectively and at a more granular level than is possible with existing data sources, such as Call Reports, data from public lending programs, or privately purchased data. Data collected under the final rule, combined with the institution's existing information on the small business lending market, can help creditors identify potentially profitable opportunities to extend credit. For example, creditors will be able to use census tract information to find areas of high credit demand into which they could consider expanding and other business opportunities for the creditor.

Governmental entities will likely use the data to develop solutions that achieve policy objectives. For example, loan guarantees provided by the SBA's 7(a) and 504 programs are designed to increase the availability of business credit for businesses that otherwise have difficulty accessing credit. Governmental entities will be able to use the comprehensive data on applications for covered credit transactions collected under the final rule to identify additional opportunities to create new—or tailor existing—programs to advance their small business lending policy objectives. Additionally, the data could help facilitate emergency governmental interventions such as disaster relief.

The data collected under the final rule will be the most extensive data on credit access for women-owned, minority-owned, and LGBTQI+-owned small businesses, and such information will help various data users in understanding the needs and opportunities of such businesses. For example, governmental entities often create programs, such as those that reserve government contracts or those that provide grants, that specifically target women-owned and minority-owned businesses. Governmental entities could use data collected under the final rule to alter existing programs or create new ones to meet the needs of these business owners. Private lenders could also use the data to find untapped markets of credit demand from women-owned, minority-owned, and LGBTQI+-owned small businesses.

As one of the premier data sources on the small business credit market, data collected under the final rule will also facilitate rigorous research by academics and advocates. HMDA data, which are similar in many ways to the data that will be collected under the final rule, have been analyzed in many scholarly publications. The data collected under section 1071 will provide public- and private-sector academics and other researchers a clearer window into potential discrimination in the small business credit market, as well as a better understanding of small business credit market trends and dynamics. As in the case of HMDA, data collected under the final rule will be more broadly used to understand how business owners make borrowing decisions, respond to higher prices, and respond to risk.[947]

[946] California, for example, to include prepayment policies as a required component of pricing disclosures in commercial financing (*see* Cal. S.B. 1235 (Sept. 30, 2018), *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235*).

[947] For examples of how HMDA data has facilitated research on the mortgage market, *see, e.g.,* CFPB, *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), *https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf;* CFPB, *Manufactured Housing Finance: New Insights from the Home Mortgage Disclosure Act Data* (May 2021), *https://files.consumerfinance.gov/f/documents/cfpb_manufactured-housing-finance-new-insights-hmda_report_2021-05.pdf;* Neil Bhutta & Benjamin J. Keys, *Moral Hazard during the Housing Boom: Evidence from Private Mortgage Insurance,* 35(2) Review of Fin. Studies (2021), *https://academic.oup.com/rfs/advance-article/doi/10.1093/rfs/hhab060/6279755;* Sumit Agarwal *et al., The Effectiveness of Mandatory Mortgage Counseling: Can One Dissuade Borrowers from Choosing Risky Mortgages?* (Nat'l Bureau of Econ. Research, Working Paper No. 19920, 2014), *https://www.nber.org/system/files/working_papers/w19920/w19920.pdf;* Alexei Alexandrov & Sergei Koulayev, *No Shopping in the U.S. Mortgage Market: Direct and Strategic Effects of Providing Information* (CFPB, Off. of Research Working Paper

The final rule's data points will provide the above benefits in several ways. For example, the action taken and pricing information data points will allow various entities to monitor the tightness of the small business credit market and identify areas where there are high denial rates for small business credit or where it is provided only at high cost, especially to women-owned, minority-owned, or LGBTQI+-owned small businesses. Conversely, the data may also be used to identify areas of business opportunity for creditors or help assess the characteristics of successful business lending. Data on census tract, NAICS code, gross annual revenue, and number of workers will provide insight into the availability of small business credit by geography, industry, and business size. Credit type and credit purpose will provide more information on how women-owned, minority-owned, and LGBTQI+-owned small businesses use credit and whether their use differs from that of other small businesses. Time in business information will allow data users to understand the credit needs of young small businesses, and specifically young women-owned, minority-owned, and LGBTQI+-owned small businesses. Recent research has shown that women-owned and minority-owned businesses face different financing challenges early in the business lifecycle than other firms, primarily driven by less access to external financing.[948]

As creditors, communities, and governmental entities use these data to identify business opportunities, gaps in existing supports and capital access for small businesses, and more targeted policy interventions to support small businesses, small businesses will benefit from increased access to credit. Small businesses will also benefit from credit offerings more closely tailored to their needs as the data are used by creditors and others to develop more targeted credit products.

As described above, the Bureau believes that setting a threshold for coverage at 100 originated loans in each of the preceding two calendar years provides substantial coverage of the small business credit market. While the Bureau could theoretically have collected even more data pursuant to the final rule if it retained the 25-loan threshold proposed in the NPRM, the Bureau is not adopting this threshold in order to ensure that financial institutions with the lowest volume of small business lending experience no pressure to reduce their small business lending activity in order to avoid the fixed costs of coming into compliance with this final rule. While some commenters expressed concern that institutions with a low volume of small business lending might reduce their lending in order to stay under the threshold, the Bureau cannot quantify this risk, particularly given the paucity of data on small business lending.

Comments on the Bureau's estimation of the benefits to small businesses. The Bureau sought comment on its analysis of potential benefits to small businesses as set forth in the NPRM. Many community groups and several business owners agreed that the rule would support fair lending. A small business, a CDFI lender, and some community groups said collecting data will improve visibility and understanding of small businesses, particularly those that are minority- and women-owned. The CDFI lender and a joint letter from community groups, community oriented lenders, and business advocacy groups stated that the data from this rule could be used to identify which products and business models best meet the needs of underserved entrepreneurs. One commenter pointed to agricultural products as a particular sector that would benefit from increased transparency afforded by the rule, particularly regarding the status of minority- and women-owned small businesses. Two community groups and a business advocacy group pointed to how data collected on ethnicity and race under HMDA preceded an increase in lending to minority borrowers, suggesting that a similar pattern may emerge in the small business lending market after the rule goes into effect. Similarly, a few commenters pointed to how data from the Paycheck Protection Program and studies and surveys surrounding the program allowed researchers, regulators, financial institutions, and others to identify disparate lending patterns on the basis of ethnicity and race.

An individual commenter said collecting the data will help improve the collective understanding of small business lending and its interaction with regulations, and noted that other countries, such as Norway, already collect small business lending data on a Federal level. An individual commenter and two community groups suggested that the data could reveal patterns of disparities that are already well-known through lived experiences within their respective communities, particularly Black communities and farming and agricultural communities. A joint letter from community and business advocacy groups pointed to how disaggregation of those identified as Asian has revealed wide variances in income and lending patterns within these diverse communities in the mortgage lending market, suggesting similar disaggregation of race data in the final rule would improve the understanding of these diverse communities in the small business lending market.

A few commenters noted potential positive spillover effects of the rule. One community group noted positive interaction effects between fair lending to small businesses and fair housing, as more people might purchase housing close to where local businesses flourish. An individual and a joint letter from community and business advocacy groups noted that investing in small businesses, particularly in historically underfunded neighborhoods, could provide pathways to economic opportunities for members of marginalized groups and even alleviate wealth gaps based on ethnicity and race. Another commenter similarly noted that the growth of small businesses could reduce unemployment, housing insecurity, and poverty in the surrounding community.

Finally, a few minority small business owners predicted that they would benefit if the rule improved fair lending. These commenters identified the disadvantages minority-owned small businesses face when fair lending is not enforced, including business closure. One of these commenters, along with some community groups, pointed to studies that suggested fair access to credit, such as loan modifications, during the pandemic could have prevented the closure of minority-owned firms, added millions in revenue to the U.S. economy, and created millions of jobs.

A number of commenters described ways in which the final rule would provide benefits consistent with the statutory purposes of section 1071, including the establishment of a comprehensive dataset of small business lending, and the collection of detailed data points that will allow for more accurate analyses of underwriting and pricing patterns. These data, in turn, will permit for better understanding of the supply and demand of credit, and financial institutions' treatment of small business applicants and borrowers, including those that are owned by women and minorities. Commenters corroborated other benefits identified by the Bureau, such as positive spillover effects to fair housing and the local

No. 2017–01, 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948491*.

[948] *See, e.g.,* JPMorgan Chase & Co. Inst., *Small business ownership and liquid wealth* (Mar. 2021), *https://www.jpmorganchase.com/institute/research/small-business/small-business-ownership-and-liquid-wealth-report*.

economy surrounding small businesses. Data from the final rule will help researchers (including, but not limited to, those in the government, private sector, and academia) observe and quantify these benefits, just as researchers have used data from HMDA and the Paycheck Protection Program to identify areas of potential fair lending risk.

On the other hand, many financial institutions and trade associations disagreed with the Bureau's assessment of potential benefits to small businesses. First, several commenters asserted there would be minimal or even no benefit. One bank said there would be no benefit at all. Two banks said there will be ''minimal'' benefit to their clients, to their communities, and to themselves.

Second, other commenters asserted the Bureau overestimated benefits. One bank said the usefulness of standardized data is undercut by the fact that small business lending by small lenders is highly specialized. Two trade associations specified this could be problematic because standardized data ''could result in small business borrowers appearing to be similarly situated, when, in fact, the unique attributes of each borrower would result in different loan pricing by the bank.''

Third, several commenters asserted any benefits would be outweighed by costs, *i.e.,* that there would be little benefit relative to costs. Other comments asserted the Bureau failed to adequately consider the potential benefits and costs to ''consumers'' and ''covered persons'' as required by section 1022(b)(2)(A) of the Dodd-Frank Act. While some of these arguments are discussed in detail in following sections regarding costs, we present some of the arguments here as well. Two community banks and a trade association said costs would outweigh benefits for community banks and small lenders in particular. Another trade association stated data points adopted pursuant to ECOA section 704B(e)(2)(H) in particular will only provide ''minimal'' benefits compared to the cost of collecting the data. Along a similar line of reasoning, three trade associations said the rule would harm the institutions that the rule is designed to benefit. Of these, two asserted that the small, women-owned, and minority-owned businesses the rule is designed to benefit in particular would be harmed.

As detailed above, the Bureau believes that the final rule will have benefits consistent with its two statutory purposes. The data collected under the final rule will be the most extensive data on credit access for women-owned, minority-owned, and LGBTQI+-owned small businesses, and such information will facilitate the enforcement of fair lending laws and help identify business and community development needs.

With respect to comments that asserted the Bureau overestimated the benefits of the rule, the Bureau acknowledges in part IX.C the difficulty of precisely estimating the benefits of the data collection but also details how it estimates the benefits to small businesses using the best information available. With respect to commenters who described how data collected under the final rule would not have all relevant information about a credit application, the Bureau acknowledges this limitation in part IX.C above, but also describes, in part IX.F, how the data will provide significant benefits consistent with the statutory purposes of the rule despite these limitations.

With respect to comments that the costs would outweigh any benefits or that the Bureau did not adequately fulfill the requirements of section 1022(b)(2)(A) of the Dodd-Frank Act, in part IX.E, the Bureau details its methodology for estimating benefits and costs and, in part IX.F, details its estimates of benefits and costs, incorporating feedback from comments on the proposed rule. In doing so the Bureau fulfills its requirement to consider the potential benefits and costs to ''consumers'' and ''covered persons'' as required by section 1022(b)(2)(A) of the Dodd-Frank Act.

2. Benefits to Covered Financial Institutions

The final rule will provide some benefits to some covered financial institutions—*i.e.,* the financial institutions that will be required to collect and report 1071 data on small business applications for credit. The first is some reduction of the compliance burden of fair lending reviews for lower risk financial institutions, by reducing the ''false positive'' rates during fair lending review prioritization by regulators. Currently, financial institutions are subject to fair lending reviews by regulators to ensure that they are complying with ECOA in their small business lending. Data reported under the rule will allow regulators to prioritize fair lending reviews of financial institutions with higher risk of fair lending violations, which reduces the burden on institutions with lower fair lending risk. Covered financial institutions will also be able to use the data to monitor, identify, and address their own fair lending risks and thereby reduce the potential liability from enforcement actions and adverse exam findings requiring remedial action.

The rule's data collection will also provide an unprecedented window into the small business lending market, and such transparency may benefit financial institutions. Comprehensive information on small business credit applications and originations are currently unavailable. The data made public pursuant to this rule will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other covered financial institutions.

Comments on the Bureau's estimation of the benefits to covered financial institutions. The Bureau sought comment on its analysis of potential benefits to covered financial institutions as set forth in the NPRM. A broad range of commenters, including lenders, community groups, small business owners, business advocacy groups, and others, asserted that the final rule will provide an unprecedented window into the small business lending market and thereby facilitate fair lending enforcement.

However, several industry commenters suggested that the Bureau overstated the benefits of the data collection to financial institutions. To reiterate some of the comments in the previous section, a trade association stated that they do not believe the Bureau's rule to implement section 1071 would provide ''any significant benefit'' to financial institutions. Two banks said there will be ''minimal'' benefit to their clients, to their communities, and to themselves. Another trade association noted that lenders are likely already highly aware of the market in which they lend, especially considering that small business loans often require a relatively high degree of customization. Several industry commenters said the usefulness of standardized data is undercut by the fact that small business lending by small lenders is highly specialized to accommodate the highly individualized nature of each business.

The Bureau describes in detail above the potential benefits to financial institutions. The Bureau acknowledges that many lenders may have a high awareness of the local markets in which they lend but believes that the data will still shed light on additional information about areas where lenders do not currently operate and may also shed light on currently underserved markets within the areas lenders currently operate. Comprehensive, application-level data on small business lending will provide financial

institutions better understand their local markets as well as information about markets which they do not currently serve.

3. Costs to Covered Financial Institutions

i. One-Time Costs to Covered Financial Institutions

Using the methodology described in part IX.E.1 above, Table 11 shows the estimated total expected one-time costs of the final rule for the first eight cost categories for financial institutions covered by the final rule as well as a breakdown by the eight component categories that comprise the one-time costs for Type A DIs, Type B DIs, Type C DIs, and Non-DIs.[949] The final cost category, hiring costs, is discussed later in this section. The Bureau notes that the estimated costs presented in Table 11 differ slightly from the estimated costs presented in the NPRM. This difference comes only from the update in wages between the two calculations due to a release of new data.

Table 12 shows the estimated number of junior, mid-level, and senior staff hours and non-salary expenses for each component activity for Type A DIs. Tables 13 through 15 show the same estimates for Type B DIs, Type C DIs and Non-DIs respectively. As discussed above, the Bureau estimates all one-time costs to covered financial institutions using the One-Time Cost Survey results.

TABLE 11—ESTIMATED ONE-TIME COSTS BY COST CATEGORY AND FI TYPE

Category	Type A DI	Type B DI	Type C DI	Non-DI
Preparation/planning	$6,500	$7,400	$20,500	$13,900
Updating computer systems	17,000	17,400	6,900	57,300
Testing/validating systems	11,100	3,200	11,400	7,600
Developing forms/applications	4,300	3,200	4,600	4,400
Training staff and third parties	3,500	3,900	5,300	3,100
Developing policies/procedures	4,200	2,500	3,600	4,300
Legal/compliance review	7,700	3,000	7,300	3,900
Post-implementation review	5,000	4,300	18,000	1,700
Total	59,400	44,800	77,800	96,400

TABLE 12—ESTIMATED STAFF HOURS AND NON-SALARY EXPENSES BY COST CATEGORY FOR TYPE A DIS

Category	Senior hours	Mid-level hours	Junior hours	Non-salary expenses
Preparation/planning	38	43	21	0
Updating computer systems	34	52	41	$10,000
Testing/validating systems	18	52	41	5,600
Developing forms/applications	14	34	51	0
Training staff and third parties	18	26	16	0
Developing policies/procedures	24	30	11	0
Legal/compliance review	28	26	15	3,300
Post-implementation review	26	38	19	0
Total	200	301	215	18,900

TABLE 13—ESTIMATED STAFF HOURS AND NON-SALARY EXPENSES BY COST CATEGORY FOR TYPE B DIS

Category	Senior hours	Mid-level hours	Junior hours	Non-salary expenses
Preparation/planning	50	35	21	$200
Updating computer systems	25	20	12	13,600
Testing/validating systems	18	19	12	100
Developing forms/applications	21	14	7	200
Training staff and third parties	23	29	20	400
Developing policies/procedures	16	13	7	100
Legal/compliance review	14	16	5	700
Post-implementation review	15	22	27	1,100
Total	182	168	111	16,400

TABLE 14—ESTIMATED STAFF HOURS AND NON-SALARY EXPENSES BY COST CATEGORY FOR TYPE C DIS

Category	Senior hours	Mid-level hours	Junior hours	Non-salary expenses
Preparation/planning	92	190	37	$500
Updating computer systems	6	46	35	3,000

[949] The estimated one-time costs by cost category for each FI type is the sum of the wages multiplied by the estimated staff hours plus the non-salary expenses. For example, the Bureau expects that for preparation and planning for the final rule, on average, a Type A DI will pay senior staff $95.10 × 38 hours (= $3,613.80), mid-level staff $55.40 × 43 hours (= $2,382.20), and junior staff $22.37 × 21 hours (= $469.77). The total estimated cost is $6,465.77, rounded to $6,500, because Type A DI is not expected to pay non-salary expenses for preparation and planning.

TABLE 14—ESTIMATED STAFF HOURS AND NON-SALARY EXPENSES BY COST CATEGORY FOR TYPE C DIs—Continued

Category	Senior hours	Mid-level hours	Junior hours	Non-salary expenses
Testing/validating systems	34	110	50	1,000
Developing forms/applications	13	46	34	100
Training staff and third parties	11	61	36	100
Developing policies/procedures	14	30	14	300
Legal/compliance review	9	56	44	2,300
Post-implementation review	3	246	103	1,800
Total	182	785	353	9,100

TABLE 15—ESTIMATED STAFF HOURS AND NON-SALARY EXPENSES BY COST CATEGORY FOR NON-DIs

Category	Senior hours	Mid-level hours	Junior hours	Non-salary expenses
Preparation/planning	38	47	29	$7,100
Updating computer systems	27	147	39	45,700
Testing/validating systems	26	24	39	2,900
Developing forms/applications	30	15	19	300
Training staff and third parties	14	18	17	400
Developing policies/procedures	32	15	14	200
Legal/compliance review	26	18	11	200
Post-implementation review	16	2	1	100
Total	209	286	169	56,900

The Bureau estimates that updating computer systems will be the biggest driver of one-time costs for Type A DIs, Type B DIs, and Non-DIs. Type A DIs and Type B DIs are expected to spend similar amounts on updating computer systems, but Type A DIs would rely somewhat more on staff.

The Bureau expects that Non-DIs will have the highest one-time costs and the highest costs to update computer systems. To update computer systems, Non-DIs will rely on mid-level staff and third-party vendors. Non-DIs will also spend relatively more on preparation and planning than Type A DIs or Type B DIs. These estimates are consistent with the expectation that Non-DIs will incur higher costs because they are less likely to already report data to regulators.

The Bureau estimates that the biggest drivers of one-time costs for Type C DIs will be preparation and planning and post-implementation review. These depository institutions will generally rely on mid-level staff to implement the required one-time changes and, in particular, will rely on mid-level staff for these two key activities. The Bureau estimates that Type C DIs will spend the most of all financial institution types on staff hours to implement one-time changes and the least on non-salary expenses.

The Bureau estimates that one-time costs will be higher for Type A DIs than for Type B DIs. These two types of depository institutions have similar estimated costs for most activities, but Type A DIs are expected to spend more on testing/validating systems and legal/compliance review.

In addition to these one-time costs, the Bureau estimates the one-time hiring costs for the additional FTEs a financial institution expects to hire based on the number of applications the institution expects to receive each year. In the ongoing cost discussion in part IX.F.3.ii below, the Bureau explains how it estimates the number of staff hours per application required to comply with the final rule on an ongoing basis. The Bureau estimates that a Type A FI requires 1.1 hours per application, a Type B FI requires 1.6 hours per application, and a Type C FI requires 0.83 hours per application.

For the purposes of exposition, the Bureau presents the estimated number of FTEs for representative financial institutions. For the market-level estimates, the Bureau estimates the number of staff hours required based on the estimated number of applications each depository institution receives.

The representative Type A FI receives 100 applications annually, requiring 110 hours to comply with the final rule.[950] Under the assumptions described in part IX.E.1 above, the representative Type A FI will need to hire one additional FTE at a one-time cost of $4,425 to cover the expected annual staff hours required to comply with the rule on an ongoing basis. This additional staff will also be able to cover the staff hours required to implement one-time changes because, on average, a Type A DI will require 716 staff hours for one-time changes (see Table 12). The Bureau estimates that the representative Type A DI will incur total one-time costs of $63,825 to implement the final rule.

The representative Type B FI receives 400 applications annually, requiring 654 hours to comply with the final rule. This FI will need to hire one additional FTE at a one-time cost of $4,425. This additional staff will also be able to cover the 461 staff hours, on average, required to implement one-time changes for a Type B DI. The Bureau estimates that the representative Type B DI will incur total one-time costs of $49,225 to implement the final rule.

The representative Type C FI receives 6,000 applications annually, requiring 5,009 hours to comply with the final rule. This FI will need to hire 3 additional FTE at a one-time cost of $13,275. This additional staff will also be able to cover the 1,320 staff hours, on average, required to implement one-time changes for a Type C DI. The Bureau estimates that the representative Type C DI will incur total one-time costs of $91,075 to implement the final rule.

[950] The Bureau discusses a representative Type A FI that will not be covered by the final rule to make the final estimates easier to compare with those in the NPRM and to highlight what the costs of the rule would have been for a financial institution that is not covered by the final rule.

The Bureau assumes that most nondepository institutions are primarily Type B and Type C FIs, so the estimated staff hours to cover ongoing tasks discussed above apply here. For one-time tasks, the Bureau estimates that a nondepository institution will require about 664 staff hours, on average, to implement one-time changes. One additional FTE would be sufficient to cover these hours if the institution reallocates some tasks across staff. The Bureau estimates that the representative Non-DI will incur total one-time costs of $100,825 to implement the final rule.

As mentioned above, the Bureau realizes that one-time costs vary by institution due to many factors, and that this variance exists on a continuum that is impossible to fully represent. The Bureau focuses on representative types of financial institutions in order to generate practical and meaningful estimates of costs. As a result, the Bureau expects that individual financial institutions will have slightly different one-time costs than the average estimates presented here.

The One-Time Cost Survey instructed respondents to assume that covered institutions would be required to report data at the application level on small business financing that constitutes ''credit'' for purposes of ECOA for the 13 statutorily mandated data points one time per year, and be responsible for validating the accuracy of all data. Respondents were further instructed to use their own institution's internal definition of small business, assume the Regulation B definition of an application, and assume a reporting structure similar to that under HMDA. Finally, respondents were instructed to not include any costs associated with creating a firewall (that is, shielding applicants' protected demographic information from certain employees). As such, respondents estimated one-time costs assuming that the final rule would be different in some ways from what the Bureau described as the requirements in the survey. One small entity representative provided feedback during the SBREFA Panel that it was hard to estimate one-time costs in the survey without knowing all the details of the rule. The Bureau sought comment on the one-time costs associated with the additional data points it proposed but did not receive any information on which to base estimates. The Bureau expects that accounting for the additional data points would only increase the one-time cost estimates by a small amount because most of the one-time costs come from a financial institution moving from not reporting 1071 data to being required to report such data.

The Bureau estimates that the overall market impact of one-time costs for depository institutions will be between $147,000,000 and $159,000,000.[951] These estimates include between $47,700,000 and $49,700,000 that depository institutions are estimated to spend on hiring additional staff.[952] Using a 7 percent discount rate and a five-year amortization window, the annualized one-time costs for depository institutions will be $35,700,000 to $38,600,000. The Bureau estimates that the overall market impact of one-time costs for nondepository institutions will be $59,800,000. This estimate includes the $3,630,000 that nondepository institutions are estimated to spend on hiring additional staff. Using a 7 percent discount rate and a five-year amortization window, the annualized one-time costs for nondepository institutions will be $15,500,000. As a frame of reference for these market-level one-time cost estimates, the estimated total non-interest expenses from the FFIEC and NCUA Call Reports for depository institutions that the Bureau estimates would be covered under the proposed rule was between $407 billion and $410 billion in 2019.[953] The upper bound estimate of total one-time costs is approximately 0.04 percent of the total annual non-interest expenses.

The Bureau estimated that the overall market impact of one-time costs from the NPRM would have been between $218,000,000 and $229,000,000 for depository institutions and $94,400,000 for nondepository institutions. The estimated market impacts for the final rule are lower than the estimated impacts from the NPRM because, based on changes made to the thresholds for the coverage of financial institutions in the final rule, the Bureau estimates that fewer financial institutions will be covered by the final rule. The estimates are also different because in the estimates for the final rule, the Bureau updated wages and included hiring costs.

Comments on the one-time cost estimates of the proposed rulemaking. In the NPRM, the Bureau sought comment on its analysis of one-time costs. A few industry commenters expressed the difficulty in estimating these costs. Several other industry comments provided an overall estimate of what they believed the overall one-time costs would be for their institution. These estimates ranged from slightly less than to considerably higher than the Bureau's estimates from the NPRM. For example, a bank with about 300 small business originations per year (a Type B DI in the Bureau's framework) estimated that the one-time implementation costs would be about $36,000. Another bank commenter estimated that it would cost well over $100,000 to implement changes.

A few industry commenters provided estimates of the costs associated with the individual cost categories used by the Bureau to estimate one-time costs. A few commenters provided estimates of the costs associated with updating computer systems in terms of staff hours or software (non-salary) expenses. For example, a State bankers association conveyed an estimate by a member of $5,000 for 1071 data submission software. A credit union commented that it anticipates initial costs of up to $100,000 to reconfigure or replace current reporting systems. A few other commenters provided estimates for other categories. For example, one credit union that originates about 150 small business loans per year estimated that staff would require 200 hours of training to prepare for the rule. A bank commented that it would require 30 to 80 hours to develop policies and procedures.

The Bureau has reviewed these estimates and considered the information reported by the commenters, together with the existing evidence provided in the one-time cost survey. The Bureau reiterates that the costs of implementing the rule are all institution-specific. As discussed above, the one-time cost estimates should be considered the average expected costs for an institution based on the complexity of the institution's operations. In addition, the Bureau expects that financial institutions will use a variety of methods to prepare for the rule. Some institutions will update systems using staff, while other institutions will purchase updates from third-party vendors. For example, one institution might use 50 staff hours to

[951] The Bureau notes that the variation in this range comes primarily from the uncertainty in the number of originations made by small banks and savings associations. The range does not fully account for the uncertainty associated with estimates of the one-time costs for each type of institution.

[952] The Bureau notes that the estimated hiring costs for the largest depository institutions may be an upper bound on the eventual realized costs and may be inflating the total hiring costs for depository institutions. The Bureau's methodology for estimating hiring costs implies that financial institutions with the most applications will need to hire several hundred employees to comply with the final rule. However, the Bureau anticipates that the largest institutions will likely save on these costs by automating some processes instead of hiring staff.

[953] The Bureau estimates this number by summing non-interest expenses over DIs that it estimates will be covered by the final rule.

update computer systems and another institution might pay $10,000 for an updated system. In this case, the Bureau would estimate that, on average, an institution would use 25 staff hours and $5,000 to update computer systems. For another example, a group of trade associations estimated, based on a survey of their members, that it would cost about $40,000 on average for small institutions to update commercial loan software. However, they also estimate that only a third of small institutions would need to update the software. This implies that the average cost associated with updating computer systems, including financial institutions that spend $0, is about $13,000, much closer to the Bureau's non-salary costs of updating computer systems for Type A DIs of $10,000. Overall, the trade association presented estimates only moderately higher than the Bureau's, after accounting for DIs that do not need to update computer systems. The Bureau considers most estimates provided by commenters as broadly consistent with the Bureau's one-time cost estimates.

A few industry commenters asserted that the firewall would be very costly to implement. However, the Bureau believes that, based on comments made on the firewall provision, it would not be feasible for many financial institutions to implement the firewall. In that case, the financial institution would be permitted to determine that one or more employees or officers should have access to protected demographic information and provide a notice to applicants informing them that employees and officers involved in making determinations regarding their applications may have access to protected demographic information. As a result, the Bureau has not changed its one-time cost estimates based on the cost of implementing the firewall.

Many industry commenters specifically stated that the Bureau underestimated one-time costs. Most of these commenters considered the training costs as too low and a few others thought that the technology costs were too low. Some commenters stated that staff would require multiple follow up training sessions to prepare for implementing the rule. However, none of the commenters provided specific information on how much training or technology would cost. The Bureau has not changed the training or technology cost estimates, preferring to rely on the evidence provided through the One-Time Cost Survey.

Many industry commenters expressed concern about being unable to implement the necessary one-time changes in the proposed 18-month implementation time. Several commenters noted the trial and error nature of implementing a new regulation and that this process could take a long time. Several other industry commenters said that third-party software providers would require significant time to develop new technology to comply with the proposed rule and financial institutions would still need to test the technology, conduct due diligence, and develop policies and procedures. A few others commented that small financial institutions, and particularly those unfamiliar with Federal reporting regimes like HMDA, would find it more difficult to implement one-time changes in time to comply with the proposed 18-month timeline. On the one-time costs survey, the Bureau did not ask about the time to make changes to prepare to comply with the eventual rule, nor did it specify an assumed time-frame. The Bureau interprets the survey responses as realistic estimates conditional on having enough time to implement changes. The comments received suggest that most financial institutions, particularly those that receive relatively fewer small business credit applications, would not have had enough time to implement changes in the proposed 18 months. The Bureau expects that the adoption of tiered compliance dates in the final rule, giving most lenders 24 or 33 months to comply with the rule, will give most financial institutions enough time to implement one-time changes in a manner consistent with the Bureau's estimates.

Several industry commenters asserted that the cost of complying with the proposed rule for small entities would be relatively higher than for larger entities. For example, a trade association commented that smaller banks will not be able to exploit the economies of scale necessary to mitigate costs. The Bureau has tried to account for some of these differences by estimating the costs for the different representative types of institutions. The Bureau in its final rule increased the reporting activity threshold from the proposed 25 covered originations in each of the two preceding calendar years to 100 covered originations in each of the two preceding calendar years. The Bureau estimates that many small financial institutions will no longer be required to report 1071 data because of this change in the coverage of financial institutions in the final rule.

ii. Ongoing Costs to Covered Financial Institutions

Using the methodology described in part IX.E.2 above, Table 16 shows the total expected annual ongoing costs of the final rule as well as a breakdown by the component 15 activities that comprise the ongoing costs for Type A FIs, Type B FIs, and Type C FIs. The bottom of the table shows the total estimated annual section 1071 ongoing compliance cost for each type of institution, along with the total cost per application the financial institution processes. To produce the estimates in Table 16, the Bureau used the calculations described in Tables 8 and 9 above and the assumptions for each activity in Table 10. In the following analysis, the Bureau provides examples of these cost calculations for the largest drivers of ongoing costs.

Compared to the NPRM, these estimated ongoing costs account for several changes. The first is a change in the assumed compensation for an hour of employee time, which was discussed in IX.E.2. The second is the inclusion of an additional data point, the LGBTQI+-owned indicator. Lastly, the new estimates account for an increased estimate of ongoing training costs in response to comments received, which is discussed in more detail in the comment review below. Besides these changes, the methodology for estimating ongoing costs remains the same as with respect to the proposed rule, unless explicitly stated otherwise.

TABLE 16—ESTIMATED ONGOING COSTS PER COMPLIANCE TASK AND FI TYPE

Number	Activity	Type A FI	Type B FI	Type C FI
1	Transcribing data	1,108	2,110	31,657
2	Resolving reportability questions	222	443	665
3	Transfer to 1071 data management software	1,108	0	0
4	Complete geocoding data	139	554	300
5	Standard annual edit and internal checks	510	11,126	27,972
6	Researching questions	275	551	826

TABLE 16—ESTIMATED ONGOING COSTS PER COMPLIANCE TASK AND FI TYPE—Continued

Number	Activity	Type A FI	Type B FI	Type C FI
7	Resolving question responses	0	0	0
8	Checking post-submission edits	7	26	105
9	Filing post-submission documents	14	14	14
10	1071 data management software/geocoding software	0	8,000	13,650
11	Training	1,336	6,681	44,542
12	Internal audit	0	443	127,642
13	External audit	3,500	5,000	0
14	Exam preparation	14	4,432	26,592
15	Exam assistance	116	698	4,654
	Total	$8,349	$40,079	$278,618
	Per application	$83	$100	$46

The Bureau estimates that a representative low complexity institution (*i.e.,* a Type A FI) would incur around $8,349 in total annual ongoing costs, or about $83 in total cost per application processed (assuming a representative 100 applications per year). For financial institutions of this type, the largest driver of ongoing costs is the fixed cost of the external audit, $3,500. Besides the audit cost, the largest drivers of the ongoing costs are activities that require employee time to complete. Activities like transcribing data, transferring data to the data management software, standard edits and internal checks, and training all require loan officer time. The Bureau expects training (activity number 11) to cost approximately $1,336 annually for six representative loan officers and an equivalent number of other staff to engage in two hours of training. The Bureau expects other time-dependent activities to cost around $1,000 each. For example, the Bureau assumes that Type A FIs will spend around 19 hours transferring data to 1071 data management software (activity number 3) based on estimates of the required time to transfer data to HMDA data management software. At the assumed hourly compensation, our estimate is around $1,108 for the Type A FI institutions to transfer data. An assumption of around 18 total hours to conduct standard annual editing checks (activity number 5) with some savings assumed due to an online submission platform that automatically checks for errors, results in an estimated annual ongoing cost of $510.

The Bureau estimates that a representative middle complexity institution (*i.e.,* a Type B FI), which is somewhat automated, would incur approximately $40,079 in additional ongoing costs per year, or around $100 per application (assuming a representative 400 applications per year). The largest components of this ongoing cost are the expenses of the small business application management software and geocoding software (activity number 10) in the form of an annual software subscription fee, and the external audit of the data (activity number 13). Using interviews of financial institutions conducted to determine compliance costs with HMDA, the Bureau found mid-range HMDA data management systems to be approximately $8,000 in annual costs; the Bureau believes that cost would be comparable in the small business lending context and thus applies that estimate here. This analysis assumes that the subscription purchase would be separate from HMDA management systems, but the development of a software to jointly manage HMDA and small business lending-related data would likely result in cost savings for both products. The Bureau also estimates that a Type B FI would spend around $5,000 on external audits of their small business loan application data. The Type B FI incurs employee time-related fixed costs conducting internal checks ($11,126), training ($6,681), and prepping for examinations ($4,432) but saves time and expense on data entry and geocoding by using data management software. As an example, the Bureau expects Type B FIs to have two full-time employees spend 40 hours each to prepare for an examination (activity number 14) resulting in a cost of $4,432, and have employees spend around 12 hours assisting with an examination (activity number 15) costing $698 annually.

The Bureau estimates a representative high complexity institution (*i.e.,* a Type C FI), would incur $278,618 of annual ongoing costs, or $46 per application (assuming a representative 6,000 applications per year). The largest driver of costs for a Type C FI is the employee time required to conduct an internal audit. The assumed 2,304 hours of employee time results in nearly $127,642 of ongoing costs annually. Exam preparation, training, and standard annual and internal checks would be expected to cost $26,592, $44,542, and $26,592 each year, respectively. The Bureau also assumes that a Type C institution would need a subscription to a small business data management software near the upper bound of the range found in interviews with financial institutions during the 2015 HMDA rulemaking, of $13,650.

The Bureau estimates that the total annual ongoing costs for depository institutions will be between about $297,000,000 and $313,000,000 per year, about $190,000,000 to $199,000,000 of which will be annual variable costs. The Bureau estimates that the total annual ongoing costs for nondepository institutions would be about $48,700,000, about $9,900,000 of which would be annual variable costs.

The Bureau estimated that the total annual ongoing costs from the NPRM would have been between $310,000,000 and $330,000,000 for depository institutions and $62,300,000 for nondepository institutions. The estimated total ongoing costs decreased between the proposal and the final rule because the Bureau raised the financial institution coverage threshold from 25 to 100 covered originations in each of the two preceding calendar years. However, the cost estimates per institution increased because the Bureau, taking into account comments received on the proposed rule, raised the ongoing costs per application by changing training costs. These changes almost offset each other because, while the final rule covers about 2,200 fewer institutions relative to the proposal due to the change in the financial institution coverage threshold, these institutions that are no longer covered had the fewest number of applications, and ongoing costs are commensurate with the number of applications.

To understand the impacts of these cost estimates on the profits of

depository institutions, the Bureau estimates the average total net income across all products per small business origination for all DIs by type.[954] There is no comprehensive published source of data on profits earned on small business credit transactions. The Bureau presents estimates of total net income per origination as an indication of a financial institution's ability to cover the additional expenses associated with the final rule. The Bureau relies on its estimates of originations for each depository institution, described in part IX.D. and its *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rulemaking.* The Bureau estimates that banks and savings associations of Type A that will be covered by the final rule have an average net income per origination between $134,000 and $167,000. Credit unions of Type A that will be covered by the final rule have an average net income per origination of $144,000. Assuming two applications per origination, a covered bank or savings association of Type A has a net income per application of approximately $67,000 to $83,000 and a covered credit union of the same type has a net income per application of about $72,000. The Bureau estimates that covered banks and savings associations of Type B have an average net income per origination between $65,000 and $75,000 or a net income per application between $33,000 and $38,000. The Bureau estimates that covered credit unions of Type B have an average net income per origination of $229,000 or an average net income per application of $115,000. The Bureau estimates that covered banks and savings associations of Type C have a net income per origination between $252,000 and $278,000, or, assuming three applications per origination, a net income per application between $84,000 and $93,000. The Bureau estimates that covered credit unions of Type C have an average net income per origination of $8,000, and average net income per application of about $4,000. The Bureau notes that these estimates are slightly higher than reported in the proposal due to the higher financial institution coverage threshold in the final rule.

With the publicly disclosed data, users would be able to assess fair lending risks at the institution and market level, furthering section 1071's fair lending purpose. Several commenters to the Bureau's 2017 request for information expressed concerns, however, about costs related to these analyses.[955] During the SBREFA process, some small entity representatives were concerned that published 1071 data could be used against financial institutions in class action litigation or to harm their public reputations.[956] Depending on the extent of publicly disclosed data, the Bureau expects that some financial institutions could incur ongoing costs responding to reports of disparities in their small business lending practices. Some financial institutions could also experience reputational risks associated with high profile reports of existing disparities where more complete analysis of its business practices would conclude that the disparities do not support a finding of discrimination on a prohibited basis. In anticipation of needing to respond to outside analysis and potential reputational risks, it is possible that some financial institutions may choose to change their product offerings available to small businesses, underwriting or pricing practices, or overall participation in the small business lending market. Several commenters expressed similar concerns that fair lending analyses on incomplete data could lead to false positives (*i.e.,* determinations of fair lending violations where none have occurred), that false positives could lead to reputational risk, and that lenders could change their lending behavior to avoid the potential for false positives. These costs associated with reputational risks are difficult to quantify, and commenters on the proposed rule did not provide any specific estimates of these costs.

The Bureau also received feedback that financial institutions could face potential costs with the publication of a public dataset under the final rule either because potential clients would be concerned about their data being collected or because of the additional competitive pressure brought by a publicly available dataset. The costs associated with customer privacy, reputational risk to financial institutions, and additional competitive pressure for financial institutions are difficult to quantify, and commenters on the proposed rule did not provide any specific estimates of these costs.

Comments on the ongoing cost estimates of the proposed rulemaking. Several industry commenters provided estimates of what they believed the overall ongoing costs would be for their institution. These estimates ranged from estimates that were quite similar to the Bureau's estimate for institutions of similar small business credit volume to estimates that were considerably higher than the Bureau's estimates. For example, a group of trade associations estimated that institutions under $500 million in assets, that on average originate 276 small business loans annually, would incur $145 per origination in ongoing cost. The Bureau's estimate in the proposal, for institutions of a similar size was $178 per origination ($89 per application). At the high end, a lender suggested over $1,000 per origination. The Bureau has reviewed these estimates and considered the information provided by the commenters.

The most voluminous category of comments was with respect to future staffing needs in response to the proposed rule. While not specific to any individual category of ongoing cost activity, a number of banks, credit unions, and Farm Credit System lenders, and several trade associations, described the need to hire additional staff to perform several of the ongoing cost activities that require staff time. Many provided estimates of the additional FTEs that the institution would have to hire to comply with the proposed rule. These estimates ranged from one additional FTE to up to 10 additional FTEs. A survey of community banks by a national trade association found that 88 percent of respondents would need to hire an additional FTE and, on average, institutions would have to hire 2–3 FTEs. Several commenters asserted that the hiring of additional staff alone showed that the Bureau's ongoing cost estimates in the proposal were inadequate.

In the ongoing cost estimates of the Bureau's proposal, the Bureau calculated the number of hours required to be spent on section 1071-related tasks, without distinguishing between existing or newly-hired staff. The Bureau assumes that the time spent on

[954] There are no broadly available data on profit per application for nondepository institutions. The Bureau uses the FFIEC Bank and NCUA Credit Union Call Report data from December 31, 2019, accessed on June 25, 2021. The Bureau uses the same internal estimates of small business loan originations as discussed in part VI.B above and total net income across all products. For estimates of net income per origination and per application, the Bureau uses only net income per origination for depository institutions with over 25 originations in 2019.

[955] 82 FR 22318 (May 15, 2017).

[956] For example, one small entity representative was concerned that published 1071 data could lead to increased litigation and thus a higher cost of credit for small businesses. Another expressed concern that pricing information could be misinterpreted by users of 1071 data (for example, according to the small entity representative, higher pricing for one race might be used to infer discrimination when the pricing was in fact unrelated to the race of the applicant). Such a misinterpretation may cause reputational damage and consequently decrease applications.

section 1071-related tasks necessarily takes time away from otherwise profitable activity to which the hours would be put in the rule's absence. Since the Bureau is accounting for time spent in this way, the Bureau believes that its estimates account for the additional staff activity required to be spent to collect, check, and report data under the final rule. For this reason, the Bureau did not change any staffing time estimates, with the below exceptions.

However, hiring additional FTEs would lead some institutions to incur one-time costs of hiring, including search and administrative burden, that they would not have incurred in the absence of the final rule. The Bureau categorizes this type of cost as a one-time cost, where the institution staffs up to be able to comply with the final rule. The Bureau is therefore incorporating the fixed cost of hiring new staff in the manner described in part IX.E.1.

Several commenters also suggested that the specific ongoing costs for training staff were too low in the proposal. As described in the proposal, the Bureau received similar comments during the SBREFA process, but wished to learn additional information through comments on the proposed rule to better estimate the cost of training. Several institutions provided specific annual costs of training employees or estimates of the overall employee time. Others more generally described the need to train more staff than just loan officers, but also administrative and other staff.

The Bureau's ongoing costs estimates only reflected the assumed training time required to train loan officers that directly handle the underwriting process. Based on the comments, the estimates in this final rule reflect a doubling of the number of assumed training hours required on an annual basis in order to account for the additional staff that would have to be trained on an annual basis besides simply the loan officers.

Lastly, the Bureau received several comments specifically about the ongoing cost of 1071 data management software. In addition to confirming this as an appropriate category of ongoing cost activity, several commenters provided specific estimates of the ongoing costs. One commenter's estimate was similar to the estimates the Bureau provided in its proposal, while others provided significantly larger estimates. A survey by a national trade organization found ongoing software cost estimates that were quite similar to the estimates the Bureau provided in its proposal for institutions of Types B and C. As an example, the survey average for institutions similar to Type B institutions in the Bureau's proposal was around $7,000 per year, while the Bureau's estimate in the proposal was $8,000. Taking this information into account, the Bureau has not adjusted its ongoing cost estimates of the annual cost of 1071 data management or geocoding software.

4. Costs to Small Businesses

The Bureau expects that any direct costs of the final rule on small businesses will stem from additional fields that the applicant may have to complete on credit applications due to the final rule compared to a financial institution's existing application process. This could include information such as the race, ethnicity, and sex of the principal owners or number of workers were not previously required on business credit applications. However, the Bureau expects the cost of completing the new section 1071 fields on applications to be negligible. Therefore, the Bureau focuses the rest of the discussion on the costs of small businesses to whether and how the Bureau expects financial institutions to pass on the costs of compliance with the final rule to small businesses and any possible effects on the availability of small business credit.

Three types of costs (one-time, fixed ongoing, and variable ongoing) have the potential to influence the price and availability of credit to small businesses. In a competitive marketplace, standard microeconomics suggests that lenders will extend loans up to the point at which the revenue from granting an additional loan is equal to the additional cost associated with the financial institution providing the loan. One-time costs and fixed ongoing costs affect the overall profitability of a lender's loan portfolio but do not affect the added profit from extending an additional loan. Variable ongoing costs, however, affect the profitability of each additional loan and will influence the number of loans a lender provides. Based on the Bureau's available evidence, it expects that the variable ongoing costs will be passed on in full to small business credit applicants in the form of higher prices or fees and does not expect there to be a significant reduction in small businesses' ability to access credit.

One-time and fixed ongoing costs affect the overall profitability of the loan portfolio and will be considered in the lender's decision to continue supplying small business credit at their current levels. The Bureau believes that a financial institution would find it worthwhile to incur the one-time costs associated with complying with the final rule if it expects to generate enough profit over multiple years to cover those costs. Each year, a financial institution would find it worthwhile to continue extending credit if the total expected revenue from its chosen quantity of loans is greater than the sum of its ongoing fixed and variable costs. As such, the Bureau believes a financial institution would find it worthwhile to reduce their supply of small business credit, even if it had already incurred the one-time costs, if the total expected revenue from that year were less than the total expected ongoing costs.[957] As discussed in detail below, the Bureau believes that a significant disruption in small business credit supply is unlikely.

In the One-Time Cost Survey, the Bureau asked respondents to rank a list of potential actions they may take in response to the compliance costs of implementing section 1071. Respondents ranked the following list: ''Raise rates or fees on small business products''; ''Raise rates/fees on other credit products''; ''Accept lower profits''; ''Exit some geographic markets''; ''Tighten underwriting standards''; ''Offer fewer or less complex products''; ''No longer offer small business credit products''; or ''Other'' with two write-in options. Respondents ranked these options from ''1'' to ''9'' indicating their most to least likely responses, where ''1'' was the most likely.

In order to analyze these responses, the Bureau pooled data only from respondents that answered both the ranking question and the number of originations question. The Bureau implemented these restrictions to the pool to eliminate responses from institutions that would not be required to report under the final rule. Of the 105 total respondents to the One-Time Cost Survey, 44 ranked every option and reported more than 25 originations in the last year.[958] The Bureau will henceforth refer to these respondents as the ''impacts of implementation'' sample.

Table 17 presents the potential responses to implementing section 1071 and the average ranking assigned by respondents in the impacts of implementation sample. The responses

[957] SBREFA Outline at 50–52. The small entity representative feedback discussed herein can be found in the SBREFA Panel Report at 40.

[958] The Bureau discusses a representative Type A FI that will not be covered by the final rule to make the final estimates easier to compare with those in the NPRM and to highlight what the costs of the rule would have been for a financial institution that is not covered by the final rule. The Bureau includes survey respondents with originations below the origination threshold to ensure a large enough sample size for analysis.

are listed in order of most to least likely on average, where a lower average ranking number means that respondents ranked that response most likely. These ranked responses shed light on potential disruptions to small business credit supply as a result of the final rule's implementation. Notably, respondents were least likely to report that they would reduce their small business lending activity, with respondents on average indicating that they would be more likely to accept lower profits than to reduce their small business lending activity.

TABLE 17—ONE-TIME COST SURVEY RESPONSES TO IMPACTS OF IMPLEMENTATION

Response	Average ranking
Raise rates or fees on small business products	1.77
Raise rates/fees on other credit products	2.93
Tighten underwriting standards	3.73
Accept lower profits	3.82
Offer fewer or less complex products	4.59
Exit some geographic markets	5.75
No longer offer small business credit products	6.57

Consistent with economic theory, respondents reported that they would be most likely to raise rates or fees on small business products and other credit products. The Bureau expects that the variable ongoing costs would be passed on in full to small business credit applicants in the form of higher prices or fees. Per application, the variable costs are approximately $32, $26, and $7.5 for Type A FIs, Type B FIs, and Type C FIs, respectively. Even if the variable costs were passed on in full to small business applicants in the form of higher interest rates or fees associated with a loan or line of credit, the Bureau expects that this would comprise a small portion of the total cost of the average loan to the small business applicant. Therefore, the Bureau expects this increase in cost to have limited impact on the availability or affordability of small business credit. The Bureau estimates that the total market impact of these costs for small businesses will be between $200,000,000 and $208,000,000.

The relative ranking of other survey response options provides additional insight into the potential for small business credit supply disruptions. In Table 17, financial institutions ranked ''tighten[ing] credit standards,'' on average, in the middle of their potential responses. The lowest three responses were ''offer fewer or less complex products,'' ''exit some geographic markets,'' and ''no longer offer small business credit products.'' For these reasons, the Bureau believes the survey responses indicate limited likelihood of significant small business credit supply disruptions.

The Bureau's total estimated one-time and ongoing costs are non-negligible and could potentially affect the supply of small business credit by financial institutions that do not regularly originate many covered credit transactions. The Bureau's final institutional coverage threshold of 100 covered credit transactions in two consecutive years could prevent some low-volume financial institutions from reducing small business lending activity in response to the compliance costs of the final rule. For example, the Bureau estimates that a Type A DI would incur one-time costs of $63,825 and fixed ongoing costs of $5,195. A depository institution that originates very few covered transactions every year may reduce its small business lending activity if it does not expect that profits, even over several years, would cover that one-time cost or if it does not expect annual revenues to exceed the annual ongoing costs. However, based on the net income per application estimates discussed above, and the responses to the One-Time Cost Survey, the Bureau believes that institutions that are covered under the final rule are unlikely to find either the one-time costs of implementation or the ongoing costs of compliance a meaningful influence in their business decision regarding small business lending activity. It is possible that some lenders just above the coverage threshold might reduce their small business lending to below the threshold to avoid reporting but, even if this does occur, the Bureau does not anticipate that this will significantly decrease aggregate credit supply. Furthermore, the Bureau's findings from the respondents to the One-Time Cost Survey (discussed above) additionally support the Bureau's conclusion that the increase in compliance costs will likely be passed through to customers in the form of higher prices or fees, rather than a significant reduction in financial institutions' willingness to supply small business credit.[959]

[959] As stated in the SBREFA Panel Report at 40, ''[g]enerally, [small entity representatives] did not suggest that they would leave the small business lending market in response to increased costs under the eventual 1071 rule.''

If the Bureau were to release the data in unmodified form, the Bureau acknowledges there would be an ongoing risk of re-identification, which may bring with it reputational risk for covered financial institutions and more significant privacy risks for small business applicants and related natural persons. Examples of such scenarios and their potential risks are detailed in part VIII.B.4.ii. See part VIII generally for more about how the Bureau's modification and deletion decisions will mitigate these risks.

Comments on the Bureau's estimation of the costs to small businesses. The Bureau sought comment on other potential costs to small businesses not discussed above, and on its analysis of costs to small businesses as described herein. Several trade associations conducted their own surveys, which largely provided support for the Bureau's estimations, specifically that price increases would be the most likely response, and showed limited support for significant market exit.

A number of commenters, mainly lenders and trade associations, described how they expected costs would be passed on to borrowers, namely through higher interest rates or fees, though one lender said they would not raise fees or restrict access to credit. Two trade associations asserted the price of motor vehicles could increase because of the rule's effect on automobile financing. Several industry commenters who cited potential price increases also noted they might have to reduce their overall volume of small business lending. Others who cited potential price increases noted they might reduce the number of product offerings, such as small dollar lending products or insurance premium financing transactions.

Consistent with results from the Bureau's One-Time Cost Survey, comments also provided little evidence to indicate that lenders would exit the

small business credit market. While some lenders and trade associations cited business exit as a potential consequence, only one lender stated they themselves might consider exiting. A group of trade associations noted that in the survey it administered to its own members, there seemed to be little evidence that any of its own members would exit. A few lenders and trade associations asserted that some smaller lenders could exit the market due to increased regulatory burdens and costs. A group of trade associations asserted lenders could even close altogether or merge with other institutions.

One bank estimated how much of its portfolio would be affected by compliance costs; if it were to stop offering loans of less than $50,000 because it decided they were no longer profitable, it would lose up to 59 percent of its agricultural and commercial customers, or 13 percent of its total lending volume. If the bank were to stop offering loans of less than $10,000, it would lose 20 percent of its agricultural and commercial loans, or 1 percent of its total lending volume. The bank observed that because the percentage of customers affected would be greater than the percentage of lending volume affected, these estimates show that borrowers of small loan amounts would be negatively impacted by the rule.

A few lenders noted that, other than price increases, decreased competition from market exit could impact small businesses, namely a lower degree of customization in loan processing and underwriting. Several industry commenters claimed that processing times will increase because of the collection of data fields required by the rule but not otherwise collected in the normal course of business.

The Bureau believes that the comments generally supported the Bureau's expectation that the most likely response to the compliance costs of the final rule will be an increase in interest rates or fees to pass on financial institutions' ongoing variable costs to small business credit applicants. While the Bureau acknowledges the potential for other effects, such as changes in product offerings, changes in loan sizes, increased processing time, tightening of credit standards, or a reduction in market participation by financial institutions, the Bureau does not expect these effects to be large enough to significantly impact the availability of small business credit. Additionally, the Bureau expects that its increased coverage threshold of one hundred loans for each of the two preceding years should reduce the likelihood of reduced small business credit supply by financial institutions who originate few loans per year.

5. Alternatives Considered

This section discusses two categories of alternatives considered: other methods for defining a covered financial institution and limiting the data points to those mandated by section 1071. The Bureau uses the methodologies discussed in parts IX.D and IX.E to estimate the impacts of these alternatives.

First, the Bureau considered multiple reporting thresholds for purposes of defining a covered financial institution. In particular, the Bureau considered whether to exempt financial institutions with fewer than 25, 50, 200, or 500 originations in each of the two preceding calendar years instead of 100 originations, as finalized in the rule. The Bureau also considered whether to exempt depository institutions with assets under $100 million or $200 million from section 1071's data collection and reporting requirements.

Under a 25-origination threshold, which was proposed in the NPRM, the Bureau estimates that about 4,000 to 4,200 depository institutions would report, which is approximately 2,200 more depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 3,600 to 3,800 banks and savings associations and about 400 credit unions would be covered under a 25-origination threshold. The Bureau estimates that about 98 percent of small business loans originated by depository institutions would be covered under a 25-origination threshold, an increase of about 4 percentage points relative to the final rule. The Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would report under this alternative threshold. The Bureau estimates that the total one-time costs across all financial institutions associated with a 25-origination threshold would be about $338,000,000 to $350,000,000, an increase of about $132,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with the 25-origination threshold would be about $392,000,000 to $413,000,000, an increase of between $47,000,000 and $52,000,000 per year relative to the 100-origination threshold.

Under a 50-origination threshold, the Bureau estimates that about 2,900 to 3,100 depository institutions would report, which is approximately 1,100 more depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 2,700 to 2,900 banks and savings associations and about 200 credit unions would be covered under a 50-origination threshold. The Bureau estimates that about 97 percent of small business loans originated by depository institutions would be covered under a 50-origination threshold, an increase of about 3 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with a 50-origination threshold would be about $272,000,000 to $285,000,000, an increase of about $66,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $373,000,000 to $393,000,000, an increase of about $28,000,000 to $32,000,000 per year relative to the 100-origination threshold. Again, the Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would be required to report under this alternative.

Under a 200-origination threshold, the Bureau estimates that about 1,000 to 1,100 depository institutions would report, which is approximately 800 fewer depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 900 to 1,100 banks and savings associations and fewer than 100 credit unions would be covered under a 200-origination threshold. The Bureau estimates that about 91 percent of small business loans originated by depository institutions would be covered under a 200-origination threshold, a decrease of about 3 to 4 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with a 200-origination threshold would be about $159,000,000 to $167,000,000, a decrease of about $47,000,000 to $51,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $314,000,000 to $328,000,000, a decrease of about $31,000,000 to $33,000,000 per year relative to the 100-origination threshold. The Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would be required to report under this alternative.

Under a 500-origination threshold, the Bureau estimates that about 400 to 500 depository institutions would report, which is approximately 1,500 fewer depository institutions relative to the final threshold of 100 originations. The

Bureau estimates that about 400 to 500 banks and savings associations and fewer than 20 credit unions would be covered under a 500-origination threshold. The Bureau estimates that about 88 percent of small business loans originated by depository institutions would be covered under a 500-origination threshold, a decrease of about 3 to 6 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with a 500-origination threshold would be about $128,000,000 to $131,000,000, a decrease of about $78,000,000 to $87,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $281,000,000 to $290,000,000, a decrease of about $64,000,000 to $71,000,000 per year relative to the 100-origination threshold. The Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would be required to report under this alternative.

The Bureau's NPRM discussed the possibility of exempting depository institutions with assets under $100 million or $200 million assets from the final rule. For the purposes of considering these alternatives, the Bureau estimates how institutional coverage and costs would be different if the Bureau required a 25-origination threshold in addition to an asset-based threshold for depository institutions. The Bureau assumes that the alternative proposal would have been that a depository institution would be required to report its small business lending activity for 2019 if it had more than 25 originations in 2017 and 2018 and had assets over the asset-based threshold on December 31, 2018. The Bureau further assumes that if two institutions merged in 2019 then the resulting institution would be required to report if the sum of the separate institutions' assets on December 31, 2018, exceeded the asset-based threshold.

Under a $100 million asset-based and 25-origination threshold, the Bureau estimates that between 3,500 and 3,600 depository institutions would report, approximately 1,600 to 1,700 more depository institutions relative to a 100-origination threshold with no asset-based threshold. The Bureau estimates that about 3,100 to 3,300 banks and savings associations and about 300 credit unions would be covered under a 25-origination and $100 million asset-based threshold. The Bureau estimates that about 98 percent of small business loans originated by depository institutions would be covered under a 25-origination and $100 million asset-based threshold, an increase of about 4 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with the addition of a $100 million asset-based threshold would be about $307,000,000 to $314,000,000, an increase of between $101,000,000 and $104,000,000 relative to the final rule. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $383,000,000 to $403,000,000, an increase of about $38,000,000 to $42,000,000 per year relative to the 100-origination threshold with no asset-based threshold.

Under a $200 million asset-based and 25-origination threshold, the Bureau estimates that about 2,700 depository institutions would report, approximately between 700 and 900 fewer depository institutions relative to a 100-origination threshold with no asset-based threshold. The Bureau estimates that about 2,400 banks and savings associations and about 300 credit unions would be covered under a 25-origination and $200 million asset-based threshold. The Bureau estimates that about 96 percent of small business loans originated by depository institutions would be covered under a 25-origination and $100 million asset-based threshold, an increase of about 2 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with the addition of a $200 million asset-based threshold would be about $259,000,000 to $264,000,000, an increase of between $46,000,000 and $53,000,000 relative to the final rule. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $364,000,000 to $380,000,000, an increase of about $19,000,000 per year relative to the 100-origination threshold with no asset-based threshold.

Second, the Bureau considered the costs and benefits for limiting its data collection to the data points specifically enumerated in ECOA section 704B(e)(2)(A) through (G). In addition to those data points, the statute also requires financial institutions to collect and report any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071. The final rule includes several additional data points that rely solely on that latter authority in section 704B(e)(2)(H). Specifically, the final rule requires that financial institutions collect and report data on application method, application recipient, denial reasons (for denied applications only), pricing information (for applications that are originated or approved but not accepted), NAICS code, number of workers, time in business, and number of principal owners, all of which are adopted based on the Bureau's authority pursuant to section 704B(e)(2)(H). The Bureau has considered the impact of instead finalizing only the collection of those data points enumerated in section 704B(e)(2)(A) through (G).

Requiring the collection and reporting of only the data points enumerated in ECOA section 704B(e)(2)(A) through (G) would result in a reduction in the fair lending benefit of the data compared to the final rule. For example, not collecting pricing information would obscure possible fair lending risk by covered financial institutions. Potential discriminatory behavior is not limited to the action taken on an application, but rather includes the terms and conditions under which applicants can access credit. If the Bureau did not collect pricing information, it would not be able to evaluate potential discriminatory lending practices. As mentioned in part IX.F.1 above, several of the data points the Bureau is finalizing under its ECOA section 704B(e)(2)(H) authority are critical to conducting more accurate and complete fair lending analyses. A reduction in the rule's ability to facilitate the enforcement of fair lending laws would negatively impact small businesses and small business owners and thus run counter to that statutory purpose of section 1071.

Limiting the rule's data collection to only the data points required under the statute would also reduce the ability of the rule to support the business and community development needs and opportunities of small businesses, which is the other statutory purpose of section 1071. For example, not including pricing information would significantly reduce the ability of communities, governmental entities, and creditors to understand credit conditions available to small businesses. Not including NAICS code or time in business would also reduce the ability of governmental entities to tailor programs that can specifically benefit young businesses or businesses in certain industries.

Only requiring the collection and reporting of the data points enumerated in ECOA section 704B(e)(2)(A) through (G) would have reduced the annual ongoing cost of complying with the final rule. Under this alternative, the estimated total annual ongoing costs for Type A FIs, Type B FIs, and Type C FIs would be $7,644; $38,296 and $265,809,

respectively. Per application, the estimated ongoing cost would be $76, $96, and $44 for Type A FIs, Type B FIs, and Type C FIs, respectively. Under this alternative, the estimated total ongoing costs for Type A FIs would be $705 less per year and $7 less per application than the final rule; the estimated total ongoing costs for Type B FIs would be $1,783 less per year and $4 less per application than the final rule; and the estimated total ongoing costs for Type C FIs would be $12,809 per year and $2 per application than the final rule. The estimated total annual market-level ongoing cost of reporting would be between $326,000,000 and $340,000,000, or between about $19,000,000 to $21,000,000 per year less than under the final rule. As discussed above, respondents to the One-Time Cost Survey were instructed to assume that they would only report the statutorily mandated data fields. Hence, the Bureau can only estimate how ongoing costs would be different under this alternative.

G. Potential Impact on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets

As discussed above, the final rule will exclude financial institutions with fewer than 100 originated covered credit transactions in both of the two preceding calendar years. The Bureau believes that the benefits of the final rule to banks, savings associations, and credit unions with $10 billion or less in total assets will be similar to the benefits to covered financial institutions as a whole, discussed above. Regarding costs, other than as noted here, the Bureau also believes that the impact of the final rule on banks, savings associations, and credit unions with $10 billion or less in total assets will be similar to the impact for covered financial institutions as a whole. The primary difference in the impact on these institutions is likely to come from differences in the level of complexity of operations, compliance systems, and software, as well as number of product offerings and volume of originations of these institutions, all of which the Bureau has incorporated into the cost estimates using the three representative financial institution types.

Based on FFIEC and NCUA Call Report data for December 2019, 10,375 of 10,525 banks, savings associations, and credit unions had $10 billion or less in total assets. The Bureau estimates that between 1,700 and 1,900 of such institutions would be subject to the final rule. The Bureau estimates that the market-level impact of the final rule on annual ongoing costs for banks, savings associations, and credit unions with $10 billion or less in assets would be between $124,000,000 and $140,000,000. Regarding one-time costs, the Bureau estimates that the market-level impact of the final rule for banks, savings associations, and credit unions with $10 billion or less in assets would be between $102,000,000 and $114,000,000. Using a 7 percent discount rate and a five-year amortization window, the estimated annualized one-time costs would be between $25,000,000 and $28,000,000.

H. Potential Impact on Small Businesses in Rural Areas

The Bureau expects that small businesses in rural areas will directly experience many of the benefits of the rule described above in IX.F.1. Small businesses in rural areas will directly benefit from facilitating the enforcement of fair lending laws and the enabling of communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. As with all small businesses, small businesses in rural areas may bear some indirect costs of the rule. This would occur if financial institutions serving rural areas are covered by the final rule and if those institutions pass on some or all of their cost of complying with the final rule to small businesses.

The source data from CRA submissions that the Bureau uses to estimate institutional coverage and market estimates provide information on the county in which small business borrowers are located. However, approximately 89 percent of all banks did not report CRA data in 2019, and as a result the Bureau does not believe the reported data are robust enough to estimate the locations of the small business borrowers for the banks that do not report CRA data. The NCUA Call Report data do not provide any information on the location of credit union borrowers. Nonetheless, the Bureau is able to provide some geographical estimates of institutional coverage based on depository institution branch locations.

The Bureau used the FDIC's Summary of Deposits to identify the location of all brick and mortar bank and savings association branches and the NCUA Credit Union Branch Information to identify the location of all credit union branch and corporate offices.[960] A bank, savings association, or credit union branch was defined as rural if it is in a rural county, as specified by the USDA's Urban Influence Codes.[961] A branch is considered covered by the final rule if it belongs to a bank, savings association, or credit union that the Bureau estimated would be included if they exceed 100 originations in 2017 and 2018. Using the estimation methodology discussed in part IX.D above, the Bureau estimates that about 65 to 70 percent of rural bank and savings association branches and about 95 percent of non-rural bank and savings association branches would be covered under the final rule. The Bureau estimates that about 14 percent of rural credit union branches and about 11 percent of non-rural credit union branches would be covered under the final rule.[962]

In a competitive framework in which financial institutions are profit maximizers, financial institutions would pass on variable costs to future small business applicants, but absorb one-time costs and increased fixed costs in the short run.[963] Based on previous HMDA rulemaking efforts, the following seven operational steps affect variable costs: transcribing data, resolving reportability questions, transferring data to a data entry system, geocoding, researching questions, resolving question responses, and checking post-submission edits. Overall, the Bureau estimates that the impact of the final rule on variable costs per application is $32 for Type A FIs, $26 for Type B FIs, and $7.50 for Type C FIs. The Bureau believes that the covered financial institutions that serve rural areas will attempt to pass these variable costs on to future small business applicants.

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[960] *See* Fed. Deposit Ins. Corp., *Summary of Deposits (SOD)—Annual Survey of Branch Office Deposits* (last updated June 1, 2022), *https://www.fdic.gov/regulations/resources/call/sod.html.* The NCUA provides data on credit union branches in the quarterly Call Report Data files. *See* Nat'l Credit Union Admin., *Call Report Quarterly Data, https://www.ncua.gov/analysis/credit-union-corporate-call-report-data/quarterly-data* (last visited Mar. 20, 2023).

[961] This is a similar methodology as used in the Bureau's rural counties list. *See* CFPB, *Rural and underserved counties list, https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/rural-and-underserved-counties-list/* (last visited Mar. 20, 2023).

[962] The Bureau notes that most credit union branches do not belong to covered credit unions because most credit unions did not report any small business loans in the NCUA Call Report data. Of the 5,437 credit unions that existed in December 2019, 4,359 (or 81.5 percent) reported no small business originations in 2017 or 2018.

[963] If markets are not perfectly competitive or financial institutions are not profit maximizers, then what financial institutions pass on may differ. For example, they may attempt to pass on one-time costs and increases in fixed costs, or they may not be able to pass on variable costs. Furthermore, some financial institutions may exit the market in the long run. However, other financial institutions may also enter the market in the long run.

Amortized over the life of the loan, this expense would represent a negligible increase in the overall cost of a covered credit transaction.

The One-Time Cost Survey can shed light on how financial institutions that serve rural communities will respond to the final rule. The Bureau asked respondents to the survey to report whether their institution primarily served rural or urban communities or an even mix. All respondents in the impacts of implementation sample answered this question. Of the 44 respondents in the impacts of implementation sample, 13 primarily serve rural communities, 15 primarily serve urban communities, and 16 serve an even mix. Table 18 presents the potential responses to implementing section 1071 and the average ranking assigned by respondents that serve rural communities, urban communities, an even mix, and all of the respondents in the impacts of implementation sample. The responses are listed in order of most to least likely on average across all respondents, where a lower average ranking number means that respondents ranked that response most likely. Respondents that primarily serve rural communities or an even mix rank raising rates or fees on small business or other credit products as the most likely response. These institutions also rank exiting some geographic markets and no longer offering small business credit products as the least likely response to a rule implementing section 1071.

TABLE 18—ONE-TIME COST SURVEY RESPONSES TO IMPACTS OF IMPLEMENTATION BY TYPE OF COMMUNITY SERVED

Response	Rural (n = 13)	Urban (n = 15)	Even mix (n = 16)	All (n = 44)
Raise rates or fees on small business products	1.62	1.6	2.06	1.77
Raise rates/fees on other credit products	2.54	2.73	3.44	2.93
Tighten underwriting standards	3.46	4.27	3.44	3.73
Accept lower profits	3.77	4.2	3.5	3.82
Offer fewer or less complex products	4.62	4.07	5.06	4.59
Exit some geographic markets	5.69	5.13	6.38	5.75
No longer offer small business credit products	6.62	6.13	6.94	6.57

The Bureau thus does not anticipate any material adverse effect on credit access in the long or short term to rural small businesses.

X. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA)[964] generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements. These analyses must ''describe the impact of the proposed rule on small entities.''[965] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[966] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[967]

In the proposal, the Bureau did not certify that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Bureau convened and chaired a Small Business Review Panel under SBREFA to consider the impact of the proposals under consideration on small entities that would be subject to the rule implementing section 1071 and to obtain feedback from representatives of such small entities. The proposal preamble included detailed information on the Small Business Review Panel. The Panel's advice and recommendations are found in the Small Business Review Panel Final Report[968] and were discussed in the section-by-section analysis of the proposed rule.[969] The proposal also contained an IRFA pursuant to section 603 of the RFA. In this IRFA, the Bureau solicited comment on any costs, recordkeeping requirements, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small businesses; comment regarding any Federal rules that would duplicate, overlap or conflict with the proposed rule; and comment on alternative means of compliance for small entities. Comments addressing individual provisions of the proposed rule are addressed in the section-by-section analysis above. Comments addressing the impact on small entities are discussed below. Many of these comments implicated individual provisions of the final rule or the Bureau's Dodd-Frank Act section 1022 discussion and are also addressed in those parts.

Based on the comments received, and for the reasons stated below, the Bureau believes the final rule will have a significant economic impact on a substantial number of small entities. Accordingly, the Bureau has prepared the following final regulatory flexibility analysis pursuant to section 604 of the RFA.

Final Regulatory Flexibility Analysis

Under RFA section 604(a), when promulgating a final rule under 5 U.S.C. 553, after publishing a notice of proposed rulemaking, the Bureau must prepare a FRFA. Section 603(a) of the RFA also sets forth the required elements of the FRFA. Section 604(a)(1) requires the FRFA to contain a statement of the need for, and objectives of, the rule. Section 604(a)(2) requires the FRFA to contain a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments. Section 604(a)(3) requires the Bureau to respond to any comments filed by the

[964] 5 U.S.C. 601 *et seq.*

[965] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of SBA regulations and reference to the NAICS classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[966] 5 U.S.C. 605(b).

[967] 5 U.S.C. 609.

[968] CFPB, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking* (Dec. 14, 2020), *https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa-report.pdf.*

[969] 86 FR 56356, 56378–510 (Oct. 8, 2021).

Chief Counsel for Advocacy of the SBA in response to the proposed rule and provide a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

The FRFA further must contain a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.[970] Section 603(b)(5) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record. In addition, the Bureau must describe any steps it has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. Finally, as amended by the Dodd-Frank Act, RFA section 604(a)(6) requires that the FRFA include a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

A. Statement of the Need for, and Objectives of, the Rule

As discussed in part I above, section 1071 of the Dodd-Frank Act amended ECOA to require that financial institutions collect and report to the Bureau certain data regarding applications for credit for women-owned, minority-owned, and small businesses.[971] Section 1071's statutory purposes are (1) to facilitate enforcement of fair lending laws, and (2) to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the Bureau to require any additional data that the Bureau determines would aid in fulfilling 1071's statutory purposes. Section 1071 also contains a number of other requirements, including those that address restricting the access of underwriters and other persons to certain data, publication of data, and the Bureau's discretion to modify or delete data prior to publication in order to advance a privacy interest.

As discussed throughout this document, Congress amended ECOA by adding section 1071, which directs the Bureau to adopt regulations governing the collection and reporting of small business lending data. Section 1071 directs the Bureau to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, and permits the Bureau to adopt exceptions to any requirement or to exempt financial institutions from the requirements of section 1071 as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

In addition, as discussed in part II above, currently available data on small business lending are fragmented, incomplete, and not standardized, making it difficult to make meaningful comparisons across products, financial institutions, and over time. This hinders attempts by policymakers and other stakeholders to understand the size, composition, and dynamics of the small business lending marketplace, including the interaction of supply and demand, as well as potentially problematic lending practices, gaps, or trends in funding that may be holding back some communities.[972]

Data collected under the final rule will constitute the largest and most comprehensive data in the United States on credit availability for small businesses. The data collection will also provide an unprecedented window into the small business lending market, and such transparency will benefit financial institutions covered by the rule. The public data published under the final rule will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other lenders. Lenders will likely use the data to understand small business lending market conditions more effectively and at a more granular level than is possible with existing data sources, such as Call Reports, data from public lending programs, or privately purchased data. Data collected under the final rule will enable lenders to identify promising opportunities to extend credit to small businesses.

The final rule will also provide some reduction of the compliance burden of fair lending reviews for lower risk financial institutions by reducing the ''false positive'' rates during fair lending review prioritization by regulators. Currently, financial institutions are subject to fair lending reviews by regulators to ensure that they are complying with ECOA in their small business lending. Data reported under the final rule will allow regulators to prioritize fair lending reviews of lenders with higher risk of potential fair lending violations, which reduces the burden on institutions with lower fair lending risk.

The final rule effectuates Congress's specific mandate to the Bureau to adopt rules to implement section 1071. For a further description of the reasons why agency action is being considered, see the background discussion for the final rule in part II above.

This rulemaking has multiple objectives. The final rule is intended to advance the two statutory purposes of section 1071, which are (1) facilitating enforcement of fair lending laws and (2) enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. To achieve these objectives, the rule will require covered financial institutions to collect and report certain data on applications for covered credit transactions for small businesses, including minority-owned, women-owned, and LGBTQI+-owned small businesses. The data to be collected and reported will include a number of statutorily required data fields regarding small business applications, as well as several additional data fields that the Bureau determined will help fulfill the purposes of section 1071. The Bureau will make available to the public, annually on the Bureau's website, the data submitted to it by financial institutions, subject to deletions or modifications made by the Bureau if the Bureau determines that such deletions or modifications would advance a privacy interest.

B. Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made to the Proposed Rule in the Final Rule as a Result of Such Comments

In accordance with section 603(a) of the RFA, the Bureau prepared an IRFA. In the IRFA, the Bureau estimated the possible compliance cost for small entities with respect to a pre-statute

[970] 5 U.S.C. 603(a)(4).

[971] ECOA section 704B.

[972] While Call Report and CRA data provide some indication of the level of supply of small business credit, the lack of data on small business credit applications makes demand for credit by small businesses more difficult to assess, including with respect to local markets or protected classes.

baseline. Additionally, the IRFA discussed possible impacts on small entities, such as small businesses to whom lenders provide credit.

Very few commenters specifically address the IRFA included in the proposal. Comments made by the SBA Office of Advocacy related to the estimates included in the IRFA are addressed below in part X.B.3. A comprehensive discussion of comments that relate to parts of the regulatory flexibility analysis can be found throughout part IX above. This section addresses specific significant comments that affects the FRFA analysis.

Commenters provided feedback on the overall magnitudes of the one-time and ongoing cost estimates, which form a core part of the IRFA analysis. Some industry commenters provided their own estimates of either their institution's specific one-time or ongoing costs. With respect to one-time costs, the Bureau has reviewed estimates and considered the information provided by the commenters, together with the existing evidence provided in the One-Time Cost Survey. The Bureau considers most estimates provided by commenters as broadly consistent with the Bureau's one-time cost estimates. With respect to ongoing costs, industry commenters' estimates ranged from estimates that were quite similar to the Bureau's estimate for institutions of similar small business credit volume to estimates that were considerably higher than the Bureau's estimates. The Bureau has reviewed these estimates and considered the information provided by the commenters.

Many industry commenters claimed a need to hire additional staff, both with respect to the one-time cost of implementing the rule and the ongoing cost of reporting 1071 data annually. Many provided estimates of the additional FTEs that the institution would have to hire to comply with the proposed rule. These estimates ranged from one additional FTE to up to 10 additional FTEs. A survey of community banks by a national trade association found that 88 percent of respondents would need to hire an additional FTE and, on average, institutions would have to hire 2–3 FTEs. Several commenters asserted that the hiring of additional staff alone showed that the Bureau's one-time and ongoing cost estimates in the proposal were inadequate. In the ongoing costs estimates of the Bureau's proposal, the Bureau calculated the number of hours required to be spent on 1071-related tasks, without distinguishing between existing or newly-hired staff. The Bureau assumes that the time spent on 1071-related tasks necessarily takes time away from otherwise profitable activity to which the hours would be put in the rule's absence. Since the Bureau is accounting for time spent in this way, the Bureau believes that its estimates account for the additional staff activity required to be spent to collect, check, and report data under the final rule. For this reason, the Bureau did not change any staffing time estimates, with exceptions mentioned below.

However, hiring additional FTEs would lead some institutions to incur fixed one-time costs of hiring, including search, administrative burden, and additional training, that they would not have incurred in the absence of the final rule. The Bureau categorizes this type of cost as a one-time cost, where the institution staffs up to be able to comply with the rule. So, while the Bureau has not changed ongoing costs estimates with respect to staff hours, it is incorporating the fixed cost of hiring new staff in its estimation of one-time costs.

Several commenters also suggested that the specific ongoing costs for training staff were too low in the proposal. As described in the proposal, the Bureau received similar comments during the SBREFA process, but wished to learn additional information through comments on the proposed rule to better estimate the cost of training. Several institutions provided specific annual costs of training employees or estimates of the overall employee time expected to be required to comply with the final rule. Others more generally described the need to train more staff than just loan officers, but also administrative and other staff.

The Bureau's ongoing cost estimates only reflected the assumed training time required to train loan officers that directly handle the underwriting process. The Bureau decided, based on the comments to the proposed rule, to double the amount of assumed training hours required on an annual basis to account for the additional staff that would have to be trained on an annual basis besides simply the loan officers. The estimates in this final rule reflect the doubling of annual training hours.

C. Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

SBA Office of Advocacy provided a formal comment letter to the Bureau in response to the proposed rule. This letter expressed concerns that the Bureau underestimated the costs of the proposed rule, that the Bureau did not adequately consider the scope of coverage, and that the Bureau additionally underestimated the effect of the proposed rule on the cost of credit to small entities. Additionally, SBA Office of Advocacy provided specific feedback related to certain provisions of the proposed rule, which are addressed below.

Comments related to the Bureau's cost estimates. SBA Office of Advocacy asserted that the Bureau's estimated costs of compliance in the proposal were too low, arguing, specifically, that training costs were too low and stated that the Bureau had acknowledged that small entity representatives, during the SBREFA process, had noted that the Bureau's training costs might be low because they did not account for enough staff being trained. Regarding these training costs, the Bureau notes that, as SBA Office of Advocacy observed, the proposal identified the feedback from small entity representatives that the training costs might be underestimated. In part VIII.F.3 of the proposal the Bureau sought comments on the training and other estimates to inform the ongoing cost estimation. As noted in part IX.F above, the Bureau has increased its estimates of training costs in response to SBA Office of Advocacy and other comments to account for additional staff that would need to be trained on an ongoing basis.

SBA Office of Advocacy expressed concerns that the Bureau has underestimated the one-time costs, specifically with regard to training costs. As noted in the above methods (part IX.E) and estimations (part IX.F) discussions, the Bureau estimated one-time costs from the Bureau's One-Time Cost Survey, which was conducted of industry participants potentially subject to the Bureau's rule implementing section 1071. The Bureau's Tables 14 through 16 provide averages of survey responses. To obtain final estimates, the Bureau combined this information with relevant information from comments on the proposal. The Bureau reviewed and considered comments on the cost estimates included in its proposal.

SBA Office of Advocacy also asserted that the Bureau underestimated the pass through of compliance costs to small businesses in the form of rates and fees. SBA Office of Advocacy also asserted that, because institutions could charge an application fee, the fee may be a disincentive for small businesses to shop for a better priced loan, and

therefore the overall cost of credit may be higher than indicated.

Regarding these comments on the pass through of costs, the Bureau notes in part IX.F.4 above that it expects the variable portion of ongoing costs to be passed on to small business credit borrowers in the form of higher interest rates and fees. It made this determination from the results to its One-Time Cost Survey, economic theory, and comments on the proposed rule. Additionally, lenders presently have the ability to charge applicants application fees, something that the potential increase in fees from compliance costs associated with this final rule does not change.

Comments related to other aspects of the proposed rule. In the section-by-section analysis of the final rule in part V above, the Bureau has responded to the SBA Office of Advocacy's comments concerning a number of topics in the proposed rule, including the definition of financial institution, the small business definition, the coverage of automobile dealers, the data points generally, the proposed visual observation and surname requirement related to applicants' demographic information, data points adopted pursuant to ECOA section 704B(e)(2)(H), and the compliance date of the rule. SBA Office of Advocacy's comments and the Bureau's responses on these topics are summarized below.

Scope of coverage/definition of financial institution. Initially, SBA Office of Advocacy expressed concern about the scope of coverage, particularly as related to who would be a covered financial institution required to collect and report 1071 data. SBA Office of Advocacy argued that the proposed 25-origination threshold may be too low, and that the Bureau has not analyzed the data fully to determine whether a higher threshold would garner an appropriate amount of information to fulfill the purposes of section 1071. SBA Office of Advocacy further urged the Bureau to consider additional alternative thresholds, and supplement its analysis, including 50-, 100-, 200- and 500-origination threshold alternatives. In the final rule, the Bureau has increased the institutional coverage threshold from 25 to 100 originations annually to address industry concerns regarding the impact on the smallest financial institutions. Smaller lenders play an integral role in lending to parts of the small business sector and the Bureau does not want to risk disruption to this sector, which would run contrary to the business and community development purpose of section 1071. The Bureau also considered higher thresholds, but believes that raising the threshold further would undermine the purposes of section 1071.

Definition of small business. Next, SBA Office of Advocacy commended the Bureau for proposing an alternative size standard to SBA's approach to defining a small business, noting prior feedback concerning the need for a simpler definition that is easy for small business applicants to understand and financial institutions to implement. However, SBA Office of Advocacy noted concern from stakeholders that the $5 million gross annual revenue threshold may be too high for small financial institutions to implement and may cause some of those entities to forgo making business loans. SBA Office of Advocacy urged the Bureau to analyze other possible thresholds at a lower amount that would garner sufficient data, without the risk of smaller banks discontinuing business loans. Although the Bureau considered different threshold amounts and different size standards, it believes that a $5 million gross annual revenue threshold strikes the right balance in terms of broadly covering the small business credit market to fulfill section 1071's statutory purposes while meeting the SBA's criteria for an alternative size standard. The final rule also anticipates updates to this threshold every five years to account for inflation.

Data points—collection of ethnicity and race via visual observation or surname, and data points adopted pursuant to ECOA section 704B(e)(2)(H). SBA Office of Advocacy raised two concerns related to data points required to be collected under section 1071. First, SBA Office of Advocacy argued that the requirement in the proposed rule to collect ethnicity and race information based on visual observation or surname should be removed. SBA Office of Advocacy reiterated concerns expressed during the SBREFA panel about a visual observation requirement. SBA Office of Advocacy further argued that data collected through visual observation or surname could be corrupted by bias or other forms of discrimination, and would therefore be in opposition to the intent of section 1071. They further stated that even well trained and well-motivated financial institutions could make wrong assumptions and taint the quality of the data. After considering the issue further as explained in the section-by-section analysis of § 1002.107(a)(19) above, the final rule does not include a requirement to collect applicant demographic information based on visual observation or surname.

Second, SBA Office of Advocacy urged the Bureau to remove from the rule all data points proposed pursuant to its statutory authority set forth in ECOA section 704B(e)(2)(H), arguing that such data points are not required by section 1071, are costly, and potentially raise privacy concerns. SBA Office of Advocacy noted that these data points could be reverse engineered to determine what businesses were denied credit, particularly in small communities. They focused particularly on pricing data, asserting that these data would be costly and could damage the reputation of the institution by creating unjustified inferences that pricing disparities are due to fair lending violations. The Bureau believes that pricing and the other data points provide valuable information that furthers the dual purposes of section 1071. The Bureau believes that any risks to privacy interests can be addressed through modifications or deletions to public, application-level data, as appropriate.

Next, SBA Office of Advocacy urged the Bureau to work with small automobile dealers to make the direct and indirect impacts of the rulemaking as least burdensome as possible. SBA Office of Advocacy stated that dealers may either directly issue credit or, as noted by a trade association, in many cases, act as intermediaries between buyers and financial institutions, and in those roles may be asked to support financial institutions' compliance with the rule. The Bureau's rule does not apply to motor vehicle dealers.[973] The Bureau has also made revisions to the rule's provisions addressing reporting obligations when multiple financial institutions are involved in originating a single covered credit transaction, which the Bureau believes will provide greater clarity to motor vehicle dealers and the covered financial institutions that work with them, as well as to other covered financial institutions that originate covered credit transactions for small businesses through third parties. In addition, the Bureau has sought to reduce burden on small covered financial institutions through many provisions in the final rule, including, for example, by issuing a sample data collection form that institutions can use to collect protected demographic data from applicants. Finally, SBA Office of Advocacy encouraged the Bureau to consider an implementation period of three years or longer for the rule, rather

[973] The Bureau's rules, including this final rule to implement section 1071, generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

than 18 months as proposed. SBA Office of Advocacy reiterated feedback from a roundtable session it held that an 18-month compliance period would not be sufficient, and it may take up to three years for small financial institutions to comply. They noted that unlike HMDA, financial institutions are not building off a system already in place, and instead need to develop new systems. SBA Office of Advocacy also reiterated feedback during the SBREFA process that supported a two- to three-year implementation period. The Bureau is adopting a tiered compliance date schedule because it believes that smaller and mid-sized lenders would have particular difficulties complying within the single 18-month compliance period proposed in the NPRM. Compliance with the rule beginning October 1, 2024 is required for financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026.[974] The Bureau believes that approximately 90 percent of all covered financial institutions that are themselves ''small'' under the SBA's size standards will fall under the latest compliance date, giving them nearly three years to prepare for compliance with the Bureau's final rule.

D. Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply

For the purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions.[975] A ''small business'' is determined by application of SBA regulations in reference to the North American Industry Classification System (NAICS) classification and size standards.[976] Under such standards, the Bureau identified several categories of small entities that may be subject to the proposed provisions: depository institutions; online lenders and merchant cash advance providers; commercial finance companies; nondepository CDFIs; Farm Credit System members; and governmental lending entities. The NAICS codes covered by these categories are described below.

The following table provides the Bureau's estimate of the number and types of entities that may be affected by the proposed rule:

TABLE 19—ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY CATEGORY

Category	NAICS	Small entity threshold	Est. total covered financial institutions	Est. number of small financial institutions
Depository Institutions	522110, 522180, 522130, 522210	$850 million in assets	1,900	1,000
Online Lenders and Merchant Cash Advance Providers.	522299, 522291, 522320, 518210	$40 million (NAICS 518210); $47 million (NAICS 522299, 522291, 522320).	100	90
Commercial Finance Companies	513210, 532411, 532490, 522220, 522291.	$47 million (NAICS 513210, 522220, 522291); $40 million (NAICS 532490); $45.5 million (NAICS 532411).	240	216
Nondepository CDFIs	522390, 523910, 813410, 522310	$9.5 million (NAICS 813410); $15 million (NAICS 522310); $47 million (NAICS 523910, 522390).	139	132
Farm Credit System members	522299	$47 million	71	31
Governmental Lending Entities	NA	Population below 50,000	70	0

The following paragraphs describe the categories of entities that the Bureau expects would be affected by the final rule.

Depository institutions (banks and credit unions): The Bureau estimates that there are about 1,900 banks, savings associations, and credit unions engaged in small business lending that originate enough covered transactions to be covered by the final rule.[977] These companies potentially fall into four different industry categories, including ''Commercial Banking'' (NAICS 522110), ''Savings Institutions'' (NAICS 522120), ''Credit Unions'' (NAICS 522130), and ''Credit Card Issuing'' (NAICS 522210). All of these industries have a size standard threshold of $850 million in assets. The Bureau estimates that about 1,000 of these institutions are small entities according to this threshold. See part IX.D above for more detail on how the Bureau arrived at these estimates.

Online lenders and merchant cash advance providers: As discussed in more detail in part II.D above, the Bureau estimates that there are about 100 fintech lenders and merchant cash advance providers engaged in small business lending that originate enough covered transactions to be covered by the final rule. These companies span multiple industries, including ''All Other Nondepository Credit Intermediation'' (NAICS 522298), ''Consumer Lending'' (NAICS 522291), ''Financial Transactions, Processing, Reserve, and Clearinghouse Activities'' (NAICS 522320), and ''Data Processing, Housing and Related Services'' (NAICS 518210). All of these industries have a size standard threshold of $40 million in sales (NAICS 518210) or $47 million in sales (all other NAICS). The Bureau assumes that about 90 percent, or 90, of these entities are small according to these size standards.

Commercial finance companies: As discussed in more detail in part II.D above, the Bureau estimates that there are about 240 commercial finance companies, including captive and independent financing, engaged in small business lending that originate enough covered credit transactions to be covered by the final rule. These companies span multiple industries, including ''Software Publishers'' (NAICS 513210), ''Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing'' (NAICS 532411), ''Other Commercial and Industrial Machinery and Equipment Rental and Leasing'' (NAICS 532490), ''Sales financing'' (NAICS 522220) and ''Consumer Lending'' (NAICS 522291). These industries have size standard thresholds of $47 million in sales (NAICS 513210, 522220, 522291), $45.5

[974] The Bureau estimates that most small depository institutions will fall into Tier 3 and will be required to begin complying with the final rule in 2026.

[975] 5 U.S.C. 601(6).

[976] The current SBA size standards are found on the SBA's website, Small Bus. Admin., *Table of size standards* (Mar. 17, 2023), *https://www.sba.gov/document/support-table-size-standards.*

[977] The Bureau notes that the category of depository institutions also includes CDFIs that are also depository institutions.

million in sales (NAICS 532411), or $40 million in sales (NAICS 532490). The Bureau assumes that about 90 percent, or 216, commercial finance companies are small according to these size standards.

Nondepository CDFIs: As discussed in more detail in part II.D above, the Bureau estimates that there are 139 nondepository CDFIs engaged in small business lending that originate enough covered credit transactions to be covered by the final rule. CDFIs generally fall into ''Activities Related to Credit Intermediation (Including Loan Brokers)'' (NAICS 522390), ''Miscellaneous Intermediation'' (NAICS 523910), ''Civic and Social Organizations'' (NAICS 813410), and ''Mortgage and Nonmortgage Loan Brokers'' (NAICS 522310). These industries have size standard thresholds of $9.5 million in sales (NAICS 813410), $15 million in sales (NAICS 522310), and $47 million in sales (NAICS 522390, 523910). The Bureau assumes that about 95 percent, or 132, nondepository CDFIs are small entities.

Farm Credit System members: The Bureau estimates that there are 71 members of the Farm Credit System (banks and associations) that are engaged in small business lending and that originate enough covered credit transactions to be covered by the final rule.[978] These institutions are in the ''International, Secondary Market, and All Other Credit Intermediation'' (NAICS 522299) industry. The size standard for this industry is $47 million in sales. The Bureau estimates that 18 members of the Farm Credit System are small entities.

Governmental lending entities: As discussed in more detail in part II.D above, the Bureau estimates that there are about 70 governmental lending entities engaged in small business lending that originate enough covered credit transactions to be covered by the final rule. ''Small governmental jurisdictions'' are the governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand. The Bureau assumes that none of the governmental lending entities covered by the final rule are considered small.

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report or Record

Reporting requirements. ECOA section 704B(f)(1) provides that ''[t]he data required to be compiled and maintained under [section 1071] by any financial institution shall be submitted annually to the Bureau.'' Section 1071 requires financial institutions to collect and report information regarding any application for ''credit'' made by women-owned, minority-owned, and small businesses. In its rule to implement section 1071, the Bureau is not covering the following transactions: leases, factoring, consumer-designated credit used for business purposes, HMDA-reportable transactions, insurance premium financing, trade credit, public utilities credit, securities credit, and incidental credit.

Under the final rule, financial institutions would be required to report data on small business credit applications if they originated at least 100 covered transactions in each of the previous two calendar years. The Bureau is requiring that data collection occur on a calendar-year basis and submitted to the Bureau by the following June 1. Under the final rule, covered financial institutions are required to collect and report the following data points: (1) a unique identifier, (2) application date, (3) application method, (4) application recipient, (5) credit type, (6) credit purpose, (7) amount applied for, (8) amount approved or originated, (9) action taken, (10) action taken date, (11) denial reasons, (12) pricing information, (13) census tract, (14) gross annual revenue, (15) NAICS code, (16) number of workers, (17) time in business, (18) minority-owned business status, women-owned business status, and LGBTQI+-owned business status, (19) ethnicity, race, and sex of principal owners, and (20) the number of principal owners. The section-by-section analyses in part V above discuss the required data points and the scope of the final rule in greater detail.

Recordkeeping requirements. ECOA section 704B(f)(2)(A) requires that information compiled and maintained under section 1071 be ''retained for not less than 3 years after the date of preparation.'' The Bureau is requiring that financial institutions retain 1071 data for at least three years after it is submitted to the Bureau. In accordance with 704B(e)(3), the Bureau is also instituting a prohibition on including certain personally identifiable information about any individuals associated with small business applicants in the data that a financial institution is required to compile, maintain, and report to the Bureau, other than information specifically required to be collected and reported (such as the ethnicity, race, and sex of principal owners and whether the business is women-owned, minority-owned, or LGBTQI+-owned). Financial institutions must, unless subject to an exception, limit the access of certain officers and employees to applicants' responses to the inquiries regarding women-owned, minority-owned, and LGBTQI+-owned business status, as well as the ethnicity, race, and sex of principal owners. In addition, applicants' responses to the inquiries regarding women-owned, minority-owned, and LGBTQI+-owned business status, as well as the ethnicity, race, and sex of principal owners, must be maintained separately from the application and accompanying information.

Costs to small entities. The Bureau expects that the proposed rule may impose one-time and ongoing costs on small-entity providers of credit to small businesses. The Bureau has identified eight categories of one-time costs that make up the components necessary for a financial institution to develop the infrastructure to collect and report data required by the rule. Those categories are preparation/planning; updating computer systems; testing/validating systems; developing forms/applications; training staff and third parties (such as dealers and brokers); developing policies/procedures; legal/compliance review; and post-implementation review of compliance policies and procedures. The Bureau conducted a survey regarding potential one-time implementation costs for section 1071 compliance targeted at financial institutions who extend small business credit. The Bureau used the results of this survey to estimate the one-time costs for financial institutions covered by the proposed rule using the methodology described in part VIII.E.1 above. The Bureau estimates that depository institutions with the lowest level of complexity in compliance

[978] Fed. Farm Credit Banks Funding Corp., *Farm Credit 2019 Annual Information Statement of the Farm Credit System,* at 7 (Feb. 28, 2020), *https://www.farmcreditfunding.com/ffcb_live/serve/public/pressre/finin/report.pdf?assetId=395570.* The Bureau notes that Farm Credit System banks do not report FFIEC Call Reports and are thus not counted in the number of banks and savings associations discussed above. To estimate the number of small Farm Credit System members, the Bureau considered FCA Call Reports and Young, Beginning, and Small Farmers Reports for all Farm Credit System members as of December 31, 2019. The reports can be found at *https://reports.fca.gov/CRS/.* A Farm Credit System is covered if it reported more than 100 total number of loans on its Young, Beginning, and Small Farmers Report in 2019. A Farm Credit System member is considered small if its net interest income plus total non-interest income is less than $41.5 million.

operations (*i.e.,* Type A DIs) would incur one-time costs of $63,825, including expected hiring costs. The Bureau estimates that depository institutions with a middle level of complexity in compliance operations (*i.e.,* Type B DIs) would incur one-time costs of $49,225, including expected hiring costs. The Bureau estimates that depository institutions with the highest level of complexity in compliance operations (*i.e.,* Type C DIs) would incur one-time costs of $91,075, including expected hiring costs. Finally, the Bureau estimates that Non-DIs would incur one-time costs of $105,250, including the costs of hiring two additional staff.

The Bureau estimates that the overall market impact of one-time costs for small depository institutions will be between $56,000,000 and $67,000,000.[979] The Bureau estimates that the overall market impact of one-time costs for Non-DIs will be about $45,000,000.

Adapting ongoing cost methodology from previous HMDA rulemaking efforts, the Bureau identified 15 specific data collection and reporting activities that would impose ongoing costs to financial institutions covered by the rule.[980] The Bureau estimates that representative financial institutions with the lowest level of complexity in compliance operations (*i.e.,* Type A FIs) would incur around $8,349 in total annual ongoing costs, or about $83 in total cost per application processed (assuming a representative 100 applications per year). For financial institutions of this type, the largest drivers of the ongoing costs are activities that require employee time to complete. Activities like transcribing data, transferring data to the data management software, standard edits and internal checks, and training all require loan officer time. The Bureau estimates that financial institutions with a middle level of complexity in compliance operations (*i.e.,* Type B FIs), which are somewhat automated, would incur approximately $40,079 in additional ongoing costs per year, or around $100 per application (assuming a representative 400 applications per year). The largest components of this ongoing cost are the expenses of the small business application management software and geocoding software (in the form of an annual software subscription fee) and the external audit of the data. The Bureau estimates that financial institutions with the highest level of complexity in compliance operations (*i.e.,* Type C FIs), which are significantly automated, would incur approximately $278,618 in additional ongoing costs per year, or around $46 per application (assuming a representative 6,000 applications per year). The largest components of this ongoing cost are the cost of an internal audit, transcribing data, and annual edits and internal checks.

The Bureau estimates that the overall market impact of ongoing costs for small entities will be between $83,000,000 and $96,000,000 per year.

Estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record. Section 603(b)(4) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The recordkeeping and compliance requirements of the final rule that would affect small entities are summarized above. Based on outreach with financial institutions, vendors, and governmental agency representatives, the Bureau classified the operational activities that financial institutions would likely use for section 1071 data collection and reporting into 15 operational ''tasks'' which can be further grouped into four ''primary tasks.'' These are:

1. *Data collection:* Transcribing data, resolving reportability questions, and transferring data to a 1071 data management system.
2. *Reporting and resubmission:* Geocoding, standard annual edit and internal checks, researching questions, resolving question responses, checking post-submission edits, filing post-submission documents, and using vendor data management software.
3. *Compliance and internal audits:* Training, internal audits, and external audits.
4. *Section 1071-related exams:* Exam preparation and exam assistance.

All these tasks are related to the preparation of reports or records and most of them are performed by compliance personnel in the compliance department of financial institutions. For some financial institutions, however, the data intake and transcribing stage could involve loan officers or processors whose primary function is to evaluate or process loan applications. For example, at some financial institutions the loan officers would take in information from the applicant to complete the application and input that information into the reporting system. However, the Bureau believes that such roles generally do not require any additional professional skills related for the recordkeeping or other compliance requirements of this final rule that are not otherwise required during the ordinary course of business for small entities. The Bureau also notes that small nondepository institutions might not be subject to fair lending exams and might, therefore, have reduced costs.

The type of professional skills required for compliance varies depending on the particular task involved. For example, data transcribing requires data entry skills. Transferring data to a data entry system and using vendor data management software requires knowledge of computer systems and the ability to use them. Researching and resolving reportability questions requires a more complex understanding of the regulatory requirements and the details of the relevant line of business. Geocoding requires skills in using the geocoding software, web systems, or, in cases where geocoding is difficult, knowledge of the local area in which the property is located. Standard annual editing, internal checks, and post-submission editing require knowledge of the relevant data systems, data formats, and section 1071 regulatory requirements in addition to skills in quality control and assurance. Filing post-submission documents requires skills in information creation, dissemination, and communication. Training, internal audits, and external audits require communications skills, educational skills, and regulatory knowledge. Section 1071-related exam preparation and exam assistance involve knowledge of regulatory requirements, the relevant line of business, and the relevant data systems.

The Standard Occupational Classification code has compliance officers listed under code 13–1041. The Bureau believes that most of the skills required for preparation of the reports or records related to this rule are the skills required for job functions performed in this occupation. However, the Bureau recognizes that under this general occupational code there is a high level of heterogeneity in the type of skills required as well as the corresponding labor costs incurred by the financial institutions performing these functions. During the SBREFA process, some small entity representatives noted that, for instance, high-level corporate officers

[979] The Bureau notes that the variation in this range comes primarily from the uncertainty in the number of originations made by small banks and savings associations. The range does not fully account for the uncertainty associated with estimates of the one-time costs for each type of institution.

[980] The Bureau applied the same methodology for the ongoing costs for small entities as that found in part IX.E.2 above.

such as CEOs and senior vice presidents could be directly involved in some regulatory tasks. The Bureau acknowledges the possibility that certain aspects of the final rule may require some small entities to hire additional compliance staff. The Bureau received many comments on its proposal that asserted that industry participants would have to hire additional employees to comply with the rule. The Bureau made changes to its estimates of one-time costs to reflect the additional one-time cost of hiring new staff. Compliance with the final rule may emphasize certain skills. For example, new data points may increase demand for skills involved in researching questions, standard annual editing, and post-submission editing. Nevertheless, the Bureau believes that compliance would still involve the general set of skills identified above. The recordkeeping and reporting requirements associated with the final rule would also involve skills for information technology system development, integration, and maintenance. Financial institutions required to report data under HMDA often use data management systems called HMDA Management Systems for existing regulatory purposes. A similar software for reporting the data required under the final rule could be developed by the institution internally or purchased from a third-party vendor. It is possible that other systems used by financial institutions, such as loan origination systems, might also need to be upgraded to capture new data fields required to be collected and reported under the final rule. The professional skills required for this one-time upgrade would be related to software development, testing, system engineering, information technology project management, budgeting and operation.

F. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected; and for a Covered Agency, as Defined in Section 609(d)(2), a Description of the Steps the Agency Has Taken To Minimize Any Additional Cost of Credit for Small Entities

In drafting this final rule, the Bureau considered multiple financial institution reporting thresholds. In particular, the Bureau considered whether to exempt financial institutions with fewer than 25, 50, 200, or 500 originations of covered credit transactions for small businesses in each of the two preceding calendar years, instead of 100 originations as finalized. The Bureau also considered whether to exempt depository institutions with assets under $100 million or $200 million from section 1071's data collection and reporting requirements. The Bureau expects that some burden reduction will result from the higher threshold of 100 loans.

The following table shows the estimated impact that different reporting thresholds the Bureau considered would have had on financial institution coverage. For the purposes of considering the asset-based threshold alternatives, the Bureau estimates how institutional coverage and costs would be different if the Bureau required a 25-origination threshold in addition to an asset-based threshold for depository institutions. For the asset-based threshold alternatives, the Bureau assumes that the alternative proposal would have been that a depository institution would be required to report its small business lending activity for 2019 if it had more than 25 originations in both 2017 and 2018 and had assets over the asset-based threshold on December 31, 2018. The Bureau further assumes that if two institutions merged in 2019 then the resulting institution would be required to report if the sum of the separate institutions' assets on December 31, 2018 exceeded the asset-based threshold.

TABLE 20—ESTIMATED IMPACT OF DIFFERENT REPORTING THRESHOLDS ON THE NUMBER AND PERCENTAGE OF SMALL DEPOSITORY INSTITUTIONS COVERED

Threshold considered	Number of small depository institutions covered	% of small depository institutions covered
25 originations	2,900–3,000	32–33
50 originations	1,900–2,100	21–23
100 originations	1,000–1,100	11–12
200 originations	400–500	4–6
500 originations	50–100	0.6–1
25 originations AND $100 million in assets	2,400–2,500	26–28
25 originations AND $200 million in assets	1,600–1,700	18–19

Further, the Bureau is finalizing several data points pursuant to its authority under ECOA section 704B(e)(2)(H) that is has concluded would help the data collection fulfill the purposes of section 1071: application method, application recipient, pricing, number of principal owners, NAICS code, number of workers, and time in business.

During the SBREFA process, small entity representatives provided detailed feedback on the data points that the Bureau was considering proposing pursuant to ECOA section 704B(e)(2)(H).[981] One small entity representative stated that the cost of collecting and reporting such data points under consideration would be significant, and another stated that the Bureau should include as few data points as possible to avoid unnecessary costs. Another small entity representative stated that the Bureau should finalize a rule with just the data points enumerated in 704B(e)(2)(A) through (G) and avoid adding any additional data points. Other small entity representatives favored or opposed the inclusion of some or all of the individual data points under consideration during the SBREFA process. Many industry commenters and SBA Office of Advocacy opposed the collection of any data points pursuant to section 704B(e)(2)(H). These commenters stated that such data points would be burdensome to collect and report, while some, particularly the

[981] The small entity representative feedback discussed herein can be found in the SBREFA Panel Report at 30–32.

pricing data point, could be subject to misinterpretation by data users.

The Bureau understands that certain data points may introduce additional burden to small entities. However, the Bureau has determined that these data points would aid in fulfilling the statutory purposes of section 1071—facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Three types of costs (one-time, fixed ongoing, and variable ongoing) have the potential to influence the price and availability of credit to small businesses. In a competitive marketplace, standard microeconomics suggests that lenders will extend loans up to the point at which the value of granting an additional loan is equal to the additional cost associated with the financial institution providing the loan. One-time costs and fixed ongoing costs affect the overall profitability of a lender's loan portfolio but do not affect the profitability of extending an additional loan. Variable ongoing costs, however, affect the profitability of each additional loan and will influence the number of loans a lender provides. Based on the Bureau's available evidence, it expects that the variable ongoing costs to comply with the proposed rule will be passed on in full to small business credit applicants in the form of higher prices or fees to small businesses.

In the One-Time Cost Survey, the Bureau asked respondents to rank a list of potential actions they may take in response to the compliance costs of implementing section 1071.[982] Respondents ranked the following list: ''Raise rates or fees on small business products''; ''Raise rates/fees on other credit products''; ''Accept lower profits''; ''Exit some geographic markets''; ''Tighten underwriting standards''; ''Offer fewer or less complex products''; ''No longer offer small business credit products''; or ''Other'' with two write-in options. Respondents ranked these options from ''1'' to ''9'' indicating their most to least likely responses. Respondents also had the opportunity to write in their own responses. Consistent with economic theory, respondents reported that they would be most likely to raise rates or fees on small business products and other credit products. On average, respondents reported that they would be least likely to exit some geographic markets or cease offering small business credit products. Accordingly, the Bureau expects the likely impact of the rule on the cost of credit to small entities to be higher rates and fees because financial institutions pass on the variable ongoing costs of the required data collection. The Bureau estimates that $32, $26, and $7.50 in variable costs would be passed through per application to Type A, B, and C FIs, respectively. To put these values in context, the Bureau estimates that the per application net income is in a range of $66,000–$83,000; $33,000–$38,000; and $83,000–$92,000 for covered banks and savings associations of Types A, B, and C, respectively.

The Bureau also carefully considered the rule's potential impact on small entities in its decision related to transactional scope. For example, the Bureau is not covering trade credit in its 1071 final rule because it believes that trade credit is categorically different from products like loans, lines of credit, credit cards, and merchant cash advances and that there are several reasons to exclude it from coverage. As discussed in the section-by-section analysis of § 1002.104(b)(1), one such reason is that the Bureau understands that trade credit can be offered by entities that are themselves very small businesses; these entities, in particular, may incur large costs relative to their size to collect and report 1071 data in an accurate and consistent manner.[983] The Bureau is also adding new § 1002.104(b)(5) to exclude all HMDA reportable transactions (*i.e.,* covered loans as defined by Regulation C, 12 CFR 1003.2(e)). The Bureau is finalizing this exclusion of HMDA-reportable transactions in order to alleviate concerns from a broad range of industry commenters, including small entities, about the difficulties associated with dual reporting, particularly in light of potential inconsistences related to demographic data collection and recordkeeping. Moreover, the final rule makes clear that the term covered credit transaction does not include consumer-designated credit used for business or agricultural purposes, because such transactions are not business credit. The Bureau believes that this interpretation will reduce burden for financial institutions (including smaller ones) that offer only consumer-designated credit.

In response to the suggestion to exempt agricultural lending because of the impact on small local community financial institutions, such as credit unions, the Bureau is not defining a ''covered credit transaction'' in a way that would exclude agricultural credit from the final rule. As detailed in the section-by-section analysis of § 1002.104(a), the Bureau believes that covering agricultural credit in this rulemaking is important for both of section 1071's statutory purposes. The Bureau does note, however, that it is increasing its institutional coverage threshold, as discussed above, to minimize compliance costs for smaller financial institutions with lower lending volumes.

The Bureau believes that its adoption of a simplified small business definition better meets the needs of small entities. The final rule provides that a business is a small business if its gross annual revenue for its preceding fiscal year is $5 million or less. As discussed in the section-by-section analysis of § 1002.106(b)(1), the Bureau believes that this approach addresses the concerns that the Bureau has heard (during the SBREFA process and in response to the NPRM) with respect to determining whether applicants are small businesses for purposes of complying with section 1071, particularly with respect to the concerns regarding determining the applicant's NAICS code.

XI. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[984] Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct nor sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

As part of its continuing effort to reduce paperwork and respondent burden, the Bureau conducted a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on the information collection requirements in accordance with the PRA. This helps ensure that the public understands the Bureau's requirements or instructions, respondents can provide the requested data in the desired format,

[982] *See* One-Time Cost Survey at 11.

[983] *See* Leora Klapper *et al., Trade Credit Contracts,* 25(3) Review of Fin. Studies 838–67 (2012), *https://academic.oup.com/rfs/article/25/3/838/1616515,* and Justin Murfin & Ken Njoroge, *The Implicit Costs of Trade Credit Borrowing by Large Firms,* 28(1) Review of Fin. Studies 112–45 (2015) *https://academic.oup.com/rfs/article/28/1/112/1681329.*

[984] 44 U.S.C. 3501 *et seq.*

reporting burden (time and financial resources) is minimized, information collection instruments are clearly understood, and the Bureau can properly assess the impact of information collection requirements on respondents. The Bureau conducted several rounds of message, form, and user testing that were approved under OMB control number 3170–0022 after appropriate public notice and a 30-day comment period.

The final rule amends 12 CFR part 1002 (Regulation B), which implements ECOA. The Bureau's OMB control number for Regulation B is 3170–0013. This final rule will revise the information collection requirements contained in Regulation B that OMB has approved under that OMB control number.

Under the rule, the Bureau adds four information collection requirements to Regulation B:

1. Compilation of reportable data (§ 1002.107), including a notice requirement (in § 1002.107(a)(18) and (19)).
2. Reporting data to the Bureau (§ 1002.109).
3. Firewall notice requirement (§ 1002.108(d)).
4. Recordkeeping (§ 1002.111).

The information collection requirements in this final rule are mandatory. Certain data fields will be modified or deleted by the Bureau, in its discretion, to advance a privacy interest before the 1071 data are made available to the public (as permitted by section 1071 and the Bureau's final rule). The data that are not modified or deleted will be made available to the public. The rest of the data will be considered confidential if the information:

- Identifies any applicants or natural persons who might not be applicants (*e.g.,* owners of a business where a legal entity is the applicant); or
- Implicates the relevant privacy interests of applicants, related natural persons, or financial institutions.

The collections of information contained in this rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the PRA. A complete description of the information collection requirements (including the burden estimate methods) is provided in the information collection request that the Bureau has submitted to OMB under the requirements of the PRA. The information collection request submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at *www.regulations.gov* as well as on OMB's public-facing docket at *www.reginfo.gov.*

Title of Collection: Regulation B: Equal Credit Opportunity Act.

OMB Control Number: 3170–0013.

Type of Review: Revision of a currently approved collection.

Affected Public: Private Sector; Federal and State Governments.

Estimated Number of Respondents: 2,470 (subpart B only).

Estimated Total Annual Burden Hours: 8,302,000 (subpart B only).

The Bureau will publish a separate **Federal Register** notice once OMB concludes its review announcing OMB approval of the information collections contained in this final rule.

In the NPRM, the Bureau invited comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

No comments pertaining specifically to this section were received. The other comments on the rule generally are summarized above.

XII. Congressional Review Act

Pursuant to the Congressional Review Act,[985] the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1002

Banks, banking, Civil rights, Consumer protection, Credit, Credit unions, Marital status discrimination, National banks, Penalties.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation B, 12 CFR part 1002, as set forth below:

[985] 5 U.S.C. 801 *et seq.*

PART 1002—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

■ 1. The authority citation for part 1002 is revised to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1691b. Subpart B is also issued under 15 U.S.C. 1691c–2.

■ 2. Designate §§ 1002.1 through 1002.16 as subpart A under the following heading:

Subpart A—General

§ 1002.1 [Amended

■ 3. In § 1002.1 amend the second sentence of paragraph (a) by removing the phrase ''this part applies'' and adding in its place ''this subpart applies''.

■ 4. Section 1002.2 is amended by revising the introductory text to read as follows:

§ 1002.2 Definitions.

For the purposes of this part, unless the context indicates otherwise or as otherwise defined in subpart B, the following definitions apply:

* * * * *

■ 5. Section 1002.5 is amended by revising the introductory text of paragraph (a)(4) and adding paragraphs (a)(4)(vii) through (x) to read as follows:

§ 1002.5 Rules concerning requests for information.

(a) * * *

(4) *Other permissible collection of information.* Notwithstanding paragraph (b) of this section, a creditor may collect information under the following circumstances provided that the creditor collects the information in compliance with § 1002.107(a)(18) and (19) and accompanying commentary, or appendix B to 12 CFR part 1003, as applicable:

* * * * *

(vii) A creditor that was required to report small business lending data pursuant to § 1002.109 for any of the preceding five calendar years but is not currently a covered financial institution under § 1002.105(b) may collect information pursuant to subpart B of this part for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners if it complies with the requirements for covered financial institutions pursuant to §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for that

application. Such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B of this part if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110.

(viii) A creditor that exceeded the loan-volume threshold in the first year of the two-year threshold period provided in § 1002.105(b) may, in the second year, collect information pursuant to subpart B of this part for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners if it complies with the requirements for covered financial institutions pursuant to §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for that application. Such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B of this part if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110.

(ix) A creditor that is not currently a covered financial institution under § 1002.105(b), and is not otherwise a creditor to which § 1002.5(a)(4)(vii) or (viii) applies, may collect information pursuant to subpart B of this part for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners for a transaction if it complies with the requirements for covered financial institutions pursuant to §§ 1002.107 through 1002.112 for that application.

(x) A creditor that is collecting information pursuant to subpart B of this part or as described in paragraphs (a)(4)(vii) through (ix) of this section for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners may also collect that same information for any co-applicants provided that it also complies with the relevant requirements of subpart B of this part or as described in paragraphs (a)(4)(vii) through (ix) of this section with respect to those co-applicants.

* * * * *

■ 6. Section 1002.12 is amended by revising paragraphs (b)(1) introductory text, (b)(2) introductory text, (b)(3), (4), and (5), and paragraph (b)(7) introductory text to read as follows:

§ 1002.12 Record retention.

* * * * *

(b) * * * (1) *Applications.* For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B of this part) after the date that a creditor notifies an applicant of action taken on an application or of incompleteness, the creditor shall retain in original form or a copy thereof:

* * * * *

(2) *Existing accounts.* For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B of this part) after the date that a creditor notifies an applicant of adverse action regarding an existing account, the creditor shall retain as to that account, in original form or a copy thereof:

* * * * *

(3) *Other applications.* For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B of this part) after the date that a creditor receives an application for which the creditor is not required to comply with the notification requirements of § 1002.9, the creditor shall retain all written or recorded information in its possession concerning the applicant, including any notation of action taken.

(4) *Enforcement proceedings and investigations.* A creditor shall retain the information beyond 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B) if the creditor has actual notice that it is under investigation or is subject to an enforcement proceeding for an alleged violation of the Act or this part, by the Attorney General of the United States or by an enforcement agency charged with monitoring that creditor's compliance with the Act and this part, or if it has been served with notice of an action filed pursuant to section 706 of the Act and § 1002.16 of this part. The creditor shall retain the information until final disposition of the matter, unless an earlier time is allowed by order of the agency or court.

(5) *Special rule for certain business credit applications.* With regard to a business that had gross revenues in excess of $1 million in its preceding fiscal year, or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, the creditor shall retain records for at least 60 days, except as otherwise provided for in subpart B, after notifying the applicant of the action taken. If within that time period the applicant requests in writing the reasons for adverse action or that records be retained, the creditor shall retain records for 12 months.

* * * * *

(7) *Prescreened solicitations.* For 25 months after the date on which an offer of credit is made to potential customers (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B), the creditor shall retain in original form or a copy thereof:

* * * * *

■ 7. Subpart B is added to read as follows:

Subpart B—Small Business Lending Data Collection

Sec.

§ 1002.101 Authority, purpose, and scope.
§ 1002.102 Definitions.
§ 1002.103 Covered applications.
§ 1002.104 Covered credit transactions and excluded transactions.
§ 1002.105 Covered financial institutions and exempt institutions.
§ 1002.106 Business and small business.
§ 1002.107 Compilation of reportable data.
§ 1002.108 Firewall.
§ 1002.109 Reporting of data to the Bureau.
§ 1002.110 Publication of data and other disclosures.
§ 1002.111 Recordkeeping.
§ 1002.112 Enforcement.
§ 1002.113 Severability.
§ 1002.114 Effective date, compliance date, and special transitional rules.

Subpart B—Small Business Lending Data Collection

§ 1002.101 Authority, purpose, and scope.

(a) *Authority and scope.* This subpart to Regulation B is issued by the Bureau pursuant to section 704B of the Equal Credit Opportunity Act (15 U.S.C. 1691c–2). Except as otherwise provided herein, this subpart applies to covered financial institutions, as defined in § 1002.105(b), other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 2004 (2010).

(b) *Purpose.* This subpart implements section 704B of the Equal Credit

Opportunity Act, which Congress intended:

(1) To facilitate enforcement of fair lending laws; and

(2) To enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

§ 1002.102 Definitions.

In this subpart:

(a) *Affiliate* means, with respect to a financial institution, any company that controls, is controlled by, or is under common control with, another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*). With respect to a business or an applicant, *affiliate* shall have the same meaning as in 13 CFR 121.103.

(b) *Applicant* means any person who requests or who has received an extension of business credit from a financial institution.

(c) *Business* is defined in § 1002.106(a).

(d) *Business credit* shall have the same meaning as in § 1002.2(g).

(e) *Closed-end credit transaction* means an extension of business credit that is not an open-end credit transaction under paragraph (n) of this section.

(f) *Covered application* is defined in § 1002.103.

(g) *Covered credit transaction* is defined in § 1002.104.

(h) *Covered financial institution* is defined in § 1002.105(b).

(i) *Credit* shall have the same meaning as in § 1002.2(j).

(j) *Financial institution* is defined in § 1002.105(a).

(k) *LGBTQI+ individual* includes an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex.

(l) *LGBTQI+-owned business* means a business for which one or more LGBTQI+ individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.

(m) *Minority-owned business* means a business for which one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.

(n) *Open-end credit transaction* means an open-end credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in § 1026.2(a)(12), is extended by a creditor, as defined in § 1026.2(a)(17), or is extended to a consumer, as defined in § 1026.2(a)(11).

(o) *Principal owner* means an individual who directly owns 25 percent or more of the equity interests of a business.

(p) *Small business* is defined in § 1002.106(b).

(q) *Small business lending application register* or *register* means the data reported, or required to be reported, annually pursuant to § 1002.109.

(r) *State* shall have the same meaning as in § 1002.2(aa).

(s) *Women-owned business* means a business for which more than 50 percent of its ownership or control is held by one or more women, and more than 50 percent of its net profits or losses accrue to one or more women.

§ 1002.103 Covered applications.

(a) *Covered application.* Except as provided in paragraph (b) of this section, covered application means an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested.

(b) *Circumstances that are not covered applications.* A covered application does not include:

(1) Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts.

(2) Inquiries and prequalification requests.

§ 1002.104 Covered credit transactions and excluded transactions.

(a) *Covered credit transaction* means an extension of business credit that is not an excluded transaction under paragraph (b) of this section.

(b) *Excluded transactions.* The requirements of this subpart do not apply to:

(1) *Trade credit.* A financing arrangement wherein a business acquires goods or services from another business without making immediate payment in full to the business providing the goods or services.

(2) *Home Mortgage* Disclosure *Act (HMDA)-reportable transactions.* A covered loan, or application therefor, as defined by Regulation C, 12 CFR 1003.2(e).

(3) *Insurance premium financing.* A financing arrangement wherein a business agrees to pay to a financial institution, in installments, the principal amount advanced by the financial institution to an insurer or insurance producer in payment of premium on the business's insurance contract or contracts, plus charges, and, as security for repayment, the business assigns to the financial institution certain rights, obligations, and/or considerations (such as the unearned premiums, accrued dividends, or loss payments) in its insurance contract or contracts. Insurance premium financing does not include the financing of insurance policy premiums obtained in connection with the financing of goods and services.

(4) *Public utilities credit.* Public utilities credit as defined in § 1002.3(a)(1).

(5) *Securities credit.* Securities credit as defined in § 1002.3(b)(1).

(6) *Incidental credit.* Incidental credit as defined in § 1002.3(c)(1), but without regard to whether the credit is consumer credit, as defined in § 1002.2(h).

§ 1002.105 Covered financial institutions and exempt institutions.

(a) *Financial institution* means any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.

(b) *Covered financial institution* means a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years.

§ 1002.106 Business and small business.

(a) *Business* has the same meaning as the term ''business concern or concern'' in 13 CFR 121.105.

(b) *Small business definition*—(1) *Small business* has the same meaning as the term ''small business concern'' in 15 U.S.C. 632(a), as implemented in 13 CFR 121.101 through 121.107. Notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of this subpart, a business is a small business if its gross annual revenue, as defined in § 1002.107(a)(14), for its preceding fiscal year is $5 million or less.

(2) *Inflation adjustment.* Every 5 years after January 1, 2025, the gross annual revenue threshold set forth in paragraph (b)(1) of this section shall adjust based on changes to the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), as published by the United States Bureau of Labor Statistics. Any adjustment that takes effect under this paragraph shall be rounded to the nearest multiple of $500,000. If an adjustment is to take

effect, it will do so on January 1 of the following calendar year.

§ 1002.107 Compilation of reportable data.

(a) *Data format and itemization.* A covered financial institution shall compile and maintain data regarding covered applications from small businesses. The data shall be compiled in the manner prescribed herein and the Filing Instructions Guide for this subpart for the appropriate year. The data compiled shall include the items described in paragraphs (a)(1) through (20) of this section.

(1) *Unique identifier.* An alphanumeric identifier, starting with the legal entity identifier of the financial institution, unique within the financial institution to the specific covered application, and which can be used to identify and retrieve the specific file or files corresponding to the application for or extension of credit.

(2) *Application date.* The date the covered application was received or the date shown on a paper or electronic application form.

(3) *Application method.* The means by which the applicant submitted the covered application directly or indirectly to the financial institution.

(4) *Application recipient.* Whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party.

(5) *Credit type.* The following information regarding the type of credit applied for or originated:

(i) *Credit product.* The credit product.

(ii) *Guarantees.* The type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated.

(iii) *Loan term.* The length of the loan term, in months, if applicable.

(6) *Credit purpose.* The purpose or purposes of the credit applied for or originated.

(7) *Amount applied for.* The initial amount of credit or the initial credit limit requested by the applicant.

(8) *Amount approved or originated.* (i) For an application for a closed-end credit transaction that is approved but not accepted, the amount approved by the financial institution; or

(ii) For a closed-end credit transaction that is originated, the amount of credit originated; or

(iii) For an application for an open-end credit transaction that is originated or approved but not accepted, the amount of the credit limit approved.

(9) *Action taken.* The action taken by the financial institution on the covered application, reported as originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete.

(10) *Action taken date.* The date of the action taken by the financial institution.

(11) *Denial reasons.* For denied applications, the principal reason or reasons the financial institution denied the covered application.

(12) *Pricing information.* The following information regarding the pricing of a covered credit transaction that is originated or approved but not accepted, as applicable:

(i) *Interest rate.* (A) If the interest rate is fixed, the interest rate that is or would be applicable to the covered credit transaction; or

(B) If the interest rate is adjustable, the margin, index value, initial rate period expressed in months (if applicable), and index name that is or would be applicable to the covered credit transaction;

(ii) *Total origination charges.* The total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars;

(iii) *Broker fees.* The total amount of all charges included in paragraph (a)(12)(ii) of this section that are fees paid by the applicant directly to a broker or to the financial institution for delivery to a broker, expressed in dollars;

(iv) *Initial annual charges.* The total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction, expressed in dollars;

(v) *Additional cost for merchant cash advances or other sales-based financing.* For a merchant cash advance or other sales-based financing transaction, the difference between the amount advanced and the amount to be repaid, expressed in dollars; and

(vi) *Prepayment penalties.* (A) Notwithstanding whether such a provision was in fact included, whether the financial institution could have included a charge to be imposed for paying all or part of the transaction's principal before the date on which the principal is due under the policies and procedures applicable to the covered credit transaction; and

(B) Notwithstanding the response to paragraph (a)(12)(vi)(A) of this section, whether the terms of the covered credit transaction do in fact include a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due.

(13) *Census tract.* The census tract in which is located:

(i) The address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or

(ii) If the information in paragraph (a)(13)(i) of this section is unknown, the address or location of the main office or headquarters of the applicant; or

(iii) If the information in both paragraphs (a)(13)(i) and (ii) of this section is unknown, another address or location associated with the applicant.

(iv) The financial institution shall also indicate which one of the three types of addresses or locations listed in paragraphs (a)(13)(i), (ii), or (iii) of this section the census tract is based on.

(14) *Gross annual revenue.* The applicant's gross annual revenue for its preceding fiscal year.

(15) *NAICS code.* A 3-digit North American Industry Classification System (NAICS) code for the applicant.

(16) *Number of workers.* The number of non-owners working for the applicant.

(17) *Time in business.* The time the applicant has been in business.

(18) *Minority-owned, women-owned, and LGBTQI+-owned business statuses.* Whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned business. When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, the financial institution shall inform the applicant that the financial institution cannot discriminate on the basis of minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides this information.

(19) *Ethnicity, race, and sex of principal owners.* The ethnicity, race, and sex of the applicant's principal owners. When requesting ethnicity, race, and sex information from an applicant, the financial institution shall inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information.

(20) *Number of principal owners.* The number of the applicant's principal owners.

(b) *Reliance on and verification of applicant-provided data.* Unless otherwise provided in this subpart, the financial institution may rely on information from the applicant, or appropriate third-party sources, when compiling data. If the financial institution verifies applicant-provided data, however, it shall report the verified data.

(c) *Time and manner of collection*—(1) *In general.* A covered financial institution shall not discourage an applicant from responding to requests for applicant-provided data under paragraph (a) of this section and shall otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response.

(2) *Applicant-provided data collected directly from the applicant.* For data collected directly from the applicant, procedures that are reasonably designed to obtain a response shall include provisions for the following:

(i) The initial request for applicant-provided data occurs prior to notifying an applicant of final action taken on a covered application;

(ii) The request for applicant-provided data is prominently displayed or presented;

(iii) The collection does not have the effect of discouraging an applicant from responding to a request for applicant-provided data; and

(iv) Applicants can easily respond to a request for applicant-provided data.

(3) *Procedures to monitor compliance.* A covered financial institution shall maintain procedures to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data.

(4) *Low response rates.* A low response rate for applicant-provided data may indicate discouragement or other failure by a covered financial institution to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response.

(d) *Previously collected data.* A covered financial institution is permitted, but not required, to reuse previously collected data to satisfy paragraphs (a)(13) through (20) of this section if:

(1) To satisfy paragraphs (a)(13) and (a)(15) through (20) of this section, the data were collected within the 36 months preceding the current covered application, or to satisfy paragraph (a)(14) of this section, the data were collected within the same calendar year as the current covered application; and

(2) The financial institution has no reason to believe the data are inaccurate.

§ 1002.108 Firewall.

(a) *Definitions.* For purposes of this section, the following terms shall have the following meanings:

(1) *Involved in making any determination concerning a covered application from a small business* means participating in a decision regarding the evaluation of a covered application from a small business or the creditworthiness of a small business applicant for a covered credit transaction.

(2) *Should have access* means that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties.

(b) *Prohibition on access to certain information.* Unless the exception under paragraph (c) of this section applies, an employee or officer of a covered financial institution or a covered financial institution's affiliate shall not have access to an applicant's responses to inquiries that the financial institution makes pursuant to this subpart regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19), if that employee or officer is involved in making any determination concerning that applicant's covered application.

(c) *Exception to the prohibition on access to certain information.* The prohibition in paragraph (b) of this section shall not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to an applicant's responses to the financial institution's inquiries under § 1002.107(a)(18) or (19) and the financial institution provides the notice required under paragraph (d) of this section to the applicant. It is not feasible to limit access as required pursuant to paragraph (b) of this section if the financial institution determines that an employee or officer involved in making any determination concerning a covered application from a small business should have access to one or more applicants' responses to the financial institution's inquiries under § 1002.107(a)(18) or (19).

(d) *Notice.* In order to satisfy the exception set forth in paragraph (c) of this section, a financial institution shall provide a notice to each applicant whose responses will be accessed, informing the applicant that one or more employees or officers involved in making determinations concerning the covered application may have access to the applicant's responses to the financial institution's inquiries regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and regarding the ethnicity, race, and sex of the applicant's principal owners. The financial institution shall provide the notice required by this paragraph (d) when making the inquiries required under § 1002.107(a)(18) and (19) and together with the notices required pursuant to § 1002.107(a)(18) and (19).

§ 1002.109 Reporting of data to the Bureau.

(a) *Reporting to the Bureau*—(1) *Annual reporting.* (i) On or before June 1 following the calendar year for which data are compiled and maintained as required by § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau.

(ii) An authorized representative of the covered financial institution with knowledge of the data shall certify to the accuracy and completeness of the data reported pursuant to this paragraph (a).

(iii) When the last day for submission of data prescribed under paragraph (a)(1) of this section falls on a Saturday or Sunday, a submission shall be considered timely if it is submitted on the next succeeding Monday.

(2) *Reporting by subsidiaries.* A covered financial institution that is a subsidiary of another covered financial institution shall complete a separate small business lending application register. The subsidiary shall submit its small business lending application register, directly or through its parent, to the Bureau.

(3) *Reporting obligations where multiple financial institutions are involved in a covered credit transaction.* Where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction, only the last covered financial institution with authority to set the material terms of the covered credit transaction is required to report the application. Financial institutions report the actions of their agents.

(b) *Financial institution identifying information.* A financial institution shall provide each of the following with its submission:

(1) Its name.

(2) Its headquarters address.

(3) The name and business contact information of a person that the Bureau or other regulators may contact about the financial institution's submission.

(4) Its Federal prudential regulator, if applicable.

(5) Its Federal Taxpayer Identification Number (TIN).

(6) Its Legal Entity Identifier (LEI).

(7) Its Research, Statistics, Supervision, and Discount

identification (RSSD ID) number, if applicable.

(8) Parent entity information, if applicable, including:

(i) The name of the immediate parent entity;

(ii) The LEI of the immediate parent entity, if available;

(iii) The RSSD ID number of the immediate parent entity, if available;

(iv) The name of the top-holding parent entity;

(v) The LEI of the top-holding parent entity, if available; and

(vi) The RSSD ID number of the top-holding parent entity, if available.

(9) The type of financial institution that it is, indicated by selecting the appropriate type or types of institution from the list provided.

(10) Whether the financial institution is voluntarily reporting covered applications from small businesses.

(c) *Procedures for the submission of data to the Bureau.* The Bureau shall make available a Filing Instructions Guide, containing technical instructions for the submission of data to the Bureau pursuant to this section, as well as any related materials, at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/.*

§ 1002.110 Publication of data and other disclosures.

(a) *Publication of small business lending application registers and associated financial institution information.* The Bureau shall make available to the public generally the data reported to it by financial institutions pursuant to § 1002.109, subject to deletions or modifications made by the Bureau if the Bureau determines that the deletion or modification of the data would advance a privacy interest. The Bureau shall make such data available on an annual basis.

(b) *Publication of aggregate data.* The Bureau may compile and aggregate data submitted by financial institutions pursuant to § 1002.109, and make any compilations or aggregations of such data publicly available as the Bureau deems appropriate.

(c) *Statement of financial institution's small business lending data available on the Bureau's website.* A covered financial institution shall make available to the public on its website, or otherwise upon request, a statement that the covered financial institution's small business lending application register, as modified by the Bureau pursuant to § 1002.110(a), is or will be available from the Bureau. A financial institution shall use language provided by the Bureau, or substantially similar language, to satisfy the requirement to provide a statement pursuant to this paragraph (c).

(d) *Availability of statements.* A covered financial institution shall make the notice required by paragraph (c) of this section available to the public on its website when it submits a small business lending application register to the Bureau pursuant to § 1002.109(a)(1), and shall maintain the notice for as long as it has an obligation to retain its small business lending application registers pursuant to § 1002.111(a).

(e) *Further disclosure prohibited*—(1) *Disclosure by a financial institution.* A financial institution shall not disclose or provide to a third party the information it collects pursuant to § 1002.107(a)(18) and (19) except to further compliance with the Act or this part or as required by law.

(2) *Disclosure by a third party.* A third party that obtains information collected pursuant to § 1002.107(a)(18) and (19) for the purpose of furthering compliance with the Act or this part is prohibited from any further disclosure of such information except to further compliance with the Act or this part or as required by law.

§ 1002.111 Recordkeeping.

(a) *Record retention.* A covered financial institution shall retain evidence of compliance with this subpart, which includes a copy of its small business lending application register, for at least three years after the register is required to be submitted to the Bureau pursuant to § 1002.109.

(b) *Certain information kept separate from the rest of the application.* A financial institution shall maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries pursuant to this subpart regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19).

(c) *Limitation on personally identifiable information in certain records retained under this section.* In reporting a small business lending application register pursuant to § 1002.109, maintaining the register pursuant to paragraph (a) of this section, and maintaining a separate record of information pursuant to paragraph (b) of this section, a financial institution shall not include any name, specific address, telephone number, email address, or any other personally identifiable information concerning any individual who is, or is connected with, an applicant, other than as required pursuant to § 1002.107 or paragraph (b) of this section.

§ 1002.112 Enforcement.

(a) *Administrative enforcement and civil liability.* A violation of section 704B of the Act or this subpart is subject to administrative sanctions and civil liability as provided in sections 704 (15 U.S.C. 1691c) and 706 (15 U.S.C. 1691e) of the Act, where applicable.

(b) *Bona fide errors.* A bona fide error in compiling, maintaining, or reporting data with respect to a covered application is one that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. A bona fide error is not a violation of the Act or this subpart. A financial institution is presumed to maintain procedures reasonably adapted to avoid such errors with respect to a given data field if the number of errors found in a random sample of the financial institution's submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose in appendix F to this part. However, an error is not a bona fide error if either there is a reasonable basis to believe the error was intentional or there is evidence that the financial institution does not or has not maintained procedures reasonably adapted to avoid such errors.

(c) *Safe harbors*—(1) *Incorrect entry for application date.* A financial institution does not violate the Act or this subpart if it reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to § 1002.107(a)(2).

(2) *Incorrect entry for census tract.* An incorrect entry for census tract is not a violation of the Act or this subpart if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau.

(3) *Incorrect entry for NAICS code.* An incorrect entry for a 3-digit NAICS code is not a violation of the Act or this subpart, provided that the financial institution obtained the 3-digit NAICS code by:

(i) Relying on an applicant's representations or on an appropriate third-party source, in accordance with § 1002.107(b), regarding the NAICS code; or

(ii) Identifying the NAICS code itself, provided that the financial institution maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code.

(4) *Incorrect determination of small business status, covered credit transaction, or covered application.* A financial institution that initially collects data regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners pursuant to § 1002.107(a)(18) and (19) but later concludes that it should not have collected such data does not violate the Act or this regulation if the financial institution, at the time it collected this data, had a reasonable basis for believing that the application was a covered application for a covered credit transaction from a small business pursuant to §§ 1002.103, 1002.104, and 1002.106, respectively. A financial institution seeking to avail itself of this safe harbor shall comply with the requirements of this subpart as otherwise required pursuant to §§ 1002.107, 1002.108, and 1002.111 with respect to the collected data.

§ 1002.113 Severability.

If any provision of this subpart, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect.

§ 1002.114 Effective date, compliance date, and special transitional rules.

(a) *Effective date.* The effective date for this subpart is August 29, 2023.

(b) *Compliance date.* The dates by which covered financial institutions are initially required to comply with the requirements of this subpart are as follows:

(1) A covered financial institution that originated at least 2,500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning October 1, 2024.

(2) A covered financial institution that is not subject to paragraph (b)(1) of this section and that originated at least 500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning April 1, 2025.

(3) A covered financial institution that is not subject to paragraphs (b)(1) or (2) of this section and that originated at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning January 1, 2026.

(4) A financial institution that did not originate at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 but subsequently originates at least 100 such transactions in two consecutive calendar years shall comply with the requirements of this subpart in accordance with § 1002.105(b), but in any case no earlier than January 1, 2026.

(c) *Special transitional rules*—(1) *Collection of certain information prior to a financial institution's compliance date.* A financial institution as described in paragraphs (b)(1), (2), or (3) of this section is permitted, but not required, to collect information regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under § 1002.107(a)(18), and the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19) beginning 12 months prior to its applicable compliance date as set forth in paragraphs (b)(1), (2), or (3) of this section. A financial institution collecting such information pursuant to this paragraph (c)(1) must do so in accordance with the requirements set out in §§ 1002.107(a)(18) and (19), 1002.108, and 1002.111(b) and (c).

(2) *Determining which compliance date applies to a financial institution that does not collect information sufficient to determine small business status.* A financial institution that is unable to determine the number of covered credit transactions it originated for small businesses in each of calendar years 2022 and 2023 for purposes of determining its compliance date pursuant to paragraph (b) of this section, because for some or all of this period it does not have readily accessible the information needed to determine whether its covered credit transactions were originated for small businesses as defined in § 1002.106(b), is permitted to use any reasonable method to estimate its originations to small businesses for either or both of the calendar years 2022 and 2023.

■ 7. Appendices E and F are added to read as follows:

Appendix E to Part 1002—Sample Form for Collecting Certain Applicant-Provided Data Under Subpart B

BILLING CODE 4810–AM–P

Sample data collection form

Federal law requires that we request the following information to help ensure that all small businesses applying for loans and other kinds of credit are treated fairly and that communities' small business credit needs are met.

One or more employees or officers involved in making a determination concerning your application may have access to the information provided on this form. However, **FEDERAL LAW PROHIBITS DISCRIMINATION** on the basis of your answers on this form. Additionally, we cannot discriminate on the basis of whether you provide this information.

While you are not required to provide this information, we encourage you to do so. Importantly, our staff are not permitted to discourage you in any way from responding to these questions. **Filling out this form will help to ensure that ALL small business owners are treated fairly.**

Business ownership status

Please indicate the business ownership status of your small business. For the purposes of this form, your business is a minority-owned, women-owned, or LGBTQI+-owned business if one or more minorities,* women, or LGBTQI+ individuals (i) directly or indirectly own or control more than 50 percent of the business AND (ii) receive more than 50 percent of the net profits/losses of the business.

What is your business ownership status?

(Check one or more of the options below)

☐ **Minority-owned business**

☐ **Women-owned business**

☐ **LGBTQI+-owned business**

– or –

☐ **None of these apply**

– or –

☐ **I do not wish to provide this information**

*Minority means Hispanic or Latino, American Indian or Alaska Native, Asian, Black or African American, or Native Hawaiian or Other Pacific Islander. A multi-racial or multi-ethnic individual is a minority for this purpose.

Number of principal owners

For purposes of this form, a principal owner is any individual who owns 25 percent or more of the equity interest of a business. A business might not have any principal owners if, for example, it is not directly owned by any individuals (i.e., if it is owned by another entity or entities) or if no individual directly owns at least 25 percent of the business.

How many principal owners does your business have? *(Check one)*

☐ **0**

☐ **1**

☐ **2**

☐ **3**

☐ **4**

Demographic information about principal owners

As a reminder, applicants are not required to provide this information but are encouraged to do so. We cannot discriminate on the basis of any person's ethnicity, race, or sex/gender. Additionally, we cannot discriminate on the basis of whether you provide this information.

Please fill out one sheet for each principal owner.

1 Are you Hispanic or Latino?

i.e., What's your ethnicity? (Check one or more)

- ☐ **Hispanic or Latino**
  - ☐ Cuban
  - ☐ Mexican
  - ☐ Puerto Rican
  - ☐ Other Hispanic or Latino *(Please specify your origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on):*
- ☐ **Not Hispanic or Latino**

– or –

- ☐ **I do not wish to provide my ethnicity**

2 What is your sex/gender?

(Please specify):

– or –

- ☐ **I do not wish to provide my sex/gender**

3 What is your race?

(Check one or more)

- ☐ **American Indian or Alaska Native** *(Please specify the name of your enrolled or principal tribe):*
- ☐ **Asian**
  - ☐ Asian Indian
  - ☐ Chinese
  - ☐ Filipino
  - ☐ Japanese
  - ☐ Korean
  - ☐ Vietnamese
  - ☐ Other Asian *(Please specify your race, for example, Cambodian, Hmong, Laotian, Pakistani, Thai, and so on):*
- ☐ **Black or African American**
  - ☐ African American
  - ☐ Ethiopian
  - ☐ Haitian
  - ☐ Jamaican
  - ☐ Nigerian
  - ☐ Somali
  - ☐ Other Black or African American *(Please specify your race, for example, Barbadian, Ghanaian, South African, and so on):*
- ☐ **Native Hawaiian or Other Pacific Islander**
  - ☐ Guamanian or Chamorro
  - ☐ Native Hawaiian
  - ☐ Samoan
  - ☐ Other Pacific Islander *(Please specify your race, for example, Fijian, Tongan, and so on):*
- ☐ **White**

– or –

- ☐ **I do not wish to provide my race**

BILLING CODE 4810–AM–C

Appendix F to Part 1002—Tolerances for Bona Fide Errors in Data Reported Under Subpart B

As set out in § 1002.112(b) and in comment 112(b)–1, a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of a financial institution's data submission for a given data field do not equal or exceed the threshold in column C of the following table (Table 1, Tolerance Thresholds for Bona Fide Errors):

TABLE 1 TO APPENDIX F—TOLERANCE THRESHOLDS FOR BONA FIDE ERRORS

Small business lending application register count (A)	Random sample size[986] (B)	Threshold (#) (C)	Threshold (%) (D)
100–130	47	3	6.4
131–190	56	3	5.4
191–500	59	3	5.1
501–100,000	79	4	5.1
100,001+	159	4	2.5

The size of the random sample, under column B, shall depend on the size of the financial institution's small business lending application register, as shown in column A of the Threshold Table.

The thresholds in column C of the Threshold Table reflect the number of unintentional errors a financial institution may make within a particular data field (*e.g.,* the credit product data field within the credit type data point or the ethnicity data field for a particular principal owner within the ethnicity, race, and sex of principal owners data point) in a small business lending application register that would be deemed bona fide errors for purposes of § 1002.112(b).

For instance, a financial institution that submitted a small business lending application register containing 105 applications would be subject to a threshold of three errors per data field. If the financial institution had made two errors in reporting loan amount and two errors reporting gross annual income, all of these errors would be covered by the bona fide error provision of § 1002.112(b) and would not constitute a violation of the Act or this part. If the same financial institution had made four errors in reporting loan amount and two errors reporting gross annual income, the bona fide error provision of § 1002.112(b) would not apply to the four loan amount errors but would still apply to the two gross annual income errors.

Even when the number of errors in a particular data field do not equal or exceed the threshold in column C, if either there is a reasonable basis to believe that errors in that field were intentional or there is evidence that the financial institution did not maintain procedures reasonably adapted to avoid such errors, then the errors are not bona fide errors under § 1002.112(b).

For purposes of determining bona fide errors under § 1002.112(b), the term ''data field'' generally refers to individual fields. Some data fields may allow for more than one response. For example, with respect to information on the ethnicity or race of an applicant's principal owners, a data field may identify more than one race or more than one ethnicity for a given person. If one or more of the ethnicities or races identified in a data field are erroneous, they count as one (and only one) error for that data field.

[986] For a financial institution with fewer than 30 entries in its small business lending application register, the full sample size is the financial institution's total number of entries. The threshold number for such financial institutions remains three. Accordingly, the threshold percentage will be higher for financial institutions with fewer than 30 entries in their registers

■ 8. In Supplement I to part 1002:

■ a. Under *Section 1002.5—Rules Concerning Requests for Information,* revise *Paragraph 5(a)(2)* and *Paragraph 5(a)(4);*

■ b. Under *Section 1002.12—Record Retention,* revise *12(b)(7) Preapplication marketing information;*

■ c. Under *Section 1002.13—Information for Monitoring Purposes,* revise *13(b) Obtaining of information;* and

■ d. Add: *Section 1002.102—Definitions; Section 1002.103—Covered Applications; Section 1002.104—Covered Credit Transactions and Excluded Transactions; Section 1002.105—Covered Financial Institutions and Exempt Institutions; Section 1002.106—Business and Small Business; Section 1002.107—Compilation of Reportable Data; Section 1002.108—Firewall; Section 1002.109—Reporting of Data to the Bureau; Section 1002.110—Publication of Data and Other Disclosures; Section 1002.111—Recordkeeping; Section 1002.112—Enforcement;* and *Section 1002.114—Effective Date, Compliance Date, and Special Transition Rules.*

The revisions and additions read as follows:

Supplement I to Part 1002—Official Interpretations

* * * * *

Section 1002.5—Rules Concerning Requests for Information

* * * * *

5(a)(2) Required Collection of Information

1. *Local laws.* Information that a creditor is allowed to collect pursuant to a ''state'' statute or regulation includes information required by a local statute, regulation, or ordinance.

2. *Information required by Regulation C.* Regulation C, 12 CFR part 1003, generally requires creditors covered by the Home Mortgage Disclosure Act (HMDA) to collect and report information about the race, ethnicity, and sex of applicants for certain dwelling-secured loans, including some types of loans not covered by § 1002.13.

3. *Collecting information on behalf of creditors.* Persons such as loan brokers and correspondents do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to subpart B of this part, the Home Mortgage Disclosure Act, or another Federal or State statute or regulation requiring data collection.

4. *Information required by subpart B.* Subpart B of this part generally requires creditors that are covered financial institutions as defined in § 1002.105(b) to collect and report information about the ethnicity, race, and sex of the principal owners of applicants for certain small business credit, as well as whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, as defined in § 1002.102(m), (s), and (*l*), respectively.

5(a)(4) Other Permissible Collection of Information

1. *Other permissible collection of information.* Information regarding ethnicity, race, and sex that is not required to be collected pursuant to Regulation C, 12 CFR part 1003, or subpart B of this part, may nevertheless be collected under the circumstances set forth in § 1002.5(a)(4) without violating § 1002.5(b). The information collected pursuant to 12 CFR part 1003 must be retained pursuant to the requirements of § 1002.12. The information collected pursuant to subpart B of this part must be retained pursuant to the requirements set forth in § 1002.111.

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Section 1002.12—Record Retention

* * * * *

12(b) Preservation of Records

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12(b)(7) Preapplication Marketing Information

1. *Prescreened credit solicitations.* The rule requires creditors to retain copies of prescreened credit solicitations. For purposes of this part, a prescreened solicitation is an ''offer of credit'' as described in 15 U.S.C. 1681a(1) of the Fair Credit Reporting Act. A creditor complies with § 1002.12(b)(7) if it retains a copy of each solicitation mailing that contains different terms, such as the amount of credit offered, annual percentage rate, or annual fee.

2. *List of criteria.* A creditor must retain the list of criteria used to select potential recipients. This includes the criteria used by the creditor both to determine the potential recipients of the particular solicitation and to determine who will actually be offered credit.

3. *Correspondence.* A creditor may retain correspondence relating to consumers' complaints about prescreened solicitations in any manner that is reasonably accessible and is understandable to examiners. There is no requirement to establish a separate database or set of files for such correspondence, or to match consumer complaints with specific solicitation programs.

* * * * *

Section 1002.13—Information for Monitoring Purposes

* * * * *

13(b) Obtaining of Information

1. *Forms for collecting data.* A creditor may collect the information specified in § 1002.13(a) either on an application form or on a separate form referring to the application. Appendix B to this part provides for two alternative data collection model forms for use in complying with the requirements of § 1002.13(a)(1)(i) and (ii) to collect information concerning an applicant's ethnicity, race, and sex. When a creditor collects ethnicity and race information pursuant to § 1002.13(a)(1)(i)(A), the applicant must be offered the option to select more than one racial designation. When a creditor collects ethnicity and race information pursuant to § 1002.13(a)(1)(i)(B), the applicant must be offered the option to select more than one ethnicity designation and more than one racial designation.

2. *Written applications.* The regulation requires written applications for the types of credit covered by § 1002.13. A creditor can satisfy this requirement by recording on paper or by means of computer the information that the applicant provides orally and that the creditor normally considers in a credit decision.

3. *Telephone, mail applications.* i. A creditor that accepts an application by telephone or mail must request the monitoring information.

ii. A creditor that accepts an application by mail need not make a special request for the monitoring information if the applicant has failed to provide it on the application form returned to the creditor.

iii. If it is not evident on the face of an application that it was received by mail, telephone, or via an electronic medium, the creditor should indicate on the form or other application record how the application was received.

4. *Video and other electronic-application processes.* i. If a creditor takes an application through an electronic medium that allows the creditor to see the applicant, the creditor must treat the application as taken in person. The creditor must note the monitoring information on the basis of visual observation or surname, if the applicant chooses not to provide the information.

ii. If an applicant applies through an electronic medium without video capability, the creditor treats the application as if it were received by mail.

5. *Applications through loan-shopping services.* When a creditor receives an application through an unaffiliated loan-shopping service, it does not have to request the monitoring information for purposes of the ECOA or subpart A of this Regulation B. Creditors subject to the Home Mortgage Disclosure Act should be aware, however, that data collection may be called for under Regulation C (12 CFR part 1003), which generally requires creditors to report, among other things, the sex and race of an applicant on brokered applications or applications received through a correspondent. Similarly, creditors that are covered financial institutions under subpart B of this Regulation may also be required to collect, report, and maintain certain data, as set forth in subpart B of this Regulation.

6. *Inadvertent notation.* If a creditor inadvertently obtains the monitoring information in a dwelling-related transaction not covered by § 1002.13, the creditor may process and retain the application without violating the regulation.

* * * * *

Section 1002.102—Definitions

102(b) Applicant

1. *General.* In no way are the limitations to the term applicant in § 1002.102(b) of subpart B intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term applicant in § 1002.2(e) as applicable to subpart A.

102(l) LGBTQI+-Owned Business

1. *General.* In order to be an LGBTQI+-owned business for purposes of subpart B of this part, a business must satisfy both prongs of the definition of LGBTQI+-owned business. First, one or more LGBTQI+ individuals must own or control more than 50 percent of the business. However, it is not necessary that one or more LGBTQI+ individuals both own and control more than 50 percent of the business. For example, a business that is owned entirely by one or more LGBTQI+ individuals but is not controlled by any one or more such individuals satisfies the first prong of the definition. Similarly, a business that is controlled by an LGBTQI+ individual satisfies this first prong of the definition, even if none of the individuals with ownership in the business are LGBTQI+ individuals. If a business does not satisfy this first prong of the definition, it is not an LGBTQI+-owned business. Second, 50 percent or more of the net profits or losses must accrue to one or more LGBTQI+ individuals. If a business does not satisfy this second prong of the definition, it is not an LGBTQI+-owned business, regardless of whether it satisfies the first prong of the definition.

2. *Purpose of definition.* The definition of LGBTQI+-owned business is used only when an applicant determines if it is an LGBTQI+-owned business for purposes of § 1002.107(a)(18). A financial institution shall provide an applicant with the definition of LGBTQI+-owned business when asking the applicant to provide its LGBTQI+-owned business status pursuant to § 1002.107(a)(18). A financial institution satisfies this requirement if it provides the definition as set forth in the sample data collection form in appendix E. The financial institution must provide additional clarification by referencing the definition of LGBTQI+ individual as set forth in § 1002.102(k) if asked by the applicant. The financial institution is neither permitted nor required to make its own determination regarding the applicant's LGBTQI+-owned business status.

3. *Further clarifications of terms used in the definition of LGBTQI+-owned*

business. In order to assist an applicant when determining whether it is an LGBTQI+-owned business, a financial institution may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses and related concepts set forth in comments 102(*l*)–4 through –6. A financial institution may assist an applicant when the applicant is determining its LGBTQI+-owned business status but is not required to do so. For purposes of reporting an applicant's status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

4. *Ownership.* For purposes of determining if a business is an LGBTQI+-owned business, an individual owns a business if that individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Examples of ownership include being the sole proprietor of a sole proprietorship, directly or indirectly owning or holding the stock of a corporation or company, directly or indirectly having a partnership interest in a business, or directly or indirectly having a membership interest in a limited liability company. Indirect as well as direct ownership are used when determining ownership for purposes of §§ 1002.102(*l*) and 1002.107(a)(18). Thus, where applicable, ownership must be traced through corporate or other indirect ownership structures. For example, assume that the applicant is company A. If company B owns 60 percent of applicant company A and an individual owns 100 percent of company B, the individual owns 60 percent of applicant company A. Similarly, if an individual directly owns 20 percent of applicant company A and is an equal partner in partnership B that owns the remaining 80 percent of applicant company A, the individual owns 60 percent of applicant company A (*i.e.,* 20 percent due through direct ownership and 40 percent indirectly through partnership B). A trustee is considered the owner of the trust. Thus, if a trust owns a business and the trust has two co-trustees, each co-trustee owns 50 percent of the business.

5. *Control.* An individual controls a business if that individual has significant responsibility to manage or direct the business. An individual controls a business if the individual is an executive officer or senior manager (*e.g.,* a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president, or treasurer) or regularly performs similar functions. Additionally, a business may be controlled by two or more LGBTQI+ individuals if those individuals collectively control the business, such as constituting a majority of the board of directors or a majority of the partners of a partnership.

6. *Accrual of net profits or losses.* A business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

102(m) Minority-Owned Business

1. *General.* In order to be a minority-owned business for purposes of subpart B of this part, a business must satisfy both prongs of the definition of minority-owned business. First, one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals must own or control more than 50 percent of the business. However, it is not necessary that one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals both own and control more than 50 percent of the business. For example, a business that is owned entirely, but is not controlled by, individuals belonging to one of these groups satisfies the first prong of the definition. Similarly, a business that is controlled by an American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individual satisfies this first prong of the definition, even if none of the individuals with ownership in the business are American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino. If a business does not satisfy this first prong of the definition, it is not a minority-owned business. Second, 50 percent or more of the net profits or losses must accrue to one or more individuals belonging to these groups. If a business does not satisfy this second prong of the definition, it is not a minority-owned business, regardless of whether it satisfies the first prong of the definition.

2. *Purpose of definition.* The definition of minority-owned business is used only when an applicant determines if it is a minority-owned business for purposes of § 1002.107(a)(18). A financial institution shall provide an applicant with the definition of minority-owned business when asking the applicant to provide its minority-owned business status pursuant to § 1002.107(a)(18), but the financial institution is neither permitted nor required to make its own determination regarding the applicant's minority-owned business status.

3. *Further clarifications of terms used in the definition of minority-owned business.* In order to assist an applicant when determining whether it is a minority-owned business, a financial institution may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses and related concepts set forth in comments 102(m)–4 through –6. A financial institution may assist an applicant when the applicant is determining its minority-owned business status but is not required to do so. For purposes of reporting an applicant's status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

4. *Ownership.* For purposes of determining if a business is a minority-owned business, an individual owns a business if that individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Examples of ownership include being the sole proprietor of a sole proprietorship, directly or indirectly owning or holding the stock of a corporation or company, directly or indirectly having a partnership interest in a business, or directly or indirectly having a membership interest in a limited liability company. Indirect as well as direct ownership are used when determining ownership for purposes of §§ 1002.102(m) and 1002.107(a)(18). Thus, where applicable, ownership must be traced through corporate or other indirect ownership structures. For example, assume that the applicant is company A. If company B owns 60 percent of applicant company A and an individual owns 100 percent of company B, the individual owns 60 percent of applicant company A. Similarly, if an individual directly owns 20 percent of applicant company A and is an equal partner in partnership B that owns the remaining 80 percent of applicant company A, the individual owns 60 percent of applicant company A (*i.e.,* 20 percent due through direct ownership and 40 percent indirectly through partnership B). A trustee is considered the owner of the trust. Thus, if a trust owns a business and the trust

has two co-trustees, each co-trustee owns 50 percent of the business.

5. *Control.* An individual controls a business if that individual has significant responsibility to manage or direct the business. An individual controls a business if the individual is an executive officer or senior manager (*e.g.,* a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president, or treasurer) or regularly performs similar functions. Additionally, a business may be controlled by two or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals if those individuals collectively control the business, such as constituting a majority of the board of directors or a majority of the partners of a partnership.

6. *Accrual of net profits or losses.* A business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

7. *Multi-racial and multi-ethnic individuals.* For purposes of subpart B of this part, an individual who is multi-racial or multi-ethnic constitutes an individual for whom the definition of minority-owned business may apply, depending on whether the individual meets the other requirements of the definition. For example, an individual who is both Asian and White is an individual for whom the definition of minority-owned business shall apply if the individual meets the other requirements of the definition related to ownership or control and accrual of profits or losses.

8. *Relationship to disaggregated subcategories used to determine ethnicity and race of principal owners.* The ethnicity and race categories used in this section are aggregate ethnicity (Hispanic or Latino) and race (American Indian or Alaska Native, Asian, Black or African American, and Native Hawaiian or Other Pacific Islander) categories. Those ethnicity and race categories are the same aggregate categories used (along with Not Hispanic or Latino for ethnicity, and White for race) to collect an applicant's principal owners' ethnicity and race pursuant to § 1002.107(a)(19).

102(o) Principal Owner

1. *Individual.* Only an individual can be a principal owner of a business for purposes of subpart B of this part. Entities, such as trusts, partnerships, limited liability companies, and corporations, are not principal owners for this purpose. Additionally, an individual must directly own an equity share of 25 percent or more in the business in order to be a principal owner. Unlike the determination of ownership for purposes of collecting and reporting minority-owned business status, women-owned business status, and LGBTQI+-owned business status, indirect ownership is not considered when determining if someone is a principal owner for purposes of collecting and reporting principal owners' ethnicity, race, and sex or the number of principal owners. Thus, when determining who is a principal owner, ownership is not traced through multiple corporate structures to determine if an individual owns 25 percent or more of the equity interests. For example, if individual A directly owns 20 percent of a business, individual B directly owns 20 percent, and partnership C owns 60 percent, the business does not have any owners who satisfy the definition of principal owner set forth in § 1002.102(o), even if individual A and individual B are the only partners in the partnership C. Similarly, if individual A directly owns 30 percent of a business, individual B directly owns 20 percent, and trust D owns 50 percent, individual A is the only principal owner as defined in § 1002.102(o), even if individual B is the sole trustee of trust D.

2. *Trustee.* Although a trust is not considered a principal owner of a business for the purposes of subpart B, if the applicant for a covered credit transaction is a trust, a trustee is considered the owner of the trust. Thus, if a trust is an applicant for a covered credit transaction and the trust has two co-trustees, each co-trustee is considered to own 50 percent of the business and would each be a principal owner as defined in § 1002.102(o). In contrast, if the trust has five co-trustees, each co-trustee is considered to own 20 percent of the business and would not meet the definition of principal owner under § 1002.102(o).

3. *Purpose of definition.* A financial institution shall provide an applicant with the definition of principal owner when asking the applicant to provide the number of its principal owners pursuant to § 1002.107(a)(20) and the ethnicity, race, and sex of its principal owners pursuant to § 1002.107(a)(19). See comments 107(a)(19)–2 and 107(a)(20)–1.

102(s) Women-Owned Business

1. *General.* In order to be a women-owned business for purposes of subpart B of this part, a business must satisfy both prongs of the definition of women-owned business. First, one or more women must own or control more than 50 percent of the business. However, it is not necessary that one or more women both own and control more than 50 percent of the business. For example, a business that is owned entirely by women but is not controlled by any women satisfies the first prong of the definition. Similarly, a business that is controlled by a woman satisfies this first prong of the definition, even if none of the individuals with ownership in the business are women. If a business does not satisfy this first prong of the definition, it is not a women-owned business. Second, 50 percent or more of the net profits or losses must accrue to one or more women. If a business does not satisfy this second prong of the definition, it is not a women-owned business, regardless of whether it satisfies the first prong of the definition.

2. *Purpose of definition.* The definition of women-owned business is used only when an applicant determines if it is a women-owned business pursuant to § 1002.107(a)(18). A financial institution shall provide an applicant with the definition of women-owned business when asking the applicant to provide its women-owned business status pursuant to § 1002.107(a)(18), but the financial institution is neither permitted nor required to make its own determination regarding the applicant's women-owned business status.

3. *Further clarifications of terms used in the definition of women-owned business.* In order to assist an applicant when determining whether it is a women-owned business, a financial institution may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses and related concepts set forth in comments 102(s)–4 through –6. A financial institution may assist an applicant when the applicant is determining its women-owned business status but is not required to do so. For purposes of reporting an applicant's status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

4. *Ownership.* For purposes of determining if a business is a women-owned business, an individual owns a business if that individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Examples of ownership include being the sole proprietor of a sole proprietorship,

directly or indirectly owning or holding the stock of a corporation or company, directly or indirectly having a partnership interest in a business, or directly or indirectly having a membership interest in a limited liability company. Indirect as well as direct ownership are used when determining ownership for purposes of §§ 1002.102(s) and 1002.107(a)(18). Thus, where applicable, ownership must be traced through corporate or other indirect ownership structures. For example, assume that the applicant is company A. If company B owns 60 percent of the applicant company A and an individual owns 100 percent of company B, the individual owns 60 percent of the applicant company A. Similarly, if an individual directly owns 20 percent of the applicant company A and is an equal partner in a partnership B that owns the remaining 80 percent of the applicant company A, the individual owns 60 percent of applicant company A (*i.e.,* 20 percent due through direct ownership and 40 percent indirectly through partnership B). A trustee is considered the owner of the trust. Thus, if a trust owns a business and the trust has two co-trustees, each co-trustee owns 50 percent of the business.

5. *Control.* An individual controls a business if that individual has significant responsibility to manage or direct the business. An individual controls a business if the individual is an executive officer or senior manager (*e.g.,* a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president, or treasurer) or regularly performs similar functions. Additionally, a business may be controlled by two or more women if those women collectively control the business, such as constituting a majority of the board of directors or a majority of the partners of a partnership.

6. *Accrual of net profits or losses.* A business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

Section 1002.103—Covered Applications

103(a) Covered Application

1. *General.* Subject to the requirements of subpart B of this part, a financial institution has latitude to establish its own application procedures, including designating the type and amount of information it will require from applicants.

2. *Procedures used.* The term ''procedures'' refers to the actual practices followed by a financial institution as well as its stated application procedures. For example, if a financial institution's stated policy is to require all applications to be in writing on the financial institution's application form, but the financial institution also makes credit decisions based on oral requests, the financial institution's procedures are to accept both oral and written applications.

3. *Consistency with subpart A.* Bureau interpretations that appear in this supplement I in connection with §§ 1002.2(f) and 1002.9 are generally applicable to the definition of a covered application in § 1002.103. However, the definition of a covered application in § 1002.103 does not include inquiries and prequalification requests. The definition of a covered application also does not include reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. See § 1002.103(b).

4. *Solicitations and firm offers of credit.* For purposes of subpart B of this part, the term covered application does not include solicitations, firm offers of credit, or other evaluations initiated by the financial institution because in these situations the business has not made a request for credit. For example, if a financial institution sends a firm offer of credit to a business for a $10,000 line of credit, and the business does not respond, it is not a covered application because the business never made a request for credit. However, using the same example, if the business seeks to obtain the credit offered, assuming the requirements of a covered application are otherwise met, the business's request constitutes a covered application for purposes of subpart B of this part. See also comment 103(b)–4.

5. *Requests for multiple covered credit transactions at one time.* Assuming the requirements of a covered application are met, if an applicant makes a request for two or more covered credit transactions at the same time, the financial institution reports each request as a separate covered application. For example, if an applicant is seeking both a term loan and a line of credit and requests them both on the same application form, the financial institution reports the requests as two separate covered applications, one for a term loan and another for a line of credit. See § 1002.107(d) for the requirements for reusing data so that a financial institution need only ask once for certain data required under § 1002.107(a). If, on the other hand, the applicant is only requesting a single covered credit transaction, but has not decided on which particular product, the financial institution reports the request as a single covered application. For example, if the applicant indicates interest in either a term loan or a line of credit, but not both, the financial institution reports the request as a single covered application. See comment 107(a)(5)–1 for instructions on reporting credit product in this situation.

6. *Initial request for a single covered credit transaction that would result in the origination of multiple covered credit transactions.* Assuming the requirements of a covered application are met, if an applicant initially makes a request for one covered credit transaction, but over the course of the application process requests multiple covered credit transactions, each covered credit transaction must be reported as a separate covered application. See § 1002.107(d) for the requirements for reusing data so that a financial institution need only ask once for certain data required under § 1002.107(a).

7. *Requests for multiple lines of credit at one time.* Assuming the requirements of a covered application are met, if an applicant requests multiple lines of credit on a single credit account, it is reported as one or more covered applications based on the procedures used by the financial institution for the type of credit account. For example, if a financial institution treats a request for multiple lines of credit at one time as sub-components of a single account, the financial institution reports the request as a single covered application. If, on the other hand, the financial institution treats each line of credit as a separate account, then the financial institution reports each request for a line of credit as a separate covered application, as set forth in comment 103(a)–5.

8. *Duplicate applications.* If a financial institution receives two or more duplicate covered applications (*i.e.,* from the same applicant, for the same credit product, for the same amount, at or around the same time), the financial institution may treat the request as a single covered application for purposes of subpart B, so long as for purposes of determining whether to extend credit, it would also treat one or more of the applications as a duplicate under its procedures.

9. *Changes in whether there is a covered credit transaction.* In certain circumstances, an applicant may change the type of product requested during the course of the application process.

Assuming other requirements of a covered application are met, if an applicant initially requests a product that is not a covered credit transaction, but prior to final action taken decides to seek instead a product that is a covered credit transaction, the application is a covered application and must be reported pursuant to § 1002.109. In this circumstance, the financial institution shall endeavor to compile, maintain, and report the data required under § 1002.107(a) in a manner that is reasonable under the circumstances. If, on the other hand, an applicant initially requests a product that is a covered credit transaction, but prior to final action taken decides instead to seek a product that is not a covered credit transaction, the application is not a covered application and thus is not reported. See also § 1002.112(c)(4), which provides a safe harbor for incorrect collection of certain data if, at the time of collection, the financial institution had a reasonable basis for believing that the application was a covered application. Assuming other requirements of a covered application are met, if an applicant initially requests a product that is a covered credit transaction, the financial institution counteroffers with a product that is not a covered credit transaction, and the applicant declines to proceed or fails to respond, the application is reported as a covered application. For example, if an applicant initially applies for a term loan, but then, after consultation with the financial institution, decides that a lease would better meet its needs and decides to proceed with that product, the application is not a covered application and thus is not reported. However, if an applicant initially applies for a term loan, the financial institution offers to consider the applicant only for a lease, and the applicant refuses, the transaction is a covered application that must be reported.

10. *Multiple unaffiliated co-applicants.* If a covered financial institution receives a covered application from multiple businesses that are not affiliates, as defined by § 1002.102(a), it shall compile, maintain, and report data pursuant to §§ 1002.107 through 1002.109 for only a single applicant that is a small business, as defined in § 1002.106(b). A covered financial institution shall establish consistent procedures for designating a single small business for purposes of collecting and reporting data under subpart B in situations where there is more than one small business co-applicant, such as reporting on the first small business listed on an application form. For example, if three businesses jointly apply as co-applicants for a term loan to purchase a piece of equipment, but only one of the businesses is a small business, as defined in § 1002.106(b), the financial institution reports on the single small business. If, however, two of the businesses are small businesses, as defined in § 1002.106(b), the financial institution must have a procedure for designating which small business among multiple small business co-applicants it will report information on, such as consistently reporting on the first small business listed on an application form. See also § 1002.5(a)(4)(x), which permits a creditor to collect certain protected information about co-applicants under certain circumstances.

11. *Refinancings and evaluation, extension, or renewal requests that request additional credit amounts.* As discussed in comments 103(b)–2 and –3, assuming other requirements of a covered application are met, an applicant's request to refinance and an applicant's request for additional credit amounts on an existing account both constitute covered applications.

103(b) Circumstances That Are Not Covered Applications

1. *In general.* The circumstances set forth in § 1002.103(b) are not covered applications for purposes of subpart B of this part, even if considered applications under subpart A of this part. However, in no way are the exclusions in § 1002.103(b) intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term application in § 1002.2(f) as applicable to subpart A.

2. *Reevaluation, extension, or renewal requests that do not request additional credit amounts.* An applicant's request to change one or more terms of an existing account does not constitute a covered application, unless the applicant is requesting additional credit amounts on the account. For example, an applicant's request to extend the duration on a line of credit or to remove a guarantor would not be a covered application. However, assuming other requirements of a covered application are met, an applicant's request to refinance would be reportable. A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower.

3. *Reevaluation, extension, or renewal requests that request additional credit amounts.* A Assuming other requirements of a covered application are met, an applicant's request for additional credit amounts on an existing account constitutes a covered application. For example, an applicant's request for a line increase on an existing line of credit, made in accordance with a financial institution's procedures for the type of credit requested, would be a covered application. As discussed in comment 107(a)(7)–4, when reporting a covered application that seeks additional credit amounts on an existing account, the financial institution need only report the additional credit amount sought, and not the entire credit amount. For example, if an applicant currently has a line of credit account for $100,000, and seeks to increase the line to $150,000, the financial institution reports the amount applied for as $50,000.

4. *Reviews or evaluations initiated by the financial institution.* For purposes of subpart B of this part, the term covered application does not include evaluations or reviews of existing accounts initiated by the financial institution because the business has not made a request for credit. For example, if a financial institution conducts periodic reviews of its existing lines of credit and decides to increase the business's line by $10,000, it is not a covered application because the business never made a request for the additional credit amounts. However, if such an evaluation or review of an existing account by a financial institution results in the financial institution inviting the business to apply for additional credit amounts on an existing account and the business does so, the business's request constitutes a covered application for purposes of subpart B of this part, assuming other requirements of a covered application are met. Similarly, as noted in comment 103(a)–4, the term covered application also does not include solicitations and firm offers of credit.

5. *Inquiries and prequalification requests.* An inquiry is a request by a prospective applicant for information about credit terms offered by the financial institution. A prequalification request is a request by a prospective applicant for a preliminary determination on whether the prospective applicant would likely qualify for credit under a financial institution's standards or for a determination on the amount of credit for which the prospective applicant would likely qualify. Inquiries and prequalification requests are not covered applications under subpart B of this part, even though in certain circumstances inquiries and prequalification requests may constitute

applications under subpart A. For example, while an inquiry or prequalification request may become an ''application'' under subpart A if the creditor evaluates information about the business, decides to decline the request, and communicates this to the business, such inquiries or prequalifications would not be ''covered applications'' under subpart B of this part. Whether a particular request is a covered application, or whether instead it is an inquiry or prequalification request that is not reportable under subpart B, may turn, for instance, on how a financial institution structures and processes such requests: does the financial institution require or encourage a preliminary review in order for a business to be considered for a covered credit transaction, or does the business voluntarily seek preliminary feedback as a tool to explore its options before it decides whether to apply for credit with the financial institution? The name used by the financial institution for such a request is not determinative. For example, under subpart B, a review is a reportable covered application if the financial institution requires the business, before it may apply for credit, to pass through a mandatory screening process that considers particular information about the business and denies or turns away the business if it is ineligible or unlikely to qualify for credit. In contrast, a business that requests a financial institution to identify credit products for which the business might qualify based on limited or self-described characteristics, and without any commitment from the financial institution to extend credit, may not have submitted a covered application for purposes of subpart B.

Section 1002.104—Covered Credit Transactions and Excluded Transactions

104(a) Covered Credit Transaction

1. *General.* The term ''covered credit transaction'' includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b).

104(b) Excluded Transactions

1. *Factoring.* The term ''covered credit transaction'' does not cover factoring as described herein. For the purpose of this subpart, factoring is an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment in full has not yet been made. The name used by the financial institution for a product is not determinative of whether or not it is a ''covered credit transaction.'' This description of factoring is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to comment 9(a)(3)–3. A financial institution shall report an extension of business credit incident to a factoring arrangement that is otherwise a covered credit transaction as ''Other sales-based financing transaction'' under § 1002.107(a)(5).

2. *Leases.* The term ''covered credit transaction'' does not cover leases as described herein. A lease, for the purpose of this subpart, is a transfer from one business to another of the right to possession and use of goods for a term, and for primarily business or commercial (including agricultural) purposes, in return for consideration. A lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. The name used by the financial institution for a product is not determinative of whether or not it is a ''covered credit transaction.''

3. *Consumer-designated credit.* The term ''covered credit transaction'' does not include consumer-designated credit that is used for business or agricultural purposes. A transaction qualifies as consumer-designated credit if the financial institution offers or extends the credit primarily for personal, family, or household purposes. For example, an open-end credit account used for both personal and business/agricultural purposes is not business credit for the purpose of subpart B of this part unless the financial institution designated or intended for the primary purpose of the account to be business/agricultural-related.

4. *Credit transaction purchases, purchases of an interest in a pool of credit transactions, and purchases of a partial interest in a credit transaction.* The term ''covered credit transaction'' does not cover the purchase of an originated credit transaction, the purchase of an interest in a pool of credit transactions, or the purchase of a partial interest in a credit transaction such as through a loan participation agreement. Such purchases do not, in themselves, constitute an application for credit. See also comment 109(a)(3)–2.i.

104(b)(1) Trade Credit

1. *General.* Trade credit, as defined in § 1002.104(b)(1), is excluded from the definition of a covered credit transaction. An example of trade credit involves a supplier that finances the sale of equipment, supplies, or inventory. However, an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit. Also, credit extended by a business providing goods or services to another business is not trade credit for the purposes of this subpart where the supplying business intends to sell or transfer its rights as a creditor to a third party.

2. *Trade credit under subpart A.* The definition of trade credit under comment 9(a)(3)–2 applies to relevant provisions under subpart A, and § 1002.104(b)(1) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to comment 9(a)(3)–2.

Section 1002.105—Covered Financial Institutions and Exempt Institutions

105(a) Financial Institution

1. *Examples.* Section 1002.105(a) defines a financial institution as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. This definition includes, but is not limited to, banks, savings associations, credit unions, online lenders, platform lenders, community development financial institutions, Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, organizations exempt from taxation pursuant to 26 U.S.C. 501(c), and governments or governmental subdivisions or agencies.

2. *Motor vehicle dealers.* Pursuant to § 1002.101(a), subpart B of this part excludes from coverage persons defined by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 2004 (2010).

105(b) Covered Financial Institution

1. *Preceding calendar year.* The definition of covered financial institution refers to preceding calendar years. For example, in 2029, the two preceding calendar years are 2027 and 2028. Accordingly, in 2029, Financial Institution A does not meet the loan-

volume threshold in § 1002.105(b) if did not originate at least 100 covered credit transactions for small businesses both during 2027 and during 2028.

2. *Origination threshold.* A financial institution qualifies as a covered financial institution based on total covered credit transactions originated for small businesses, rather than covered applications received from small businesses. For example, if in both 2024 and 2025, Financial Institution B received 105 covered applications from small businesses and originated 95 covered credit transactions for small businesses, then for 2026, Financial Institution B is not a covered financial institution.

3. *Counting originations when multiple financial institutions are involved in originating a covered credit transaction.* For the purpose of counting originations to determine whether a financial institution is a covered financial institution under § 1002.105(b), in a situation where multiple financial institutions are involved in originating a single covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to count the origination.

4. *Counting originations after adjustments to the gross annual revenue threshold due to inflation.* Pursuant to § 1002.106(b)(2), every five years, the gross annual revenue threshold used to define a small business in § 1002.106(b)(1) shall be adjusted, if necessary, to account for inflation. The first time such an adjustment could occur is in 2030, with an effective date of January 1, 2031. A financial institution seeking to determine whether it is a covered financial institution applies the gross annual revenue threshold that is in effect for each year it is evaluating. For example, a financial institution seeking to determine whether it is a covered financial institution in 2032 counts its originations of covered credit transactions for small businesses in calendar years 2030 and 2031. The financial institution applies the initial $5 million threshold to evaluate whether its originations were to small businesses in 2030. In this example, if the small business threshold were increased to $5.5 million effective January 1, 2031, the financial institution applies the $5.5 million threshold to count its originations for small businesses in 2031.

5. *Reevaluation, extension, or renewal requests, as well as credit line increases and other requests for additional credit amounts.* While requests for additional credit amounts on an existing account can constitute a ''covered application'' pursuant to § 1002.103(b)(1), such requests are not counted as originations for the purpose of determining whether a financial institution is a covered financial institution pursuant to § 1002.105(b). In addition, transactions that extend, renew, or otherwise amend a transaction are not counted as originations. For example, if a financial institution originates 50 term loans and 30 lines of credit for small businesses in each of the preceding two calendar years, along with 25 line increases for small businesses in each of those years, the financial institution is not a covered financial institution because it has not originated at least 100 covered credit transactions in each of the two preceding calendar years.

6. *Annual consideration.* Whether a financial institution is a covered financial institution for a particular year depends on its small business lending activity in the preceding two calendar years. Therefore, whether a financial institution is a covered financial institution is an annual consideration for each year that data may be compiled and maintained for purposes of subpart B of this part. A financial institution may be a covered financial institution for a given year of data collection (and the obligations arising from qualifying as a covered financial institution shall continue into subsequent years, pursuant to §§ 1002.110 and 1002.111), but the same financial institution may not be a covered financial institution for the following year of data collection. For example, Financial Institution C originated 105 covered transactions for small businesses in both 2024 and 2025. In 2026, Financial Institution C is a covered financial institution and therefore is obligated to compile and maintain applicable 2026 small business lending data under § 1002.107(a). During 2026, Financial Institution C originates 95 covered transactions for small businesses. In 2027, Financial Institution C is not a covered financial institution with respect to 2027 small business lending data, and is not obligated to compile and maintain 2027 data under § 1002.107(a) (although Financial Institution C may volunteer to collect and maintain 2027 data pursuant to § 1002.5(a)(4)(vii) and as explained in comment 105(b)–10). Pursuant to § 1002.109(a), Financial Institution C shall submit its small business lending application register for 2026 data in the format prescribed by the Bureau by June 1, 2027 because Financial Institution C is a covered financial institution with respect to 2026 data, and the data submission deadline of June 1, 2027 applies to 2026 data.

7. *Merger or acquisition—coverage of surviving or newly formed institution.* After a merger or acquisition, the surviving or newly formed financial institution is a covered financial institution under § 1002.105(b) if it, considering the combined lending activity of the surviving or newly formed institution and the merged or acquired financial institutions (or acquired branches or locations), satisfies the criteria included in § 1002.105(b). For example, Financial Institutions A and B merge. The surviving or newly formed financial institution meets the threshold in § 1002.105(b) if the combined previous components of the surviving or newly formed financial institution (A plus B) would have originated at least 100 covered credit transactions for small businesses for each of the two preceding calendar years. Similarly, if the combined previous components and the surviving or newly formed financial institution would have reported at least 100 covered transactions for small businesses for the year previous to the merger as well as 100 covered transactions for small businesses for the year of the merger, the threshold described in § 1002.105(b) would be met and the surviving or newly formed financial institution would be a covered institution under § 1002.105(b) for the year following the merger. Comment 105(b)–8 discusses a financial institution's responsibilities with respect to compiling and maintaining (and subsequently reporting) data during the calendar year of a merger.

8. *Merger or acquisition—coverage specific to the calendar year of the merger or acquisition.* The scenarios described below illustrate a financial institution's responsibilities specifically for data from the calendar year of a merger or acquisition. For purposes of these illustrations, an ''institution that is not covered'' means either an institution that is not a financial institution, as defined in § 1002.105(a), or a financial institution that is not a covered financial institution, as defined in § 1002.105(b).

i. Two institutions that are not covered financial institutions merge. The surviving or newly formed institution meets all of the requirements necessary to be a covered financial institution. No data are required to be compiled, maintained, or reported for the calendar year of the merger (even though the merger creates an institution that meets all of the requirements necessary to be a covered financial institution).

ii. A covered financial institution and an institution that is not covered merge. The covered financial institution is the surviving institution, or a new covered financial institution is formed. For the calendar year of the merger, data are required to be compiled, maintained, and reported for covered applications from the covered financial institution and is optional for covered applications from the financial institution that was previously not covered.

iii. A covered financial institution and an institution that is not covered merge. The institution that is not covered is the surviving institution and remains not covered after the merger, or a new institution that is not covered is formed. For the calendar year of the merger, data are required to be compiled and maintained (and subsequently reported) for covered applications from the previously covered financial institution that took place prior to the merger. After the merger date, compiling, maintaining, and reporting data is optional for applications from the institution that was previously covered for the remainder of the calendar year of the merger.

iv. Two covered financial institutions merge. The surviving or newly formed financial institution is a covered financial institution. Data are required to be compiled and maintained (and subsequently reported) for the entire calendar year of the merger. The surviving or newly formed financial institution files either a consolidated submission or separate submissions for that calendar year.

9. *Foreign applicability.* As discussed in comment 1(a)–2, Regulation B (including subpart B) generally does not apply to lending activities that occur outside the United States.

10. *Voluntary collection and reporting.* Section 1002.5(a)(4)(vii) through (x) permits a creditor that is not a covered financial institution under § 1002.105(b) to voluntarily collect and report information regarding covered applications from small businesses in certain circumstances. If a creditor is voluntarily collecting information for covered applications regarding whether the applicant is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19), it shall do so in compliance with §§ 1002.107, 1002.108, 1002.111, 1002.112 as though it were a covered financial institution. If a creditor is reporting those covered applications from small businesses to the Bureau, it shall do so in compliance with §§ 1002.109 and 1002.110 as though it were a covered financial institution.

Section 1002.106—Business and Small Business

106(b) Small Business Definition

106(b)(1) Small Business

1. *Change in determination of small business status—business is ultimately not a small business.* If a financial institution initially determines an applicant is a small business as defined in § 1002.106 based on available information and collects data required by § 1002.107(a)(18) and (19) but later concludes that the applicant is not a small business, the financial institution does not violate the Act or this regulation if it meets the requirements of § 1002.112(c)(4). The financial institution shall not report the application on its small business lending application register pursuant to § 1002.109.

2. *Change in determination of small business status—business is ultimately a small business.* Consistent with comment 107(a)(14)–1, a financial institution need not independently verify gross annual revenue. If a financial institution initially determines that the applicant is not a small business as defined in § 1002.106(b), but later concludes the applicant is a small business prior to taking final action on the application, the financial institution must report the covered application pursuant to § 1002.109. In this situation, the financial institution shall endeavor to compile, maintain, and report the data required under § 1002.107(a) in a manner that is reasonable under the circumstances. For example, if the applicant initially provides a gross annual revenue of $5.5 million (that is, above the threshold for a small business as initially defined in § 1002.106(b)(1)), but during the course of underwriting the financial institution discovers the applicant's gross annual revenue was in fact $4.75 million (meaning that the applicant is within the definition of a small business under § 1002.106(b)), the financial institution is required to report the covered application pursuant to § 1002.109. In this situation, the financial institution shall take reasonable steps upon discovery to compile, maintain, and report the data necessary under § 1002.107(a) to comply with subpart B of this part for that covered application. Thus, in this example, even if the financial institution's procedure is typically to request applicant-provided data together with the application form, in this circumstance, the financial institution shall seek to collect the data during the application process necessary to comply with subpart B in a manner that is reasonable under the circumstances.

3. *Applicant's representations regarding gross annual revenue; inclusion of affiliate revenue; updated or verified information.* A financial institution is permitted to rely on an applicant's representations regarding gross annual revenue (which may or may not include any affiliate's revenue) for purposes of determining small business status under § 1002.106(b). However, if the applicant provides updated gross annual revenue information or the financial institution verifies the gross annual revenue information (see comment 107(b)–1), the financial institution must use the updated or verified information in determining small business status.

4. *Multiple unaffiliated co-applicants—size determination.* The financial institution shall not aggregate unaffiliated co-applicants' gross annual revenues for purposes of determining small business status under § 1002.106(b). If a covered financial institution receives a covered application from multiple businesses who are not affiliates, as defined by § 1002.102(a), where at least one business is a small business under § 1002.106(b), the financial institution shall compile, maintain, and report data pursuant to §§ 1002.107 through 1002.109 regarding the covered application for only a single applicant that is a small business. See comment 103(a)–10 for additional details.

106(b)(2) Inflation Adjustment

1. *Inflation adjustment methodology.* The small business gross annual revenue threshold set forth in § 1002.106(b)(1) will be adjusted upward or downward to reflect changes, if any, in the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), as published by the United States Bureau of Labor Statistics (''CPI–U''). The base for computing each adjustment is the January 2025 CPI–U; this base value shall be compared to the CPI–U value in January 2030 and every five years thereafter. For example, after the January 2030 CPI–U is made available, the adjustment is calculated by determining the percentage change in the CPI–U between January 2025 and January 2030, applying this change to the $5 million gross annual revenue threshold, and rounding to the nearest $500,000. If, as a result of this rounding, there is no change in the gross annual revenue threshold, there will be no adjustment. For example, if in January

2030 the adjusted value were $4.9 million (reflecting a $100,000 decrease from January 2025 CPI–U), then the threshold would not adjust because $4.9 million would be rounded up to $5 million. If on the other hand, the adjusted value were $5.7 million, then the threshold would adjust to $5.5 million. Where the adjusted value is a multiple of $250,000 (*e.g.,* $5,250,000), then the threshold adjusts upward (in this example, to $5,500,000).

2. *Substitute for CPI–U.* If publication of the CPI–U ceases, or if the CPI–U otherwise becomes unavailable or is altered in such a way as to be unusable, then the Bureau shall substitute another reliable cost of living indicator from the United States Government for the purpose of calculating adjustments pursuant to § 1002.106(b)(2).

Section 1002.107—Compilation of Reportable Data

107(a) Data Format and Itemization

1. *General.* Section 1002.107(a) describes a covered financial institution's obligation to compile and maintain data regarding the covered applications it receives from small businesses.

i. A covered financial institution reports these data even if the credit originated pursuant to the reported application was subsequently sold by the institution.

ii. A covered financial institution annually reports data for covered applications for which final action was taken in the previous calendar year.

iii. A covered financial institution reports data for a covered application on its small business lending application register for the calendar year during which final action was taken on the application, even if the institution received the application in a previous calendar year.

2. *Free-form text fields.* A covered financial institution may use technology such as autocorrect and predictive text when requesting applicant-provided data under subpart B of this part that the financial institution reports via free-form text fields, provided that such technology does not restrict the applicant's ability to write in its own response instead of using text suggested by the technology.

3. *Filing Instructions Guide.* Additional details and procedures for compiling data pursuant to § 1002.107 are included in the Filing Instructions Guide, which is available at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/.*

4. *Additional data point response options.* The Bureau may add additional response options to the lists of responses contained in the commentary that follows for certain of the data points set forth in § 1002.107(a), via the Filing Instructions Guide. Refer to the Filing Instructions Guide for any updates for each reporting year.

107(a)(1) Unique Identifier

1. *Unique within the financial institution.* A financial institution complies with § 1002.107(a)(1) by compiling and reporting an alphanumeric application or loan identifier unique within the financial institution to the specific application. The identifier must not exceed 45 characters, and must begin with the financial institution's Legal Entity Identifier (LEI), as defined in comment 109(b)(6)–1. Separate applications for the same applicant must have separate identifiers. The identifier may only include standard numerical and/or upper-case alphabetical characters and cannot include dashes, other special characters, or characters with diacritics. The financial institution may assign the unique identifier at any time prior to reporting the application. Refinancings or applications for refinancing must be assigned a different identifier than the transaction that is being refinanced. A financial institution with multiple branches must ensure that its branches do not use the same identifiers to refer to multiple applications.

2. *Does not include directly identifying information.* The unique identifier must not include any directly identifying information, such as a whole or partial Social Security number or employer identification number, about the applicant or persons (natural or legal) associated with the applicant. See also § 1002.111(c) and related commentary.

107(a)(2) Application Date

1. *Consistency.* Section 1002.107(a)(2) requires that, in reporting the date of covered application, a financial institution shall report the date the covered application was received or the date shown on a paper or electronic application form. Although a financial institution need not choose the same approach for its entire small business lending application register, it should generally be consistent in its approach by, for example, establishing procedures for how to report this date within particular scenarios, products, or divisions. If the financial institution chooses to report the date shown on an application form and the institution retains multiple versions of the application form, the institution reports the date shown on the first application form satisfying the definition of covered application pursuant to § 1002.103.

2. *Application received.* For an application submitted directly to the financial institution or its affiliate (as described in § 1002.107(a)(4)), the financial institution shall report the date it received the covered application, as defined under § 1002.103, or the date shown on a paper or electronic application form. For an application initially submitted to a third party, see comment 107(a)(2)–3.

3. *Indirect applications.* For an application that was not submitted directly to the financial institution or its affiliate (as described in § 1002.107(a)(4)), the financial institution shall report the date the application was received by the party that initially received the application, the date the application was received by the financial institution, or the date shown on the application form. Although a financial institution need not choose the same approach for its entire small business lending application register, it should generally be consistent in its approach by, for example, establishing procedures for how to report this date within particular scenarios, products, or divisions.

4. *Safe harbor.* Pursuant to § 1002.112(c)(1), a financial institution that reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to § 1002.107(a)(2) does not violate the Act or subpart B of this part. For purposes of this paragraph, a business day means any day the financial institution is open for business.

107(a)(3) Application Method

1. *General.* A financial institution complies with § 1002.107(a)(3) by reporting the means by which the applicant submitted the application from one of the following options: in-person, telephone, online, or mail. If the financial institution retains multiple versions of the application form, the institution reports the means by which the first application form satisfying the definition of covered application pursuant to § 1002.103 was submitted.

i. *In-person.* A financial institution reports the application method as ''in-person'' if the applicant submitted the application to the financial institution, or to another party acting on the financial institution's behalf, in person. The in-person application method applies, for example, to applications submitted at a branch office (including applications hand delivered by the applicant), at the applicant's place of

business, or via electronic media with a video component).

ii. *Telephone.* A financial institution reports the application method as ''telephone'' if the applicant submitted the application to the financial institution, or another party acting on the financial institution's behalf, by telephone call or via audio-based electronic media without a video component.

iii. *Online.* A financial institution reports the application method as ''online'' if the applicant submitted the application to the financial institution, or another party acting on the financial institution's behalf, through a website, mobile application (app), fax transmission, electronic mail, text message, or some other form of text-based electronic communication.

iv. *Mail.* A financial institution reports the application method as ''mail'' if the applicant submitted the application to the financial institution, or another party acting on the financial institution's behalf, via United States mail, courier or overnight service, or an overnight drop box.

107(a)(4) Application Recipient

1. *Agents.* When a financial institution is reporting actions taken by its agent consistent with comment 109(a)(3)–3, the agent is considered the financial institution for the purposes of § 1002.107(a)(4). For example, assume that an applicant submitted an application to Financial Institution B, and Financial Institution B made the credit decision acting as Financial Institution A's agent under State law. Financial Institution A reports the application and indicates that the application was submitted directly to Financial Institution A.

107(a)(5) Credit Type

1. *Reporting credit product—in general.* A financial institution complies with § 1002.107(a)(5)(i) by selecting the credit product applied for or originated, from the list below. If the credit product applied for or originated is not included on this list, the financial institution selects ''other,'' and reports the credit product via free-form text field. If an applicant requested more than one credit product at the same time, the financial institution reports each credit product requested as a separate application. However, if the applicant only requested a single covered credit transaction, but had not decided on which particular product, the financial institution complies with § 1002.107(a)(5)(i) by reporting the credit product originated (if originated), or the credit product denied (if denied), or the credit product of greater interest to the applicant, if readily determinable. If the credit product of greater interest to the applicant is not readily determinable, the financial institution complies with § 1002.107(a)(5)(i) by reporting one of the credit products requested as part of the request for a single covered credit transaction, in its discretion. See comment 103(a)–5 for instructions on reporting requests for multiple covered credit transactions at one time.

i. Term loan—unsecured.

ii. Term loan—secured.

iii. Line of credit—unsecured.

iv. Line of credit—secured.

v. Credit card account, not private-label.

vi. Private-label credit card account.

vii. Merchant cash advance.

viii. Other sales-based financing transaction.

ix. Other.

x. Not provided by applicant and otherwise undetermined.

2. *Credit card account, not private-label.* A financial institution complies with § 1002.107(a)(5)(i) by reporting the credit product as a ''credit card account, not private-label'' when the product is a business-purpose open-end credit account that is not private label and that may be accessed from time to time by a card, plate, or other single credit device to obtain credit, except that accounts or lines of credit secured by real property and overdraft lines of credit accessed by debit cards are not credit card accounts. The term credit card account does not include debit card accounts or closed-end credit that may be accessed by a card, plate, or single credit device. The term credit card account does include charge card accounts that are generally paid in full each billing period, as well as hybrid prepaid-credit cards. A financial institution reports multiple credit card account, not private-label applications requested at one time using the guidance in comment 103(a)–7.

3. *Private-label credit card account.* A financial institution complies with § 1002.107(a)(5)(i) by reporting the credit product as a ''private-label credit card account'' when the product is a business-purpose open-end private-label credit account that otherwise meets the description of a credit card account in comment 107(a)(5)–2. A private-label credit card account is a credit card account that can only be used to acquire goods or services provided by one business (for example, a specific merchant, retailer, independent dealer, or manufacturer) or a small group of related businesses. A co-branded or other card that can also be used for purchases at unrelated businesses is not a private-label credit card. A financial institution reports multiple private-label credit card account applications requested at one time in the same manner as credit card account, not private-label applications, using the guidance in comment 103(a)–7.

4. *Credit product not provided by the applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes credit product. However, if a financial institution is nonetheless unable to collect or otherwise determine credit product information because the applicant does not indicate what credit product it seeks and the application is denied, withdrawn, or closed for incompleteness before a credit product is identified, the financial institution reports that the credit product is ''not provided by applicant and otherwise undetermined.''

5. *Reporting credit product involving counteroffers.* If a financial institution presents a counteroffer for a different credit product than the product the applicant had initially requested, and the applicant does not agree to proceed with the counteroffer, the financial institution reports the application for the original credit product as denied pursuant to § 1002.107(a)(9). If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the disposition of the application based on the credit product that was offered and does not report the original credit product applied for. See comment 107(a)(9)–2.

6. *Other sales-based financing transaction.* For an extension of business credit incident to a factoring arrangement that is otherwise a covered credit transaction, a financial institution selects ''other sales-based financing transaction'' as the credit product. See comment 104(b)–1.

7. *Guarantees.* A financial institution complies with § 1002.107(a)(5)(ii) by selecting the type or types of guarantees that were obtained for an originated covered credit transaction, or that would have been obtained if the covered credit transaction was originated, from the list below. The financial institution selects, if applicable, up to a maximum of five guarantees for a single application. If the type of guarantee does not appear on the list, the financial institution selects ''other'' and reports the type of guarantee via free-form text field. If no guarantee is obtained or would have been obtained if the covered credit transaction was originated, the

financial institution selects ''no guarantee.'' If an application is denied, withdrawn, or closed for incompleteness before any guarantee has been identified, the financial institution selects ''no guarantee.'' The financial institution chooses State government guarantee or local government guarantee, as applicable, based on the entity directly administering the program, not the source of funding.

i. Personal guarantee—owner(s).
ii. Personal guarantee—non-owner(s).
iii. SBA guarantee—7(a) program.
iv. SBA guarantee—504 program.
v. SBA guarantee—other.
vi. USDA guarantee.
vii. FHA insurance.
viii. Bureau of Indian Affairs guarantee.
ix. Other Federal guarantee.
x. State government guarantee.
xi. Local government guarantee.
xii. Other.
xiii. No guarantee.

8. *Loan term.* A financial institution complies with § 1002.107(a)(5)(iii) by reporting the number of months in the loan term for the covered credit transaction. The loan term is the number of months after which the legal obligation will mature or terminate, measured from the date of origination. For transactions involving real property, the financial institution may instead measure the loan term from the date of the first payment period and disregard the time that elapses, if any, between the settlement of the transaction and the first payment period. For example, if a loan closes on April 12, but the first payment is not due until June 1 and includes the interest accrued in May (but not April), the financial institution may choose not to include the month of April in the loan term. In addition, the financial institution may round the loan term to the nearest full month or may count only full months and ignore partial months, as it so chooses. If a credit product, such as a credit card, does not have a loan term, the financial institution reports that the loan term is ''not applicable.'' The financial institution also reports that the loan term is ''not applicable'' if the credit product is reported as ''not provided by applicant and otherwise undetermined.'' For a credit product that generally has a loan term, the financial institution reports ''not provided by applicant and otherwise undetermined'' if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified. For merchant cash advances and other sales-based financing transactions, the financial institution complies with § 1002.107(a)(5)(iii) by reporting the loan term, if any, that the financial institution estimated or specified in processing, underwriting or providing disclosures for the application or transaction. If more than one such loan term is estimated or specified, the financial institution reports the one it considers to be most accurate, in its discretion. For merchant cash advances and other sales-based financing transactions that do not have a loan term, the financial institution reports ''not provided by applicant and otherwise undetermined.''

107(a)(6) Credit Purpose

1. *General.* A financial institution complies with § 1002.107(a)(6) by selecting the purpose or purposes of the covered credit transaction applied for or originated from the list below.

i. Purchase, construction/improvement, or refinance of non-owner-occupied real property.
ii. Purchase, construction/improvement, or refinance of owner-occupied real property.
iii. Purchase, refinance, or rehabilitation/repair of motor vehicle(s) (including light and heavy trucks).
iv. Purchase, refinance, or rehabilitation/repair of equipment.
v. Working capital (includes inventory or floor planning).
vi. Business start-up.
vii. Business expansion.
viii. Business acquisition.
ix. Refinance existing debt (other than refinancings listed above).
x. Line increase.
xi. Overdraft.
xii. Other.
xiii. Not provided by applicant and otherwise undetermined.
xiv. Not applicable.

2. *More than one purpose.* If the applicant indicates or the financial institution is otherwise aware of more than one purpose for the credit applied for or originated, the financial institution reports those purposes, up to a maximum of three, using the list provided, in any order it chooses. For example, if an applicant refinances a commercial building it owns and uses the funds to purchase a motor vehicle and expand the business it runs in a part of that building, the financial institution reports that the three purposes of the credit are purchase, construction/improvement, or refinance of owner-occupied real property; purchase, refinance, or rehabilitation/repair of motor vehicle(s) (including light and heavy trucks); and business expansion. If an application has more than three purposes, the financial institution reports any three of those purposes. In the example above, if the funds were also used to purchase equipment, the financial institution would select only three of the relevant purposes to report.

3. ''*Other*'' *credit purpose.* If a purpose of an application does not appear on the list of purposes provided, the financial institution reports ''other'' as the credit purpose and reports the credit purpose via free-form text field. If the application has more than one ''other'' purpose, the financial institution chooses the most significant ''other'' purpose, in its discretion, and reports that ''other'' purpose. The financial institution reports a maximum of three credit purposes, including any ''other'' purpose.

4. *Credit purpose not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes credit purpose. However, if a financial institution is nonetheless unable to collect or determine credit purpose information, the financial institution reports that the credit purpose is ''not provided by applicant and otherwise undetermined.''

5. *Not applicable.* If the application is for a credit product that generally has indeterminate or numerous potential purposes, such as a credit card, the financial institution may report credit purpose as ''not applicable.''

6. *Collecting credit purpose.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including credit purpose. The financial institution is permitted, but not required, to present the list of credit purposes provided in comment 107(a)(6)–1 to the applicant. The financial institution is also permitted to ask about purposes not included on the list provided in comment 107(a)(6)–1. If the applicant chooses a purpose or purposes not included on the provided list, the financial institution follows the instructions in comment 107(a)(6)–3 regarding reporting of ''other'' as the credit purpose. If an applicant chooses a purpose or purposes that are similar to purposes on the list provided, but uses different language, the financial institution reports the purpose or purposes from the list provided.

7. *Owner-occupied real property.* Real property is owner-occupied if any physical portion of the property is used by the owner for any activity, including storage.

8. *Overdraft.* When overdraft is provided as an aspect of the covered credit transaction applied for or

originated, the financial institution reports ''Overdraft'' as a purpose of the credit. The financial institution reports credit type pursuant to § 1002.107(a)(5)(i) as appropriate for the underlying covered credit transaction, such as ''Line of credit—unsecured.'' Providing occasional overdraft services as part of a deposit account offering would not be reported for the purpose of subpart B.

107(a)(7) Amount Applied For

1. *Initial amount requested.* A financial institution complies with § 1002.107(a)(7) by reporting the initial amount of credit or the initial credit limit requested by the applicant. The financial institution is not required to report credit amounts or limits discussed before an application is made, but must capture the initial amount requested at the application stage. If the applicant requests an amount as a range of numbers, the financial institution reports the midpoint of that range.

2. *No amount requested.* If the applicant does not request a specific amount at the application stage, but the financial institution underwrites the application for a specific amount, the financial institution complies with § 1002.107(a)(7) by reporting the amount considered for underwriting as the amount applied for. If the particular type of credit product applied for does not involve a specific amount requested, the financial institution reports that the requirement is ''not applicable.''

3. *Firm offers.* When an applicant responds to a ''firm offer'' that specifies an amount or limit, which may occur in conjunction with a pre-approved credit solicitation, the financial institution reports the amount of the firm offer as the amount applied for, unless the applicant requests a different amount. If the firm offer does not specify an amount or limit and the applicant does not request a specific amount, the amount applied for is the amount underwritten by the financial institution. If the firm offer specifies an amount or limit as a range and the applicant does not request a specific amount, the amount applied for is the amount underwritten by the financial institution.

4. *Additional amounts on an existing account.* When reporting a covered application that seeks additional credit amounts on an existing account, the financial institution reports only the additional credit amount sought, and not any previous amounts extended. See comment 103(b)–3.

5. *Initial amount otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the credit amount initially requested by the applicant (other than for products that do not involve a specific amount requested). However, if a financial institution is nonetheless unable to collect or otherwise determine the amount initially requested, the financial institution reports that the amount applied for is ''not provided by applicant and otherwise undetermined.'' But see comment 107(a)(7)–2 for how to report the credit amount initially requested by the applicant for particular types of credit products that do not involve a specific amount requested.

107(a)(8) Amount Approved or Originated

1. *General.* A financial institution complies with § 1002.107(a)(8) by reporting the amount approved or originated for credit that is originated or approved but not accepted. For applications that the financial institution, pursuant to § 1002.107(a)(9), reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports that the amount approved or originated is ''not applicable.''

2. *Multiple approval amounts.* A financial institution may sometimes approve an applicant for more than one credit amount, allowing the applicant to choose which amount the applicant prefers for the extension or line of credit. When multiple approval amounts are offered for a closed-end credit transaction for which the action taken is approved but not accepted, and the applicant does not accept the approved offer of credit in any amount, the financial institution reports the highest amount approved. If the applicant accepts the offer of closed-end credit, the financial institution reports the amount originated. When multiple approval amounts are offered for an open-end credit transaction for which the action taken is approved but not accepted, and the applicant does not accept the approved offer of credit in any amount, the financial institution reports the highest amount approved. If the applicant accepts the offer of open-end credit, the financial institution reports the actual credit limit established.

3. *Amount approved or originated—closed-end credit transaction.* For an originated closed-end credit transaction, the financial institution reports the principal amount to be repaid. This amount will generally be disclosed on the legal obligation.

4. *Amount approved or originated—refinancing.* For a refinancing, the financial institution reports the amount of credit approved or originated under the terms of the new debt obligation.

5. *Amount approved or originated—counteroffer.* If an applicant agrees to proceed with consideration of a counteroffer for an amount or limit different from the amount for which the applicant applied, and the covered credit transaction is approved and originated, the financial institution reports the amount granted. If an applicant does not agree to proceed with consideration of a counteroffer or fails to respond, the institution reports the application as denied and reports ''not applicable'' for the amount approved or originated. See comment 107(a)(9)–2.

6. *Amount approved or originated—existing accounts.* For additional credit amounts that were approved for or originated on an existing account, the financial institution reports only the additional credit amount approved or originated, and not any previous amounts extended.

107(a)(9) Action Taken

1. *General.* A financial institution complies with § 1002.107(a)(9) by selecting the action taken by the financial institution on the application from the following list: originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. A financial institution identifies the applicable action taken code based on final action taken on the covered application.

i. *Originated.* A financial institution reports that the application was originated if the financial institution made a credit decision approving the application and that credit decision resulted in an extension of credit.

ii. *Approved but not accepted.* A financial institution reports that the application was approved but not accepted if the financial institution made a credit decision approving the application, but the applicant or the party that initially received the application failed to respond to the financial institution's approval within the specified time, or the covered credit transaction was not otherwise consummated or the account was not otherwise opened.

iii. *Denied.* A financial institution reports that the application was denied if it made a credit decision denying the application before an applicant withdrew the application, before the application was closed for incompleteness, or before the application was denied on the basis of incompleteness.

iv. *Withdrawn by the applicant.* A financial institution reports that the application was withdrawn if the application was expressly withdrawn by the applicant before the financial institution made a credit decision approving or denying the application, before the application was closed for incompleteness, or before the application was denied on the basis of incompleteness.

v. *Incomplete.* A financial institution reports that the application was incomplete if the financial institution took adverse action on the basis of incompleteness under § 1002.9(a)(1)(ii) and (c)(1)(i) or provided a written notice of incompleteness under § 1002.9(c)(1)(ii) and (2), and the applicant did not respond to the request for additional information within the period of time specified in the notice.

2. *Treatment of counteroffers.* If a financial institution makes a counteroffer to grant credit on terms other than those originally requested by the applicant (for example, for a shorter loan maturity, with a different interest rate, or in a different amount) and the applicant declines the counteroffer or fails to respond, the institution reports the action taken as a denial on the original terms requested by the applicant. If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the action taken as the disposition of the application based on the terms of the counteroffer. For example, assume an applicant applies for a term loan and the financial institution makes a counteroffer to proceed with consideration of a line of credit. If the applicant declines to be considered for a line of credit, the financial institution reports the application as a denied request for a term loan. If, on the other hand, the applicant agrees to be considered for a line of credit, then the financial institution reports the action taken as the disposition of the application for the line of credit. For instance, using the same example, if the financial institution makes a credit decision approving the line of credit, but the applicant fails to respond to the financial institution's approval within the specified time by accepting the credit offer, the financial institution reports the application on the line of credit as approved but not accepted.

3. *Treatment of rescinded transactions.* If a borrower successfully rescinds a transaction after closing but before a financial institution is required to submit its small business lending application register containing the information for the application under § 1002.109, the institution reports the application as approved but not accepted.

4. *Treatment of pending applications.* A financial institution does not report any application still pending at the end of the calendar year; it reports such applications on its small business lending application register for the year in which final action is taken.

5. *Treatment of conditional approvals.* If a financial institution issues an approval that is subject to the applicant meeting certain conditions prior to closing, the financial institution reports the action taken as provided below dependent on whether the conditions are solely customary commitment or closing conditions or if the conditions include any underwriting or creditworthiness conditions. Customary commitment or closing conditions may include, for example, a clear-title requirement, proof of insurance policies, or a subordination agreement from another lienholder. Underwriting or creditworthiness conditions may include, for example, conditions that constitute a counteroffer (such as a demand for a higher down-payment), satisfactory loan-to-value ratios, or verification or confirmation, in whatever form the institution requires, that the applicant meets underwriting conditions concerning applicant creditworthiness, including documentation or verification of revenue, income or assets.

i. *Conditional approval—denial.* If the approval is conditioned on satisfying underwriting or creditworthiness conditions, those conditions are not met, and the financial institution takes adverse action on some basis other than incompleteness, the financial institution reports the action taken as denied.

ii. *Conditional approval—incompleteness.* If the approval is conditioned on satisfying underwriting or creditworthiness conditions that the financial institution needs to make the credit decision, and the financial institution takes adverse action on the basis of incompleteness under § 1002.9(a)(1)(ii) and (c)(1)(i), or has sent a written notice of incompleteness under § 1002.9(c)(1)(ii) and (2), and the applicant did not respond within the period of time specified in the notice, the financial institution reports the action taken as incomplete.

iii. *Conditional approval—approved but not accepted.* If the approval is conditioned on satisfying conditions that are solely customary commitment or closing conditions and the conditions are not met, the financial institution reports the action taken as approved but not accepted. If all the conditions (underwriting, creditworthiness, or customary commitment or closing conditions) are satisfied and the financial institution agrees to extend credit but the covered credit transaction is not originated (for example, because the applicant withdraws), the financial institution reports the action taken as approved but not accepted.

iv. *Conditional approval—withdrawn by the applicant.* If the applicant expressly withdraws before satisfying all underwriting or creditworthiness conditions and before the institution denies the application or before the institution closes the file for incompleteness, the financial institution reports the action taken as withdrawn.

107(a)(10) Action Taken Date

1. *Reporting action taken date for denied applications.* For applications that are denied, a financial institution reports either the date the application was denied or the date the denial notice was sent to the applicant.

2. *Reporting action taken date for applications withdrawn by applicant.* For applications that are withdrawn by the applicant, the financial institution reports the date the express withdrawal was received, or the date shown on the notification form in the case of a written withdrawal.

3. *Reporting action taken date for applications that are approved but not accepted.* For applications approved by a financial institution but not accepted by the applicant, the financial institution reports any reasonable date, such as the approval date, the deadline for accepting the offer, or the date the file was closed. A financial institution should generally be consistent in its approach to reporting by, for example, establishing procedures for how to report this date for particular scenarios, products, or divisions.

4. *Reporting action taken date for originated applications.* For applications that result in an extension of credit, a financial institution generally reports the closing or account opening date. If the disbursement of funds takes place on a date later than the closing or account opening date, the institution may, alternatively, use the date of initial disbursement. A financial institution should generally be consistent in its approach to reporting by, for example, establishing procedures for how to report this date for particular scenarios, products, or divisions.

5. *Reporting action taken date for incomplete applications.* For applications closed for incompleteness or denied for incompleteness, the financial institution reports either the date the action was taken or the date the

denial or incompleteness notice was sent to the applicant.

107(a)(11) Denial Reasons

1. *Reason for denial—in general.* A financial institution complies with § 1002.107(a)(11) by reporting the principal reason or reasons it denied the application, indicating up to four reasons. The financial institution reports only the principal reason or reasons it denied the application. For example, if a financial institution denies an application due to insufficient cashflow, unacceptable collateral, and unverifiable business information, the financial institution is required to report these three reasons. The reasons reported must accurately describe the principal reason or reasons the financial institution denied the application. A financial institution reports denial reasons by selecting its principal reason or reasons for denying the application from the following list:

i. *Credit characteristics of the business.* A financial institution reports the denial reason as ''credit characteristics of the business'' if it denies the application based on an assessment of the business's ability to meet its current or future credit obligations. Examples include business credit score, history of business bankruptcy or delinquency, and/or a high number of recent business credit inquiries.

ii. *Credit characteristics of the principal owner(s) or guarantor(s).* A financial institution reports the denial reason as ''credit characteristics of the principal owner(s) or guarantor(s)'' if it denies the application based on an assessment of the principal owner(s) or guarantor(s)'s ability to meet its current or future credit obligations. Examples include principal owner(s) or guarantor(s)'s credit score, history of charge offs, bankruptcy or delinquency, low net worth, limited or insufficient credit history, or history of excessive overdraft.

iii. *Use of credit proceeds.* A financial institution reports the denial reason as ''use of credit proceeds'' if it denies an application because, as a matter of policy or practice, it places limits on lending to certain kinds of businesses, products, or activities it has identified as high risk.

iv. *Cashflow.* A financial institution reports the denial reason as ''cashflow'' when it denies an application due to insufficient or inconsistent cashflow.

v. *Collateral.* A financial institution reports the denial reason as ''collateral'' when it denies an application due to collateral that it deems insufficient or otherwise unacceptable.

vi. *Time in business.* A financial institution reports the denial reason as ''time in business'' when it denies an application due to insufficient time or experience in a line of business.

vii. *Government loan program criteria.* Certain loan programs are backed by government agencies that have specific eligibility requirements. When those requirements are not met by an applicant, and the financial institution denies the application, the financial institution reports the denial reason as ''government loan program criteria.'' For example, if an applicant cannot meet a government-guaranteed loan program's requirement to provide a guarantor or proof of insurance, the financial institution reports the reason for the denial as ''government loan program criteria.''

viii. *Aggregate exposure.* Aggregate exposure is a measure of the total exposure or level of indebtedness of the business and its principal owner(s) associated with an application. A financial institution reports the denial reason as ''aggregate exposure'' where the total debt associated with the application is deemed high or exceeds certain debt thresholds set by the financial institution. For example, if an application for unsecured credit exceeds the maximum amount a financial institution is permitted to approve per applicant, as stated in its credit guidelines, and the financial institution denies the application for this reason, the financial institution reports the reason for denial as ''aggregate exposure.''

ix. *Unverifiable information.* A financial institution reports the denial reason as ''unverifiable information'' when it is unable to verify information provided as part of the application, and denies the application for that reason. The unverifiable information must be necessary for the financial institution to make a credit decision based on its procedures for the type of credit requested. Examples include unverifiable assets or collateral, unavailable business credit report, and unverifiable business ownership composition.

x. *Other.* A financial institution reports the denial reason as ''other'' where none of the enumerated denial reasons adequately describe the principal reason or reasons it denied the application, and the institution reports the denial reason or reasons via free-form text field.

2. *Reason for denial—not applicable.* A financial institution complies with § 1002.107(a)(11) by reporting that the requirement is not applicable if the action taken on the application, pursuant to § 1002.107(a)(9), is not a denial. For example, if the application resulted in an originated covered credit transaction, or the application was approved but not accepted, the financial institution complies with § 1002.107(a)(11) by reporting not applicable.

107(a)(12) Pricing Information

1. *General.* For applications that a financial institution, pursuant to § 1002.107(a)(9), reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports that pricing information is ''not applicable.''

107(a)(12)(i) Interest Rate

1. *General.* A financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated as reported pursuant to § 1002.107(a)(8).

2. *Interest rate—initial period.* If a covered credit transaction includes an initial period with an introductory interest rate of 12 months or less, after which the interest rate adjusts upwards or shifts from a fixed to variable rate, a financial institution complies with § 1002.107(a)(12)(i) by reporting information about the interest rate applicable after the initial period. If a covered transaction includes an initial period with an interest rate of more than 12 months after which the interest rate resets, a financial institution complies with § 1002.107(a)(12)(i) by reporting information about the interest rate applicable prior to the reset period. For example, if a financial institution originates a covered credit transaction with a fixed, initial interest rate of 0 percent for six months following origination, after which the interest rate will adjust according to a Prime index rate plus a 3 percent margin, the financial institution reports the 3 percent margin, Prime as the name of the index used to adjust the interest rate, the number 6 for the length of the initial period, and ''not applicable'' for the index value. As another example, in a 10/1 adjustable-rate mortgage transaction, where the first 10 years of the repayment period has a fixed rate of 3 percent and after year 10 the interest rate will adjust according to a Prime index rate plus a 3 percent margin, a financial institution complies with § 1002.107(a)(12)(i) by reporting the fixed rate of 3 percent, the number 120 for the initial period, and ''not applicable'' in the fields for the index, margin, and index value.

3. *Multiple interest rates.* If a covered credit transaction includes multiple

interest rates applicable to different credit features, a financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated reported pursuant to § 1002.107(a)(8). For example, if a financial institution originates a credit card with different interest rates for purchases, balance transfers, cash advances, and overdraft advances, the financial institution reports the interest rate applicable for purchases.

4. *Index names.* A financial institution complies with § 1002.107(a)(12)(i) by selecting the index used from the following list: Wall Street Journal Prime, 6-month CD rate, 1-year T-Bill, 3-year T-Bill, 5-year T-Note, 12-month average of 10-year T-Bill, Cost of Funds Index (COFI)-National, Cost of Funds Index (COFI)-11th District, Constant Maturity Treasury (CMT). If the index used is internal to the financial institution, the financial institution reports ''internal index'' via the list of indices provided. If the index used does not appear on the list of indices provided (and is not internal to the financial institution), the financial institution reports ''other'' and reports the name of the index via free-form text field.

5. *Index value.* For covered transactions with an adjustable interest rate, a financial institution complies with § 1002.107(a)(12)(i)(B) by reporting the index value used to set the rate that is or would be applicable to the covered transaction.

107(a)(12)(ii) Total Origination Charges

1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not reportable under § 1002.107(a)(12)(ii). In determining whether an item is part of the total origination charges, a financial institution should compare the covered credit transaction in question with a similar cash transaction. A financial institution financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service.

2. *Charges by third parties.* A financial institution includes fees and amounts charged by someone other than the financial institution in the total charges reported if the financial institution:

i. Requires the use of a third party as a condition of or an incident to the extension of credit, even if the applicant can choose the third party; or

ii. Retains a portion of the third-party charge, to the extent of the portion retained.

3. *Special rule; broker fees.* A financial institution complies with § 1002.107(a)(12)(ii) by including fees charged by a broker (including fees paid by the applicant directly to the broker or to the financial institution for delivery to the broker) in the total origination charges reported even if the financial institution does not require the applicant to use a broker and even if the financial institution does not retain any portion of the charge. For more information on broker fees, see commentary for § 1002.107(a)(12)(iii).

4. *Bundled services.* Total origination charges include all charges imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit. Accordingly, a financial institution complies with § 1002.107(a)(12)(ii) by including charges for other products or services paid at or before origination in the total origination charges reported if the financial institution requires the purchase of such other product or service as a condition of or an incident to the extension of credit.

5. *Origination charges—examples.* Examples of origination charges may include application fees, credit report fees, points, appraisal fees, and other similar charges.

6. *Net lender credit.* If a financial institution provides a credit to an applicant that is greater than the total origination charges the applicant would have paid, the financial institution complies with § 1002.107(a)(12)(ii) by reporting the net lender credit as a negative amount. For example, if a covered transaction has $500 provided to the applicant at origination to offset closing costs, and the financial institution does not charge any origination charges, the financial institution complies with § 1002.107(a)(12)(ii) by reporting negative $500 as the total origination charges.

107(a)(12)(iii) Broker Fees

1. *Amount.* A financial institution complies with § 1002.107(a)(12)(iii) by including the fees reported in § 1002.107(a)(12)(ii) that are fees paid by the applicant directly to the broker or to the financial institution for delivery to the broker. For example, a covered transaction has $3,000 of total origination charges. Of that $3,000, $250 are fees paid by the applicant directly to a broker and an additional $300 are fees paid to the financial institution for delivery to the broker. The financial institution complies with § 1002.107(a)(12)(iii) by reporting $550 in the broker fees reported.

2. *Fees paid directly to a broker by an applicant.* A financial institution complies with § 1002.107(a)(12)(iii) by relying on the best information readily available to the financial institution at the time final action is taken. Information readily available could include, for example, information provided by an applicant or broker that the financial institution reasonably believes regarding the amount of fees paid by the applicant directly to the broker.

107(a)(12)(iv) Initial Annual Charges

1. *Charges during the initial annual period.* The total initial annual charges include all charges scheduled to be imposed during the initial annual period following origination. For example, if a financial institution originates a covered credit transaction with a $50 monthly fee and a $100 annual fee, the financial institution complies with § 1002.107(a)(12)(iv) by reporting $700 in the initial annual charges reported. If there will be a charge in the initial annual period following origination but the amount of that charge is uncertain at the time of origination, a financial institution complies with § 1002.107(a)(12)(iv) by not reporting that charge as scheduled to be imposed during the initial annual period following origination.

2. *Interest excluded.* A financial institution complies with § 1002.107(a)(12)(iv) by excluding any interest expense from the initial annual charges reported.

3. *Avoidable charges.* A financial institution complies with § 1002.107(a)(12)(iv) by only including scheduled charges and excluding any charges for events that are avoidable by the applicant from the initial annual charges reported. Examples of avoidable charges include charges for late payment, for exceeding a credit limit, for delinquency or default, or for paying items that overdraw an account.

4. *Initial annual charges—examples.* Examples of charges scheduled to be imposed during the initial annual period may include monthly fees, annual fees, and other similar charges.

5. *Scheduled charges with variable amounts.* A financial institution complies with § 1002.107(a)(12)(iv) by reporting as the default the highest amount for a charge scheduled to be imposed. For example, if a covered credit transaction has a $75 monthly fee, but the fee is reduced to $0 if the applicant maintains an account at the financial institution originating the

covered credit transaction, the financial institution complies with § 1002.107(a)(12)(iv) by reporting $900 ($75 × 12) in the initial annual charges reported.

6. *Transactions with a term of less than one year.* For a transaction with a term of less than one year, a financial institution complies with § 1002.107(a)(12)(iv) by reporting all charges scheduled to be imposed during the term of the transaction.

107(a)(12)(v) Additional Cost for Merchant Cash Advances or Other Sales-Based Financing

1. *Merchant cash advances.* Section 1002.107(a)(12)(v) requires a financial institution to report the difference between the amount advanced and the amount to be repaid for a merchant cash advance or other sales-based financing transaction. Thus, in a merchant cash advance, a financial institution reports the difference between the amount advanced and the amount to be repaid, using the amounts (expressed in dollars) provided in the contract between the financial institution and the applicant.

107(a)(12)(vi) Prepayment Penalties

1. *Policies and procedures applicable to the covered credit transaction.* The policies and procedures applicable to the covered credit transaction include the practices that the financial institution follows when evaluating applications for the specific credit type and credit purpose requested. For example, assume that a financial institution's written procedures permit it to include prepayment penalties in the loan agreement for its term loans secured by non-owner occupied commercial real estate. For such transactions, the financial institution includes prepayment penalties in some loan agreements but not others. For an application for, or origination of, a term loan secured by non-owner occupied commercial real estate, the financial institution reports under § 1002.107(a)(12)(vi)(A) that a prepayment penalty could have been included under the policies and procedures applicable to the transaction, regardless of whether the term loan secured by non-owner occupied commercial real estate actually includes a prepayment penalty.

2. *Balloon finance charges.* A financial institution complies with § 1002.107(a)(12)(vi) by reporting as a prepayment penalty any balloon finance charge that may be imposed for paying all or part of the transaction's principal before the date on which the principal is due. For example, under the terms of a transaction, the amount of funds advanced is $12,000, the amount to be repaid is $24,000 (which includes $12,000 in principal and $12,000 in interest and fees), the length of the transaction is 12 months, and the applicant must repay $2,000 per month. The terms of the transaction state that if the applicant prepays the principal before the 12-month period is over, the applicant is responsible for paying the difference between $24,000 and the amount the applicant has already repaid prior to initiating prepayment. The difference between the $24,000 to be repaid and what the applicant has already repaid prior to initiating prepayment is a balloon finance charge and should be reported as a prepayment penalty.

107(a)(13) Census Tract

1. *General.* A financial institution complies with § 1002.107(a)(13) by reporting a census tract number as defined by the U.S. Census Bureau, which includes State and county numerical codes. A financial institution complies with § 1002.107(a)(13) if it uses the boundaries and codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting. The financial institution reports census tract based on the following:

i. *Proceeds address.* A financial institution complies with § 1002.107(a)(13) by reporting a census tract based on the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied, if known. For example, a financial institution would report a census tract based on the address or location of the site where the proceeds of a construction loan will be applied.

ii. *Main office or headquarters address.* If the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied is unknown, a financial institution complies with § 1002.107(a)(13) by reporting a census tract number based on the address or location of the main office or headquarters of the applicant, if known. For example, the address or location of the main office or headquarters of the applicant may be the home address of a sole proprietor or the office address of a sole proprietor or other applicant.

iii. *Another address or location.* If neither the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied nor the address or location of the main office or headquarters of the applicant are known, a financial institution complies with § 1002.107(a)(13) by reporting a census tract number based on another address or location associated with the applicant.

iv. *Type of address used.* In addition to reporting the census tract, pursuant to § 1002.107(a)(13)(iv) a financial institution must report which one of the three types of addresses or locations listed in § 1002.107(a)(13)(i) through (iii) and described in comments 107(a)(13)–1.i through iii that the census tract is determined from.

2. *Financial institution discretion.* A financial institution complies with § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. A financial institution is not required to make inquiries beyond its standard procedures as to the nature of the addresses or locations it collects.

3. *Address or location not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes at least one address or location for an applicant for census tract reporting. However, if a financial institution is nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution reports that the census tract information is ''not provided by applicant and otherwise undetermined.''

4. *Safe harbor.* As described in § 1002.112(c)(2) and comment 112(c)–1, a financial institution that obtains an incorrect census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau does not violate the Act or subpart B of this part.

107(a)(14) Gross Annual Revenue

1. *Collecting gross annual revenue.* A financial institution reports the applicant's gross annual revenue, expressed in dollars, for its fiscal year preceding when the information was collected. A financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue, even if the applicant's statement or information is based on estimation or extrapolation. However, pursuant to § 1002.107(b), if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. Also, pursuant to comment 107(c)(1)–5, a financial institution reports updated gross annual revenue

data if it obtains more current data from the applicant during the application process. If a financial institution has already verified gross annual revenue data and then the applicant updates it, the financial institution reports the information it believes to be more accurate, in its discretion. The financial institution may use the following language to ask about gross annual revenue and may rely on the applicant's answer (unless subsequently verified or updated):

What was the gross annual revenue of the business applying for credit in its last full fiscal year? Gross annual revenue is the amount of money the business earned before subtracting taxes and other expenses. You may provide gross annual revenue calculated using any reasonable method.

2. *Gross annual revenue not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the gross annual revenue of the applicant. However, if a financial institution is nonetheless unable to collect or determine the gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is ''not provided by applicant and otherwise undetermined.''

3. *Affiliate revenue.* A financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. Likewise, as explained in comment 106(b)(1)–3, in determining whether the applicant is a small business under § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue.

4. *Gross annual revenue for a startup business.* In a typical startup business situation where the applicant has no gross annual revenue for its fiscal year preceding when the information is collected, the financial institution reports that the applicant's gross annual revenue in the preceding fiscal year is ''zero.'' The financial institution shall not report pro forma projected revenue figures because these figures do not reflect actual gross revenue.

107(a)(15) NAICS Code

1. *General.* NAICS stands for North American Industry Classification System. The Office of Management and Budget has charged the Economic Classification Policy Committee with the maintenance and review of NAICS. A financial institution complies with § 1002.107(a)(15) if it uses the 3-digit NAICS subsector codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting.

2. *NAICS not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes NAICS code. However, if a financial institution is nonetheless unable to collect or otherwise determine a NAICS code for the applicant, the financial institution reports that the NAICS code is ''not provided by applicant and otherwise undetermined.''

3. *Safe harbor.* As described in § 1002.112(c)(3) and comment 112(c)–2, a financial institution that obtains an incorrect NAICS code does not violate the Act or subpart B of this part if it either relies on an applicant's representations or on an appropriate third-party source, in accordance with § 1002.107(b), regarding the NAICS code, or identifies the NAICS code itself, provided that the financial institution maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code.

107(a)(16) Number of Workers

1. *General.* A financial institution complies with § 1002.107(a)(16) by reporting the number of people who work for the applicant, using the ranges prescribed in the Filing Instructions Guide.

2. *Collecting number of workers.* A financial institution may collect number of workers from an applicant using the ranges for reporting as specified by the Bureau (see comment 107(a)(16)–1) or as a numerical value. When asking for the number of workers from an applicant, a financial institution shall explain that full-time, part-time and seasonal employees, as well as contractors who work primarily for the applicant, would be counted as workers, but principal owners of the applicant would not. If asked, the financial institution shall explain that volunteers are not counted as workers, and workers for affiliates of the applicant are counted if the financial institution were also collecting the affiliates' gross annual revenue. The financial institution may use the following language to ask about the number of workers and may rely on the applicant's answer (unless subsequently verified or updated):

Counting full-time, part-time and seasonal workers, as well as contractors who work primarily for the business applying for credit, but not counting principal owners of the business, how many people work for the business applying for credit?

3. *Number of workers not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of workers of the applicant. However, if a financial institution is nonetheless unable to collect or determine the number of workers of the applicant, the financial institution reports that the number of workers is ''not provided by applicant and otherwise undetermined.''

107(a)(17) Time in Business

1. *Collecting time in business.* A financial institution complies with § 1002.107(a)(17) by reporting the time the applicant has been in business.

i. If a financial institution collects or otherwise obtains the number of years an applicant has been in business as part of its procedures for evaluating an application for credit, it reports the time in business in whole years, rounded down to the nearest whole year.

ii. If a financial institution does not collect time in business as described in comment 107(a)(17)–1.i, but as part of its procedures determines whether or not the applicant's time in business is less than two years, it reports the applicant's time in business as either less than two years or two or more years in business.

iii. If a financial institution does not collect time in business as part of its procedures for evaluating an application for credit as described in comments 107(a)(17)–1.i or .ii, the financial institution complies with § 1002.107(a)(17) by asking the applicant whether it has been in existence for less than two years or two or more years and reporting the information provided by the applicant accordingly.

2. *Time in business collected as part of the financial institution's procedures for evaluating an application for credit.* A financial institution that collects or obtains an applicant's time in business as part of its procedures for evaluating an application for credit is not required to collect or obtain time in business pursuant to any particular definition of time in business for this purpose. For example, if the financial institution collects the number of years the applicant has existed (such as by asking the applicant when its business was started, or by obtaining the applicant's date of incorporation from a Secretary of State or other State or Federal agency that registers or licenses businesses) as

the time in business, the financial institution reports that information accordingly pursuant to comment 107(a)(17)–1.i. Similarly, if the financial institution collects the number of years of experience the applicant's owners have in the current line of business, the financial institution reports that information accordingly pursuant to comment 107(a)(17)–1.i. If, however, the financial institution collects both the number of years the applicant has existed as well as some other measure of time in business (such as the number of years of experience the applicant's owners have in the current line of business), the financial institution reports the number of years the applicant has existed as the time in business pursuant to comment 107(a)(17)–1.i.

3. *Time in business not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the applicant's time in business. However, if a financial institution is nonetheless unable to collect or determine the applicant's time in business, the financial institution reports that the time in business is ''not provided by applicant and otherwise undetermined.''

107(a)(18) Minority-Owned, Women-Owned, and LGBTQI+-Owned Business Statuses

1. *General.* A financial institution must ask an applicant whether it is a minority-owned, women-owned, and/or LGBTQI+-owned business. The financial institution must permit an applicant to refuse (*i.e.,* decline) to answer the financial institution's inquiry regarding business status and must inform the applicant that the applicant is not required to provide the information. See the sample data collection form in appendix E to this part for sample language for providing this notice to applicants. The financial institution must report the applicant's substantive response regarding each business status, that the applicant declined to answer the inquiry (that is, selected an answer option of ''I do not wish to provide this information'' or similar), or its failure to respond to the inquiry (that is, ''not provided by applicant''), as applicable.

2. *Definitions.* When inquiring about minority-owned, women-owned, and LGBTQI+-owned business statuses (regardless of whether the request is made on a paper form, electronically, or orally), the financial institution also must provide the applicant with definitions of the terms ''minority-owned business,'' ''women-owned business,'' and ''LGBTQI+-owned business'' as set forth in § 1002.102 (m), (s) and (*l*), respectively. The financial institution satisfies this requirement if it provides the definitions as set forth in the sample data collection form in appendix E.

3. *Combining questions.* A financial institution may combine on the same paper or electronic data collection form the questions regarding minority-owned, women-owned, and LGBTQI+-owned business status pursuant to § 1002.107(a)(18) with principal owners' ethnicity, race, and sex pursuant to § 1002.107(a)(19) and the applicant's number of principal owners pursuant to § 1002.107(a)(20). See the sample data collection form in appendix E.

4. *Notices.* When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of the applicant's minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides its minority-owned, women-owned, or LGBTQI+-owned business statuses. A financial institution must also inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. A financial institution may combine these notices regarding minority-owned, women-owned, and LGBTQI+-owned business statuses with the notices that a financial institution is required to provide when requesting principal owners' ethnicity, race, and sex if a financial institution requests information pursuant to § 1002.107(a)(18) and (19) in the same data collection form or at the same time. See the sample data collection form in appendix E for sample language that a financial institution may use for these notices.

5. *Maintaining the record of an applicant's response regarding minority-owned, women-owned, and LGBTQI+-owned business statuses separate from the application.* A financial institution must maintain the record of an applicant's responses to the financial institution's inquiry pursuant to § 1002.107(a)(18) separate from the application and accompanying information. See § 1002.111(b) and comment 111(b)–1. If the financial institution provides a paper or electronic data collection form, the data collection form must not be part of the application form or any other document that the financial institution uses to provide or collect any information other than minority-owned business status, women-owned business status, LGBTQI+-owned business status, principal owners' ethnicity, race, and sex, and the number of the applicant's principal owners. See the sample data collection form in appendix E. For example, if the financial institution sends the data collection form via email, the data collection form should be a separate attachment to the email or accessed through a separate link in the email. If the financial institution uses a web-based data collection form, the form should be on its own page.

6. *Minority-owned, women-owned, and/or LGBTQI+-owned business statuses not provided by applicant.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses. However, if a financial institution does not receive a response to the financial institution's inquiry pursuant to § 1002.107(a)(18), the financial institution reports that the applicant's business statuses were ''not provided by applicant.''

7. *Applicant declines to provide information about minority-owned, women-owned, and/or LGBTQI+-owned business statuses.* A financial institution reports that the applicant responded that it did not wish to provide the information about an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses, if the applicant declines to provide the information by selecting such a response option on a paper or electronic form (*e.g.,* by selecting an answer option of ''I do not wish to provide this information'' or similar). The financial institution also reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

8. *Conflicting responses provided by applicants.* If the applicant both provides a substantive response to the financial institution's inquiry regarding business status (that is, indicates that it is a minority-owned, women-owned, and/or LGBTQI+-owned business, or checks ''none apply'' or similar) and also checks the box indicating ''I do not wish to provide this information'' or

similar, the financial institution reports the substantive response(s) provided by the applicant (rather than reporting that the applicant declined to provide the information).

9. *No verification of business statuses.* Notwithstanding § 1002.107(b), a financial institution must report the applicant's substantive response(s), that the applicant declined to answer the inquiry (that is, selected an answer option of ''I do not wish to provide this information'' or similar), or the applicant's failure to respond to the inquiry (that is, that the information was ''not provided by applicant'') pursuant to § 1002.107(a)(18), even if the financial institution verifies or otherwise obtains an applicant's minority-owned, women-owned, and/or LGBTQI+-owned business statuses for other purposes. For example, if a financial institution uses a paper data collection form to ask an applicant if it is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business and the applicant does not indicate that it is a minority-owned business, the financial institution must not report that the applicant is a minority-owned business, even if the applicant indicates that it is a minority-owned business for other purposes, such as for a special purpose credit program or a Small Business Administration program.

107(a)(19) Ethnicity, Race, and Sex of Principal Owners

1. *General.* A financial institution must ask an applicant to provide its principal owners' ethnicity, race, and sex. The financial institution must permit an applicant to refuse (*i.e.,* decline) to answer the financial institution's inquiry and must inform the applicant that it is not required to provide the information. See the sample data collection form in appendix E to this part for sample language for providing this notice to applicants. The financial institution must report the applicant's substantive responses regarding principal owners' ethnicity, race, and sex, that the applicant declined to answer an inquiry (that is, selected an answer option of ''I do not wish to provide this information'' or similar), or its failure to respond to an inquiry (that is, ''not provided by applicant''), as applicable. The financial institution must report an applicant's responses about its principal owners' ethnicity, race, and sex, regardless of whether an applicant declines or fails to answer an inquiry about the number of its principal owners under § 1002.107(a)(20). If an applicant provides some, but not all, of the requested information about the ethnicity, race, and sex of a principal owner, the financial institution reports the information that was provided by the applicant and reports that the applicant declined to provide or did not provide (as applicable) the remainder of the information. See comments 107(a)(19)–6 and –7.

2. *Definition of principal owner.* When requesting a principal owner's ethnicity, race, and sex, the financial institution must also provide the applicant with the definition of the term ''principal owner'' as set forth in § 1002.102(o). The financial institution satisfies this requirement if it provides the definition of principal owner as set forth in the sample data collection form in appendix E.

3. *Combining questions.* A financial institution may combine on the same paper or electronic data collection form the questions regarding the principal owners' ethnicity, race, and sex pursuant to § 1002.107(a)(19) with the applicant's number of principal owners pursuant to § 1002.107(a)(20) and the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses pursuant to § 1002.107(a)(18). See the sample data collection form in appendix E.

4. *Notices.* When requesting a principal owner's ethnicity, race, and sex from an applicant, a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex/gender, or on whether the applicant provides the information. A financial institution must also inform the applicant that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. A financial institution may combine these notices with the similar notices that a financial institution is required to provide when requesting minority-owned business status, women-owned business status, and LGBTQI+-owned business status, if a financial institution requests information pursuant to § 1002.107(a)(18) and (19) in the same data collection form or at the same time. See the sample data collection form in appendix E for sample language that a financial institution may use for these notices.

5. *Maintaining the record of an applicant's responses regarding principal owners' ethnicity, race, and sex separate from the application.* A financial institution must maintain the record of an applicant's response to the financial institution's inquiries pursuant to § 1002.107(a)(19) separate from the application and accompanying information. *See* § 1002.111(b) and comment 111(b)–1. If the financial institution provides a paper or electronic data collection form, the data collection form must not be part of the application form or any other document that the financial institution uses to provide or collect any information other than minority-owned business status, women-owned business status, LGBTQI+-owned business status, principal owners' ethnicity, race, and sex, and the number of the applicant's principal owners. See the sample data collection form in appendix E for sample language. For example, if the financial institution sends the data collection form via email, the data collection form should be a separate attachment to the email or accessed through a separate link in the email. If the financial institution uses a web-based data collection form, the form should be on its own page.

6. *Ethnicity, race, or sex of principal owners not provided by applicant.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the ethnicity, race, and sex of an applicant's principal owners. However, if an applicant does not provide the information, such as in response to a request for a principal owner's ethnicity, race, or sex on a paper or electronic data collection form, the financial institution reports the ethnicity, race, or sex (as applicable) as ''not provided by applicant'' for that principal owner. For example, if the financial institution provides a paper data collection form to an applicant with two principal owners, and asks the applicant to complete and return the form but the applicant does not do so, the financial institution reports that the two principal owners' ethnicity, race, and sex were ''not provided by applicant.'' Similarly, if the financial institution provides an electronic data collection form, the applicant indicates that it has two principal owners, the applicant provides ethnicity, race, and sex for the first principal owner, and the applicant does not make any selections for the second principal owner's ethnicity, race, and sex, the financial institution reports the ethnicity, race, and sex that the applicant provided for the first principal owner and reports that each of the ethnicity, race, and sex for the second principal owner was ''not provided by applicant.'' Additionally, if the financial institution provides an

electronic or paper data collection form, the applicant indicates that it has one principal owner, provides the principal owner's ethnicity and sex information, but does not provide information about the principal owner's race and also does not select a response of ''I do not wish to provide this information'' with regard to race, the financial institution reports the ethnicity and sex provided by the applicant and reports that the race of the principal owner was ''not provided by applicant.''

7. *Applicant declines to provide information about a principal owner's ethnicity, race, or sex.* A financial institution reports that the applicant responded that it did not wish to provide the information about a principal owner's ethnicity, race, or sex (as applicable), if the applicant declines to provide the information by selecting such a response option on a paper or electronic form (*e.g.,* by selecting an answer option of ''I do not wish to provide this information'' or similar). The financial institution also reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

8. *Conflicting responses provided by applicant.* If the applicant both provides a substantive response to a request for a principal owner's ethnicity, race, or sex (that is, identifies a principal owner's race, ethnicity, or sex) and also checks the box indicating ''I do not wish to provide this information'' or similar, the financial institution reports the information on ethnicity, race, or sex that was provided by the applicant (rather than reporting that the applicant declined provide the information). For example, if an applicant is completing a paper data collection form and writes in a response that a principal owner's sex is female and also indicates on the form that the applicant does not wish to provide information regarding that principal owner's sex, the financial institution reports the principal owner's sex as female.

9. *No verification of ethnicity, race, and sex of principal owners.* Notwithstanding § 1002.107(b), a financial institution must report the applicant's substantive responses as to its principal owners' ethnicity, race, and sex (that is, the applicant's identification of its principal owners' race, ethnicity, and sex), that the applicant declined to answer the inquiry (that is, selected an answer option of ''I do not wish to provide this information'' or similar), or the applicant's failure to respond to the inquiry (that is, the information was ''not provided by applicant'') pursuant to § 1002.107(a)(19), even if the financial institution verifies or otherwise obtains the ethnicity, race, or sex of the applicant's principal owners for other purposes.

10. *Reporting for fewer than four principal owners.* If an applicant has fewer than four principal owners, the financial institution reports ethnicity, race, and sex information for the number of principal owners that the applicant has and reports the ethnicity, race, and sex fields for additional principal owners as ''not applicable.'' For example, if an applicant has only one principal owner, the financial institution reports ethnicity, race, and sex information for the first principal owner and reports as ''not applicable'' the ethnicity, race, and sex data fields for principal owners two through four.

11. *Previously collected ethnicity, race, and sex information.* If a financial institution reports one or more principal owners' ethnicity, race, or sex information based on previously collected data under § 1002.107(d), the financial institution does not need to collect any additional ethnicity, race, or sex information for other principal owners (if any). See also comment 107(d)–9.

12. *Guarantors.* A financial institution does not collect or report a guarantor's ethnicity, race, and sex unless the guarantor is also a principal owner of the applicant, as defined in § 1002.102(o).

13. *Ethnicity.* i. *Aggregate categories.* A financial institution must permit an applicant to provide each principal owner's ethnicity for purposes of § 1002.107(a)(19) using one or more of the following aggregate categories:

A. Hispanic or Latino.

B. Not Hispanic or Latino.

ii. *Disaggregated subcategories.* A financial institution must permit an applicant to provide each principal owner's ethnicity for purposes of § 1002.107(a)(19) using one or more of the following disaggregated subcategories, regardless of whether the applicant has indicated that the relevant principal owner is Hispanic or Latino and regardless of whether the applicant selects any aggregate categories: Cuban; Mexican; Puerto Rican; or Other Hispanic or Latino. If an applicant indicates that a principal owner is Other Hispanic or Latino, the financial institution must permit the applicant to provide additional information regarding the principal owner's ethnicity, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, or Spaniard. See the sample data collection form in appendix E for sample language. If an applicant chooses to provide additional information regarding a principal owner's ethnicity, such as by indicating that a principal owner is Argentinean orally or in writing on a paper or electronic form, a financial institution must report that additional information via free-form text. If the applicant provides such additional information but does not also indicate that the principal owner is Other Hispanic or Latino (*e.g.,* by selecting Other Hispanic or Latino on a paper or electronic form), a financial institution is permitted, but not required, to report Other Hispanic or Latino as well.

iii. *Selecting multiple categories.* The financial institution must permit the applicant to select one, both, or none of the aggregate categories and as many disaggregated subcategories as the applicant chooses. A financial institution must permit an applicant to select a disaggregated subcategory even if the applicant does not select the corresponding aggregate category. For example, an applicant must be permitted to select the Mexican disaggregated subcategory for a principal owner without being required to select the Hispanic or Latino aggregate category. If an applicant provides ethnicity information for a principal owner, the financial institution reports all of the aggregate categories and disaggregated subcategories provided by the applicant. For example, if an applicant selects both aggregate categories and four disaggregated subcategories for a principal owner, the financial institution reports the two aggregate categories that the applicant selected and all four of the disaggregated subcategories that the applicant selected. Additionally, if an applicant selects only the Mexican disaggregated subcategory for a principal owner and no aggregate categories, the financial institution reports Mexican for the ethnicity of the applicant's principal owner but does not also report Hispanic or Latino. Further, if the applicant selects an aggregate category (*e.g.,* Not Hispanic or Latino) and a disaggregated

subcategory that does not correspond to the aggregate category (*e.g.,* Puerto Rican), the financial institution reports the information as provided by the applicant (*e.g.,* Not Hispanic or Latino, and Puerto Rican).

14. *Race.* i. *Aggregate categories.* A financial institution must permit an applicant to provide each principal owner's race for purposes of § 1002.107(a)(19) using one or more of the following aggregate categories:

A. American Indian or Alaska Native.

B. Asian.

C. Black or African American.

D. Native Hawaiian or Other Pacific Islander.

E. White.

ii. *Disaggregated subcategories.* The financial institution must permit an applicant to provide a principal owner's race for purposes of § 1002.107(a)(19) using one or more of the disaggregated subcategories as listed in this comment 107(a)(19)–14.ii, regardless of whether the applicant has selected the corresponding aggregate category.

A. The Asian aggregate category includes the following disaggregated subcategories: Asian Indian; Chinese; Filipino; Japanese; Korean; Vietnamese; and Other Asian. An applicant must also be permitted to provide the principal owner's race using one or more of these disaggregated subcategories regardless of whether the applicant indicates that the principal owner is Asian and regardless of whether the applicant selects any aggregate categories. Additionally, if an applicant indicates that a principal owner is Other Asian, the financial institution must permit the applicant to provide additional information about the principal owner's race, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Cambodian, Hmong, Laotian, Pakistani, or Thai. See the sample data collection form in appendix E for sample language.

B. The Black or African American aggregate category includes the following disaggregated subcategories: African American; Ethiopian; Haitian; Jamaican; Nigerian; Somali; or Other Black or African American. An applicant must also be permitted to provide the principal owner's race using one or more of these disaggregated subcategories regardless of whether the applicant indicates that the principal owner is Black or African American and regardless of whether the applicant selects any aggregate categories. Additionally, if an applicant indicates that a principal owner is Other Black or African American, the financial institution must permit the applicant to provide additional information about the principal owner's race, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Barbadian, Ghanaian, or South African. See the sample data collection form in appendix E for sample language.

C. The Native Hawaiian or Other Pacific Islander aggregate category includes the following disaggregated subcategories: Guamanian or Chamorro; Native Hawaiian; Samoan; and Other Pacific Islander. An applicant must also be permitted to provide the principal owner's race using one or more of these disaggregated subcategories regardless of whether the applicant indicates that the principal owner is Native Hawaiian or Other Pacific Islander and regardless of whether the applicant selects any aggregate categories. Additionally, if an applicant indicates that a principal owner is Other Pacific Islander, the financial institution must permit the applicant to provide additional information about the principal owner's race, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Fijian or Tongan. See the sample data collection form in appendix E for sample language.

D. If an applicant chooses to provide additional information regarding a principal owner's race, such as indicating that a principal owner is Cambodian, Barbadian, or Fijian orally or in writing on a paper or electronic form, a financial institution must report that additional information via free-form text in the appropriate data reporting field. If the applicant provides such additional information but does not also indicate that the principal owner is Other Asian, Other Black or African American, or Other Pacific Islander, as applicable (*e.g.,* by selecting Other Asian on a paper or electronic form), a financial institution is permitted, but not required, to report the corresponding ''Other'' race disaggregated subcategory (*i.e.,* Other Asian, Other Black or African American, or Other Pacific Islander).

E. In addition to permitting an applicant to indicate that a principal owner is American Indian or Alaska Native, a financial institution must permit an applicant to provide the name of an enrolled or principal tribe, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. If an applicant chooses to provide the name of an enrolled or principal tribe, a financial institution must report that information via free-form text in the appropriate data reporting field. If the applicant provides the name of an enrolled or principal tribe but does not also indicate that the principal owner is American Indian or Alaska Native (*e.g.,* by selecting American Indian or Alaska Native on a paper or electronic form), a financial institution is permitted, but not required, to report American Indian or Alaska Native as well.

iii. *Selecting multiple categories.* The financial institution must permit the applicant to select as many aggregate categories and disaggregated subcategories as the applicant chooses. A financial institution must permit an applicant to select one or more disaggregated subcategories even if the applicant does not select an aggregate category. For example, an applicant must be permitted to select the Chinese disaggregated subcategory for a principal owner without being required to select the Asian aggregate category. If an applicant provides race information for a principal owner, the financial institution reports all of the aggregate categories and disaggregated subcategories provided by the applicant. For example, if an applicant selects two aggregate categories and five disaggregated subcategories for a principal owner, the financial institution reports the two aggregate categories that the applicant selected and the five disaggregated subcategories that the applicant selected. Additionally, if an applicant selects only the Chinese disaggregated subcategory for a principal owner, the financial institution reports Chinese for the race of the principal owner but does

not also report that the principal owner is Asian. Similarly, if the applicant selects an aggregate category (*e.g.,* Asian) and a disaggregated subcategory that does not correspond to the aggregate category (*e.g.,* Native Hawaiian), the financial institution reports the information as provided by the applicant (*e.g.,* Asian and Native Hawaiian).

15. *Sex.* Generally, a financial institution must permit an applicant to provide each principal owner's sex for purposes of § 1002.107(a)(19). When requesting information about a principal owner's sex, a financial institution shall use the term ''sex/gender.'' If the financial institution uses a paper or electronic data collection form to collect the information, the financial institution must allow the applicant to provide each principal owner's sex/gender using free-form text. When a financial institution collects the information orally, such as by telephone, the financial institution must inform the applicant of the opportunity to provide each principal owner's sex/gender and record the applicant's response. A financial institution reports the substantive information provided by the applicant (reported via free-form text in the appropriate data reporting field), or reports that the applicant declined to provide the information.

16. *Ethnicity and race information requested orally.* As described in comments 107(a)(19)–13 and –14, when collecting principal owners' ethnicity and race pursuant to § 1002.107(a)(19), a financial institution must present the applicant with the specified aggregate categories and disaggregated subcategories. When collecting ethnicity and race information orally, such as by telephone, a financial institution may not present the applicant with the option to decline to provide the information without also presenting the applicant with the specified aggregate categories and disaggregated subcategories.

i. *Ethnicity and race categories.* Notwithstanding comments 107(a)(19)–13 and –14, a financial institution is not required to read aloud every disaggregated subcategory when collecting ethnicity and race information orally, such as by telephone. Rather, the financial institution must orally present the lists of aggregate ethnicity and race categories, followed by the disaggregated subcategories (if any) associated with the aggregate categories selected by the applicant or which the applicant requests to be presented. After the applicant makes any disaggregated category selections associated with the aggregate ethnicity or race category, the financial institution must also ask if the applicant wishes to hear the lists of disaggregated subcategories for any aggregate categories not selected by the applicant. The financial institution must record any aggregate categories selected by the applicant, as well as any disaggregated subcategories regardless of whether such subcategories were selected based on the disaggregated subcategories read by the financial institution or were otherwise provided by the applicant.

ii. *More than one principal owner.* If an applicant has more than one principal owner, the financial institution is permitted to ask about ethnicity and race in a manner that reduces repetition when collecting ethnicity and race information orally, such as by telephone. For example, if an applicant has two principal owners, the financial institution may ask for both principal owners' ethnicity at the same time, rather than asking about ethnicity, race, and sex for the first principal owner followed by ethnicity, race, and sex for the second principal owner.

107(a)(20) Number of Principal Owners

1. *General.* If the financial institution asks the applicant to provide the number of its principal owners pursuant to § 1002.107(a)(20), a financial institution must provide the definition of principal owner set forth in § 1002.102(o). The financial institution satisfies this requirement if it provides the definition of principal owner as set forth in the sample data collection form in appendix E.

2. *Number of principal owners provided by applicant; verification of number of principal owners.* The financial institution may rely on statements or information provided by the applicant in collecting and reporting the number of the applicant's principal owners. However, pursuant to § 1002.107(b), if the financial institution verifies the number of principal owners provided by the applicant, it must report the verified information.

3. *Number of principal owners not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of principal owners of the applicant. However, if a financial institution is nonetheless unable to collect or otherwise determine the applicant's number of principal owners, the financial institution reports that the number of principal owners is ''not provided by applicant and otherwise undetermined.''

107(b) Reliance on and Verification of Applicant-Provided Data

1. *Reliance on information provided by an applicant or appropriate third-party sources.* A financial institution may rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting data pursuant to subpart B of this part for applicant-provided data; the financial institution is not required to verify those statements or that information. However, if the financial institution does verify applicant statements or information for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution reports the verified information. Depending on the circumstances and the financial institution's procedures, certain applicant-provided data can be collected from appropriate third-party sources without a specific request from the applicant, and such information may also be relied on. For example, gross annual revenue or NAICS code may be collected from tax return documents; a financial institution may also collect an applicant's NAICS code using third-party sources such as business information products. Applicant-provided data are the data that are or could be provided by the applicant, including § 1002.107(a)(5) through (7) and (13) through (20). See comment 107(c)(1)–3. In regard to restrictions on verification of minority-owned, women-owned, and LGBTQI+-owned business statuses, and principal owners' ethnicity, race, and sex, see comments 107(a)(18)–9 and 107(a)(19)–9.

107(c) Time and Manner of Collection

107(c)(1) In General

1. *Procedures.* The term ''procedures'' refers to the actual practices followed by a financial institution as well as its stated procedures. For example, if a financial institution's stated procedure is to collect applicant-provided data on or with a paper application form, but employees encourage applicants to skip the page that asks whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under § 1002.107(a)(18), the financial institution's procedures are not reasonably designed to obtain a response.

2. Latitude to design procedures. A financial institution has flexibility to establish procedures concerning the

timing and manner in which it collects applicant-provided data that work best for its particular lending model and product offerings, provided those procedures are reasonably designed to collect the applicant-provided data in § 1002.107(a), as required pursuant to § 1002.107(c)(1), and where applicable comply with the minimum requirements set forth in § 1002.107(c)(2).

3. *Applicant-provided data.* Applicant-provided data are the data that are or could be provided by the applicant, including § 1002.107(a)(5) (credit type), § 1002.107(a)(6) (credit purpose), § 1002.107(a)(7) (amount applied for), § 1002.107(a)(13) (address or location for purposes of determining census tract), § 1002.107(a)(14) (gross annual revenue), § 1002.107(a)(15) (NAICS code, or information about the business such that the financial institution can determine the applicant's NAICS code), § 1002.107(a)(16) (number of workers), § 1002.107(a)(17) (time in business), § 1002.107(a)(18) (minority-owned business status, women-owned business status, and LGBTQI+-owned business status), § 1002.107(a)(19) (ethnicity, race, and sex of the applicant's principal owners), and § 1002.107(a)(20) (number of principal owners). Applicant-provided data do not include data that are generated or supplied only by the financial institution, including § 1002.107(a)(1) (unique identifier), § 1002.107(a)(2) (application date), § 1002.107(a)(3) (application method), § 1002.107(a)(4) (application recipient), § 1002.107(a)(8) (amount approved or originated), § 1002.107(a)(9) (action taken), § 1002.107(a)(10) (action taken date), § 1002.107(a)(11) (denial reasons), § 1002.107(a)(12) (pricing information), and § 1002.107(a)(13) (census tract, based on address or location provided by the applicant).

4. *Collecting applicant-provided data without a direct request to the applicant.* Depending on the circumstances and the financial institution's procedures, certain applicant-provided data can be collected without a direct request to the applicant. For example, credit type may be collected based on the type of product chosen by the applicant. Similarly, a financial institution may rely on appropriate third-party sources to collect certain applicant-provided data. See § 1002.107(b) concerning the use of third-party sources.

5. *Data updated by the applicant.* A financial institution reports updated data if it obtains more current data from the applicant during the application process. For example, if an applicant states its gross annual revenue for the preceding fiscal year was $3 million, but then the applicant notifies the financial institution that its revenue in the preceding fiscal year was actually $3.2 million, the financial institution reports gross annual revenue of $3.2 million. For reporting verified applicant-provided data, see § 1002.107(b) and comment 107(b)–1. If a financial institution has already verified data and then the applicant updates it, the financial institution reports the information it believes to be more accurate, in its discretion. If a financial institution receives updates from the applicant after the application process has closed (for example, after closing or account opening), the financial institution may, at its discretion, update the data at any time prior to reporting the covered application to the Bureau.

107(c)(2) Applicant-Provided Data Collected Directly From the Applicant

1. *In general.* Whether a financial institution's procedures are reasonably designed to collect applicant-provided data is a fact-based determination and may depend on the financial institution's particular lending model, product offerings, and other circumstances; procedures that are reasonably designed to obtain a response may therefore require additional provisions beyond the minimum criteria set forth in § 1002.107(c)(2). In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data. While the requirements of § 1002.107(c)(2) do not apply to applicant-provided data that a financial institution obtains without a direct request to the applicant, as explained in comment 107(c)(1)–4, in such instances, a covered financial institution must still comply with § 1002.107(c)(1).

2. *Specific components.* i. *Timing of initial collection attempt.* While a financial institution has some flexibility concerning when applicant-provided data is are collected, under no circumstances may the initial request for applicant-provided data occur simultaneous with or after notifying an applicant of final action taken on a covered application. Generally, the earlier in the application process the financial institution initially seeks to collect applicant-provided data, the more likely the timing of collection is reasonably designed to obtain a response.

ii. *The request for applicant-provided data is prominently displayed or presented.* Pursuant to § 1002.107(c)(2)(ii), a financial institution must ensure an applicant actually sees, hears, or is otherwise presented with the request for applicant-provided data. If an applicant is likely to overlook or miss a request for applicant-provided data, the financial institution does not have reasonably designed procedures. Similarly, a financial institution also does not have reasonably designed procedures if it obscures, prevents, or inhibits an applicant from accessing or reviewing a request for applicant-provided data.

iii. *The collection does not have the effect of discouraging an applicant from responding to a request for applicant-provided data.* A. A covered financial institution avoids discouraging a response by, for example, communicating to the applicant that the collection of applicant-provided data is worthy of the applicant's attention or is as important as information collected in connection with the financial institution's creditworthiness determination. In contrast, a covered financial institution that collects applicant-provided data in a time or manner that directly or indirectly discourages or obstructs an applicant from responding or providing a particular response violates § 1002.107(c)(2)(iii). For example, a financial institution may not discourage a response to inquiries regarding the demographic data pursuant to § 1002.107(a)(18) and (19) by communicating to the applicant that the request is unimportant, encouraging the applicant to bypass the form altogether, or attempting to influence or alter the applicant's preferred response.

B. A covered financial institution also avoids discouraging a response by requiring an applicant to provide a response to one or more requests for applicant-provided data in order to proceed with a covered application, including, as applicable, a response of ''I do not wish to provide this information'' or similar. (As described in comments 107(a)(18)–1 and 107(a)(19)–1, a financial institution must permit an applicant to decline to provide the demographic data required by § 1002.107(a)(18) and (19), which can be satisfied by providing a response option of ''I do not wish to provide this information'' or similar.) For example, in an electronic application, a financial institution may require the applicant to either make a substantive selection about a principal owner's ethnicity, race, or sex, select an option of ''I do not wish to provide this information'' or similar, or indicate there are no principal owners before allowing the applicant to proceed to the next page of requested information.

iv. *The applicant can easily provide a response.* Pursuant to § 1002.107(c)(2)(iv), a financial institution must structure the request for information in a manner that makes it easy for the applicant to provide a response. For example, a financial institution requests applicant-provided data in the same format as other information required for the covered application, provides applicants multiple methods to provide or return applicant-provided data (for example, on a written form, through a web portal, or through other means), or provides the applicant some other type of straightforward and seamless method to provide a response. Conversely, a financial institution must avoid imposing unnecessary burden on an applicant to provide the information requested or requiring the applicant to take steps that are inconsistent with the rest of its application process. For example, a financial institution does not have reasonably designed procedures if it collects application information related to its own creditworthiness determination in electronic form, but mails a paper form to the applicant initially seeking the data required under § 1002.107(a) that the financial institution does not otherwise need for its creditworthiness determination and requiring the applicant to mail it back. On the other hand, a financial institution complies with § 1002.107(c)(2)(iv) if, at its discretion, it requests the applicant to respond to inquiries made pursuant to § 1002.107(a)(18) and (19) through a reasonable method intended to keep the applicant's responses discrete and protected from view.

v. *Multiple requests for applicant-provided data.* A financial institution is permitted, but not required, to make more than one attempt to obtain applicant-provided data if the applicant does not respond to an initial request. For example, if an applicant initially does not respond when asked early in the application process (before notifying the applicant of final action taken on the application, pursuant to § 1002.107(c)(2)(i)) to inquiries made pursuant to § 1002.107(a)(18) and (19), a financial institution may request this information again, for example, during a subsequent in-person meeting with the applicant or after notifying the applicant of final action taken on the covered application.

107(c)(3) Procedures To Monitor Compliance

1. *Procedures to identify and respond to indicia of potential discouragement, including low response rates.* Section 1002.107(c)(3) requires a covered financial institution to maintain procedures designed to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data. In general, these include monitoring for low response rates (*i.e.,* the percentage of covered applications for which the financial institution has obtained some type of response to requests for applicant-provided data, including, as applicable, an applicant response of ''I do not wish to provide this information'' or similar); monitoring for significant irregularities in any particular response that may indicate steering, improper interference, or other potential discouragement or obstruction of applicants' preferred responses; monitoring response rates and responses by division, location, loan officer, or other factors to ensure that no discouragement or improper conduct is occurring in some parts of a financial institution, even if the financial institution maintains adequate response rates and responses overall; providing adequate training to loan officers and other persons involved in collecting applicant-provided data; promptly investigating any indicia of potential discouragement; and taking prompt remedial action if discouragement or other improper conduct is identified.

107(c)(4) Low Response Rates

1. *In general.* A low response rate for applicant-provided data may indicate that the financial institution has engaged in discouragement or otherwise failed to maintain reasonably designed procedures. Response rate generally refers to whether the financial institution has obtained some type of response to requests for applicant-provided data (including, as applicable, an applicant response of ''I do not wish to provide this information'' or similar). A response rate may be measured, as appropriate, as compared to financial institutions of a similar size, type, and/or geographic reach, or other factors, as appropriate. Similarly, significant irregularities in a particular response (for example, very high rates of an applicant response of ''I do not wish to provide this information'' or similar) may also indicate that a financial institution does not have reasonably designed procedures, for example, because of steering, improper interference, or other potential discouragement or obstruction of applicants' preferred responses. Response rates may be relevant across all applicant-provided data, though are particularly relevant for the collection of the demographic data pursuant to § 1002.107(a)(18) and (19) given the heightened sensitivity of these inquiries and the importance of those data to the purposes of subpart B.

107(d) Previously Collected Data

1. *In general.* A financial institution may, for the purpose of reporting such data pursuant to § 1002.109, reuse certain previously collected data if the requirements of § 1002.107(d) are met. In that circumstance, a financial institution need not seek to collect the data anew in connection with a subsequent covered application to satisfy the requirements of this subpart. For example, if an applicant applies for and is granted a term loan, and then subsequently applies for a credit card in the same calendar year, the financial institution need not request again the data specified in § 1002.107(d). Similarly, if an applicant applies for more than one covered credit transaction at one time, a financial institution need only ask once for the data specified in § 1002.107(d).

2. *Data that can be reused.* Subject to the requirements of § 1002.107(d), a financial institution may reuse the following data: § 1002.107(a)(13) (address or location for purposes of determining census tract), § 1002.107(a)(14) (gross annual revenue) (subject to comment 107(d)–7), § 1002.107(a)(15) (NAICS code), § 1002.107(a)(16) (number of workers), § 1002.107(a)(17) (time in business) (subject to comment 107(d)–8), § 1002.107(a)(18) (minority-owned business status, women-owned business status, and LGBTQI+-owned business status) (subject to comment 107(d)–9), § 1002.107(a)(19) (ethnicity, race, and sex of applicant's principal owners) (subject to comment 107(d)–9), and § 1002.107(a)(20) (number of principal owners). A financial institution is not, however, permitted to reuse other data, such as § 1002.107(a)(6) (credit purpose).

3. *Previously reported data without a substantive response.* Data have not been ''previously collected'' within the meaning of § 1002.107(d) if the applicant did not provide a substantive response to the financial institution's request for that data and the financial institution was not otherwise able to obtain the requested data (for example, from the applicant's credit report, or tax returns).

4. *Updated data.* If, after the application process has closed on a prior covered application, a financial institution obtains updated information relevant to the data required to be collected and reported pursuant to § 1002.107(a)(13) through (20), and the

applicant subsequently submits a new covered application, the financial institution must use the updated information in connection with the new covered application (if the requirements of § 1002.107(d) are otherwise met) or seek to collect the data again. For example, if a business notifies a financial institution of a change of address of its sole business location, and subsequently submits a covered application within the time period specified in § 1002.107(d)(1) for reusing previously collected data, the financial institution must report census tract based on the updated information. In that circumstance, the financial institution may still reuse other previously collected data to satisfy § 1002.107(a)(14) through (20) if the requirements of § 1002.107(d) are met.

5. *Collection within the preceding 36 months.* Pursuant to § 1002.107(d)(1), data can be reused to satisfy § 1002.107(a)(13) and (15) through (20) if they are collected within the preceding 36 months. A financial institution may measure the 36-month period from the date of final action taken (§ 1002.107(a)(9)) on a prior application to the application date (§ 1002.107(a)(2)) on a subsequent application. For example, if a financial institution takes final action on an application on February 1, 2025, it may reuse certain previously collected data pursuant to § 1002.107(d)(1) for subsequent covered applications dated or received by the financial institution through January 31, 2028.

6. *Reason to believe data are inaccurate.* Whether a financial institution has reason to believe data are inaccurate pursuant to § 1002.107(d)(2) depends on the particular facts and circumstances. For example, a financial institution may have reason to believe data on the applicant's minority-owned business status, women-owned business status, and LGBTQI+-owned business status may be inaccurate if it knows that the applicant has had a change in ownership or a change in an owner's percentage of ownership.

7. *Collection of gross annual revenue in the same calendar year.* Pursuant to § 1002.107(d)(1), gross annual revenue information can be reused to satisfy § 1002.107(a)(14) provided it is collected in the same calendar year as the current covered application, as measured from the application date. For example, if an application is received and gross annual revenue is collected in connection with a covered application in one calendar year, but then final action was taken on the application in the following calendar year, the data may only be reused for the calendar year in which it was collected and not the calendar year in which final action was taken on the application. However, if an application is received and gross annual revenue is collected in connection with a covered application in one calendar year, a financial institution may reuse that data pursuant to § 1002.107(d) in a subsequent application initiated in the same calendar year, even if final action was taken on the subsequent application in the following calendar year.

8. *Time in business.* A financial institution that decides to reuse previously collected data to satisfy § 1002.107(a)(17) (time in business) must update the data to reflect the passage of time since the data were collected. If a financial institution only knows that the applicant had been in business less than two years at the time the data was initially collected, as described in comment 107(a)(17)–1.ii or iii, it updates the data based on the assumption that the applicant had been in business for 12 months at the time of the prior collection. For example:

i. If a financial institution previously collected data on a prior covered application that the applicant has been in business for four years, and then seeks to reuse that data for a subsequent covered application submitted one year later, it must update the data to reflect that the applicant has been in business for five years.

ii. If a financial institution previously collected data on a prior covered application that the applicant had been in business less than two years (and was not aware of the business's actual length of time in business at the time), and then seeks to reuse that data for a subsequent covered application submitted 18 months later, the financial institution reports time in business on the subsequent covered application as over two years in business.

9. *Minority-owned business status, women-owned business status, LGBTQI+-owned business status, and principal owners' ethnicity, race, and sex.* A financial institution may not reuse data to satisfy § 1002.107(a)(18) and (19) unless the data were collected in connection with a prior covered application pursuant to this subpart B. If the financial institution previously asked the applicant to provide its minority-owned business status, women-owned business status, and LGBTQI+-owned business status, and principal owners' ethnicity, race, and sex for purposes of § 1002.107(a)(18) and (19), and the applicant declined to provide the information (such as by selecting ''I do not wish to provide this information'' or similar on a data collection form or by telling the financial institution that it did not wish to provide the information), the financial institution may use that response when reporting data for a subsequent application pursuant to § 1002.107(d). However, if the applicant failed to respond (such as by leaving the response to the question blank or by failing to return a data collection form), the financial institution must inquire about the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and principal owners' ethnicity, race, or sex, as applicable, in connection with a subsequent application because the data were not previously obtained. See also comment 107(a)(19)–11 concerning previously collected ethnicity, race, and sex information.

Section 1002.108—Firewall

108(a) Definitions

1. *Involved in making any determination concerning a covered application from a small business.* i. *General.* An employee or officer is involved in making a determination concerning a covered application from a small business for purposes of § 1002.108 if the employee or officer makes, or otherwise participates in, a decision regarding the evaluation of a covered application from a small business or the creditworthiness of a small business applicant for a covered credit transaction. This includes, but is not limited to, employees and officers serving as underwriters. The decision that an employee or officer makes or participates in must be about a specific covered application or about the creditworthiness of a specific applicant. An employee or officer is not involved in making a determination concerning a covered application if the employee or officer is only involved in making a decision that affects covered applications generally, or if the employee or officer only interacts with small businesses prior to them becoming applicants or submitting an application. An employee or officer may be participating in a determination concerning a covered application even if the employee or officer is not the ultimate decision maker or the sole decision maker. For example, an employee participates in a determination concerning a covered application if the employee recommends that another employee or officer approve or deny the application. Similarly, an employee or officer participates in a determination concerning a covered application if the employee or officer is part of a larger group, such as a committee, that makes

a determination concerning a covered application. For example, an employee participates in a decision if the employee is a member of a committee that approves the terms offered to an applicant for a covered application. This is true even if the employee does not support the committee's ultimate decision regarding the terms offered. Conversely, an employee or officer does not participate in a determination concerning a covered application if the employee or officer only performs ministerial functions for the committee, such as recording the minutes, or if the committee does not make a determination concerning a specific covered application.

ii. *Examples of activities that do not constitute being involved in making a determination concerning a covered application from a small business.* The following are examples of activities that do not constitute being involved in making a determination concerning a covered application:

A. Developing policies and procedures, designing or programming computer or other systems, or conducting marketing.

B. Discussing credit products, loan terms, or loan requirements with a small business before it submits a covered application.

C. Making or participating in a decision after the financial institution has taken final action on the covered application, such as a decision about servicing or collecting a covered credit transaction.

D. Using a check box form to confirm whether an applicant has submitted all necessary documents or handling a minor or clerical matter during the application process, such as suggesting or selecting a time for an appointment with an applicant.

E. Gathering information (including information collected pursuant to § 1002.107(a)(18) or (19)) and forwarding the information or a covered application to other individuals or entities.

F. Reviewing previously collected data to determine if it can be reused for a later covered application pursuant to § 1002.107(d).

iii. *Examples of activities that constitute being involved in making a determination concerning a covered application from a small business.* The following are examples of activities (done individually or as part of a group) that constitute being involved in making a determination concerning a covered application:

A. Making or participating in a decision to approve or deny a specific covered application. This includes, but is not limited to, making or participating in a decision that an applicant does not satisfy one or more of the requirements for the covered credit transaction for which it has applied.

B. Making or participating in a decision regarding the reason(s) for denial of a covered application.

C. Making or participating in a decision that a guarantor or collateral is required in order to approve a specific covered application.

D. Making or participating in a decision regarding the credit amount or credit limit that will be approved for a specific covered application.

E. Making or participating in a decision to set one or more of the other terms that will be offered for a specific covered credit transaction. This includes, but is not limited to, making or participating in a decision regarding the interest rate, the loan term, or the payment schedule that will be offered for a specific covered credit transaction.

F. Making or participating in a decision regarding a counteroffer made to a specific applicant, including a decision regarding the terms of such a counteroffer.

G. Recommending that another decision maker approve or deny a specific covered application, provide a specific reason for denying a covered application, require a guarantor or collateral in order to approve a covered application, approve a credit amount or credit limit for a covered credit transaction, set one or more other terms for a covered credit transaction, make a counteroffer regarding a covered application, or set a specific term for such a counteroffer.

2. *Should have access.* i. *General.* A financial institution may determine that an employee or officer who is involved in making a determination concerning a covered application from a small business should have access to information otherwise subject to the prohibition in § 1002.108(b) if that employee or officer is assigned one or more job duties that may require the employee or officer to collect, see, consider, refer to, or otherwise use information subject to the prohibition in § 1002.108(b). If the employee or officer might need to collect, see, consider, refer to, or use such information to perform the employee's or officer's assigned job duties, the financial institution may determine that the employee or officer should have access. For example, if a loan officer is involved in making a determination concerning a covered application and that loan officer's job description or the financial institution's policies and procedures state that the loan officer may need to collect information pursuant to § 1002.107(a)(18) or (19), the financial institution may determine that the loan officer should have access.

ii. *When a group of employees or officers should have access.* A financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of § 1002.108. For example, if a job description, a policy, a procedure, or another document states that a loan officer may have to collect or explain any part of a data collection form that includes the inquiries described in § 1002.107(a)(18) and (19), the financial institution may determine that all employees and officers who have been assigned the position of loan officer should have access for purposes of § 1002.108.

iii. *Making a determination regarding who should have access.* A financial institution is permitted to choose what lawful factors it will consider when determining whether an employee or officer should have access. A financial institution's determination that an employee or officer should have access may take into account relevant operational factors and lawful business practices. For example, a financial institution may consider its size, the number of employees and officers within the relevant line of business or at a particular branch or office location, and/or the number of covered applications the financial institution has received or expects to receive. Additionally, a financial institution may consider its current or its reasonably anticipated staffing levels, operations, systems, processes, policies, and procedures. A financial institution is not required to hire additional staff, upgrade its systems, change its lending or operational processes, or revise its policies or procedures for the sole purpose of limiting who should have access.

108(b) Prohibition on Access to Certain Information

1. *Scope of persons subject to the prohibition.* The prohibition in § 1002.108(b) applies to an employee or officer of a covered financial institution or its affiliate if the employee or officer is involved in making any determination concerning a covered application from a small business. For example, if a financial institution is affiliated with company B and an employee of company B is involved in making a determination concerning a covered application on behalf of the financial institution, then the financial institution must comply with § 1002.108 with regard to company B's employee.

Section 1002.108 does not require a financial institution to limit the access of employees and officers of third parties who are not affiliates of the financial institution.

2. *Scope of information that cannot be accessed when the prohibition applies to an employee or officer.* i. *Information that cannot be accessed when the prohibition applies.* If a particular employee or officer is involved in making a determination concerning a covered application from a small business, the prohibition in § 1002.108(b) only limits that employee's or officer's access to that small business applicant's responses to the inquiries that the covered financial institution makes to satisfy § 1002.107(a)(18) and (19). For example, if a financial institution uses a paper data collection form to request information pursuant to § 1002.107(a)(18) and (19), an employee or officer that is subject to the prohibition is not permitted access to the paper data collection form that contains the applicant's responses to the inquiries made pursuant to pursuant to § 1002.107(a)(18) and (19), or to any other record that identifies how the particular applicant responded to those inquires. Similarly, if a financial institution makes the inquiries required pursuant to § 1002.107(a)(18) and (19) during a telephone call, the prohibition applies to the applicant's responses to those inquiries provided during that telephone call and to any record that identifies how the particular applicant responded to those inquiries.

ii. *Information that can be accessed when the prohibition applies.* If a particular employee or officer is involved in making a determination concerning a covered application, the prohibition in § 1002.108(b) does not limit that employee's or officer's access to an applicant's responses to inquiries regarding whether the applicant is a minority-owned, women-owned, or LGBTQI+-owned business, or principal owners' ethnicity, race, or sex, made for purposes other than compliance with § 1002.107(a)(18) or (19). Thus, for example, an employee or officer who is subject to the prohibition in § 1002.108(b) may have access to information regarding whether an applicant is eligible for a Small Business Administration program for women-owned businesses without regard to whether the exception in § 1002.108(c) is satisfied. Additionally, an employee or officer who knows that an applicant is a minority-owned business, women-owned business, or LGBTQI+-owned business, or who knows the ethnicity, race, or sex of any of the applicant's principal owners due to activities unrelated to the inquiries made to satisfy the financial institution's obligations under § 1002.107(a)(18) and (19) is not prohibited from making a determination concerning the applicant's covered application. Thus, an employee or officer who knows, for example, that an applicant is a minority-owned business due to a social relationship or another professional relationship with the applicant or any of its principal owners may make determinations concerning the applicant's covered application. Furthermore, an employee or officer that is involved in making a determination concerning a covered application may see, consider, refer to, or use data collected to satisfy aspects of § 1002.107 other than § 1002.107(a)(18) or (19), such as gross annual revenue, number of workers, and time in business.

108(c) Exception to the Prohibition on Access to Certain Information

1. *General.* A financial institution is not required to limit the access of an employee or officer who is involved in making determinations concerning a covered application from a small business if the financial institution determines that the particular employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) or (19), and the financial institution provides the notice required by § 1002.108(d). A financial institution is not required to perform a separate analysis of the feasibility of maintaining a firewall. A determination that an employee or officer should have access means that it is not feasible to maintain a firewall as to that particular employee or officer, and the exception applies to that employee or officer if the financial institution provides the notice required by § 1002.108(d). However, the fact that a financial institution has made a determination that an employee or officer should have access does not mean that the financial institution can permit other employees and officers who are involved in making determinations concerning a covered application to have access to the information collected pursuant to § 1002.107(a)(18) and (19). A financial institution may only permit an employee or officer who is involved in making a determination concerning a covered application to have access to information collected pursuant to § 1002.107(a)(18) and (19) if it has determined that employee or officer or a group of which the employee or officer is a member should have access to the information.

2. *Applying the exception to a specific employee or officer or group of similarly situated employees or officers.* The exception applies to an employee or officer if the financial institution determines that the employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) or (19), and the financial institution provides the notice required by § 1002.108(d). A financial institution can also determine that several employees and officers should have access, that all of a group of similarly situated employees or officers should have access, and that multiple groups of similarly situated employees or officers should have access to information collected pursuant to § 1002.107(a)(18) or (19). See also comment 108(a)–2. For example, a financial institution could determine that all its small business loan officers, small business loan processors, compliance officers, and legal officers should have access. If the financial institution provides the notice required in § 1002.108(d), the financial institution may permit all of its small business loan officers, small business loan processors, compliance officers, and legal officers to have access. However, the financial institution cannot permit other employees and officers to have access simply because it has determined that the small business loan officers, loan processors, compliance officers, and legal officers should have access. For example, in this case, the financial institution may not permit its underwriters or chief executive officer to have access to the information collected from the applicant pursuant to § 1002.107(a)(18) or (19) if they are involved in making any determination concerning a covered application, unless the financial institution also determines that they should have access. This would be true even if the chief executive officer or underwriter had some of the same assigned duties as a loan officer, such as being a member of a credit committee, but has not been assigned the task(s) that may require access to one or more applicants' responses to the financial institution's inquiries under § 1002.107(a)(18) or (19). If the financial institution separately determines that underwriters and the chief executive officer should have access, then the underwriters and chief executive officer may also have access.

108(d) Notice

1. *General.* If a financial institution determines that one or more employees or officers should have access pursuant to § 1002.108(c), the financial institution must provide the required notice to, at

a minimum, the applicant or applicants whose responses will be accessed by an employee or officer involved in making determinations concerning the applicant's or applicants' covered applications. Alternatively, a financial institution may also provide the required notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants for covered credit transactions or all applicants for a specific type of product.

2. *Content of the required notice.* The notice must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex. See the sample data collection form in appendix E to this part for sample language for providing this notice to applicants. If a financial institution establishes and maintains a firewall and chooses to use the sample data collection form, the financial institution can delete this sample language from the form.

3. *Timing for providing the notice.* If the financial institution is providing the notice orally, it must provide the notice required by § 1002.108(d) prior to asking the applicant if it is a minority-owned business, women-owned business, or LGBTQI+-owned business and prior to asking for a principal owner's ethnicity, race, or sex. If the notice is provided on the same paper or electronic data collection form as the inquiries about minority-owned business status, women-owned business status, LGBTQI+-owned business status and the principal owners' ethnicity, race, or sex, the notice must appear before the inquiries. If the notice is provided in an electronic or paper document that is separate from the data collection form, the notice must be provided at the same time as the data collection form or prior to providing the data collection form. Additionally, the notice must be provided with the non-discrimination notices required pursuant to § 1002.107(a)(18) and (19). See appendix E for sample language.

Section 1002.109—Reporting of Data to the Bureau

109(a) Reporting to the Bureau

109(a)(2) Reporting by Subsidiaries

1. *Subsidiaries.* A covered financial institution is considered a subsidiary of another covered financial institution for purposes of reporting data pursuant to § 1002.109 if more than 50 percent of the ownership or control of the first covered financial institution is held by the second covered financial institution.

109(a)(3) Reporting Obligations Where Multiple Financial Institutions Are Involved in a Covered Credit Transaction

1. *General.* The following clarifies how to report applications involving more than one financial institution. The discussion below assumes that all parties involved with the covered credit transaction are covered financial institutions. However, the same principles apply if any party is not a covered financial institution.

i. A financial institution shall report the action that it takes on a covered application, whether or not the covered credit transaction closed in the financial institution's name and even if the financial institution used underwriting criteria supplied by another financial institution. However, where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to report. Setting the material terms of the covered credit transaction include, for example, selecting among competing offers, or modifying pricing information, amount approved or originated, or repayment duration. In this situation, the determinative factor is not which financial institution actually made the last credit decision prior to closing, but rather which financial institution last had the authority for setting the material terms of the covered credit transaction prior to closing. Whether a financial institution has taken action for purposes of § 1002.109(a)(3) and comment 109(a)(3)–1 is not relevant to, and is not intended to repeal, abrogate, annul, impair, or interfere with, section 701(d) (15 U.S.C. 1691(d)) of the Act, § 1002.9, or any other provision within subpart A of this Regulation.

ii. A financial institution takes action on a covered application for purposes of § 1002.109(a)(3) if it denies the application, originates the application, approves the application but the applicant did not accept the transaction, or closes the file or denies for incompleteness. The financial institution must also report the application if it was withdrawn. For reporting purposes, it is not relevant whether the financial institution receives the application directly from the applicant or indirectly through another party, such as a broker, or (except as otherwise provided in comment 109(a)(3)–1.i) whether another financial institution also reviews and reports an action taken on a covered application involving the same credit transaction.

iii. Where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction and where more than one financial institution denies the application or otherwise does not approve the application, the reporting financial institution (the last financial institution with authority to set the material terms of the covered credit transaction) shall have a consistent procedure for determining how it reports inconsistent or differing data points for purposes of subpart B. For example, Financial Institution A is the reporting entity because it has the last authority to set the material credit terms. Financial Institution A sends the application to Financial Institution B and Financial Institution C for review, but both Financial Institution B and Financial Institution C deny the application, with different denial reasons. Based on these denials, Financial Institution A follows suit and denies the application. Financial Institution A must have a consistent procedure for what denial reason(s) to report, such as reporting the denial reason(s) from the first financial institution that denied the covered application.

2. *Examples.* The following scenarios illustrate how a financial institution reports a particular covered application. The illustrations assume that all parties involved with the covered credit transaction are covered financial institutions. However, the same principles apply if any party is not a covered financial institution. Examples i through iv involve a single financial institution with responsibility for making a credit decision without the involvement of an intermediary. Example v describes a financial institution intermediary with only passive involvement in the covered credit transaction. Example vi describes a transaction where multiple financial institutions independently decision and take action on a covered application. Examples vii and viii describe situations where more than one financial institution must make a credit decision in order to approve the covered credit transaction. Examples ix and x describe situations involving pooled and participation interests.

i. Financial Institution A received a covered application from an applicant

and approved the application before closing the covered credit transaction in its name. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution B later purchased the covered credit transaction from Financial Institution A. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution A reports the application. Financial Institution B has no reporting obligation for this transaction.

ii. Financial Institution A received a covered application from an applicant. If approved, the covered credit transaction would have closed in Financial Institution B's name. Financial Institution A denied the application without sending it to Financial Institution B for approval. Financial Institution A was not acting as Financial Institution B's agent. Since Financial Institution A took action on the application, Financial Institution A reports the application as denied. Financial Institution B does not report the application.

iii. Financial Institution A reviewed a covered application and made a credit decision to approve it using the underwriting criteria provided by a Financial Institution B. Financial Institution B did not review the application and did not make a credit decision prior to closing. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution A reports the application. Financial Institution B has no reporting obligation for this application.

iv. Financial Institution A reviewed and made the credit decision on a covered application based on the criteria of a third-party insurer or guarantor (for example, a government or private insurer or guarantor). Financial Institution A reports the action taken on the application.

v. Financial Institution A received a covered application from an applicant and forwarded that application to Financial Institution B. Financial Institution B reviewed the application and made a credit decision approving the application prior to closing. The covered credit transaction closed in Financial Institution A's name. Financial Institution B purchased the covered credit transaction from Financial Institution A after closing. Financial Institution B was not acting as Financial Institution A's agent. Since Financial Institution B made the credit decision prior to closing, and Financial Institution A's approval was not necessary for the credit transaction, Financial Institution B reports the origination. Financial Institution A does not report the application. Assume the same facts, except that Financial Institution B reviewed the application before the covered credit transaction would have closed, but Financial Institution B denied the application. Financial Institution B reports the application as denied. Financial Institution A does not report the application because it did not take an action on the application. If, under the same facts, the application was withdrawn before Financial Institution B made a credit decision, Financial Institution B would report the application as withdrawn and Financial Institution A would not report the application for the same reason.

vi. Financial Institution A received a covered application and forwarded it to Financial Institutions B and C. Financial Institution A made a credit decision, acting as Financial Institution D's agent, and approved the application. Financial Institutions B and C are not working together with Financial Institutions A or D, or with each other, and are solely responsible for setting the terms of their own credit transactions. Financial Institution B made a credit decision approving the application, and Financial Institution C made a credit decision denying the application. The applicant did not accept the covered credit transaction from Financial Institution D. Financial Institution D reports the application as approved but not accepted. Financial Institution A does not report the application, because it was acting as Financial Institution D's agent. The applicant accepted the offer of credit from Financial Institution B, and credit was extended. Financial Institution B reports the application as originated. Financial Institution C reports the application as denied.

vii. Financial Institution A received a covered application and made a credit decision to approve it using the underwriting criteria provided by Financial Institution B. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution A forwarded the application to Financial Institution B. Financial Institution B reviewed the application and made a credit decision approving the application prior to closing. Financial Institution A makes a credit decision on the application and modifies the credit terms (the interest rate and repayment term) offered by Financial Institution B. The covered credit transaction reflecting the modified terms closes in Financial Institution A's name. Financial Institution B purchases the covered credit transaction from Financial Institution A after closing. As the last financial institution with the authority for setting the material terms of the covered credit transaction, Financial Institution A reports the application as originated. Financial Institution B does not report the origination because it was not the last financial institution with the authority to set the material terms on the application. If, under the same facts, Financial Institution A did not modify the credit terms offered by Financial Institution B, Financial Institution A still reports the application as originated because it was still the last financial institution with the authority for setting the material terms, even if it chose not to so do in a particular instance. Financial Institution B does not report the origination.

viii. Financial Institution A received a covered application and forwarded it to Financial Institutions B, C, and D. Financial Institution A was not acting as anyone's agent. Financial Institution B and C reviewed the application and made a credit decision approving the application and Financial Institution D reviewed the application and made a credit decision denying the application. Prior to closing, Financial Institution A makes a credit decision on the application by deciding to offer to the applicant the credit terms offered by Financial Institution B and does not convey to the applicant the credit terms offered by Financial Institution C. The applicant does not accept the covered credit transaction. As the last financial institution with the authority for setting the material terms of the covered credit transaction, Financial Institution A reports the application as approved but not accepted. Financial Institutions B, C, and D do not report the application because they were not the last financial institution with the authority for setting the material terms of the covered credit transaction. Assume the same facts, except the applicant accepts the terms of the covered credit transaction from Financial Institution B as offered by Financial Institution A. The covered credit transaction closes in Financial Institution A's name. Financial Institution B purchases the transaction after closing. Here, Financial Institution A reports the application as originated. Financial Institutions B, C, and D do not report the application because they were not the last financial institution responsible for setting the material terms of the covered credit transaction.

ix. Financial Institution A receives a covered application and approves it, and then Financial Institution A elects to organize a loan participation agreement where Financial Institutions B and C agree to purchase a partial interest in the covered credit

transaction. Financial Institution A reports the application. Financial Institutions B and C have no reporting obligation for this application.

x. Financial Institution A purchases an interest in a pool of covered credit transactions, such as credit-backed securities or real estate investment conduits. Financial Institution A does not report this purchase.

3. *Agents.* If a covered financial institution takes action on a covered application through its agent, the financial institution reports the application. For example, acting as Financial Institution A's agent, Financial Institution B approved an application prior to closing and a covered credit transaction was originated. Financial Institution A reports the covered credit transaction as an origination. State law determines whether one party is the agent of another.

109(b) Financial Institution Identifying Information

1. *Changes to financial institution identifying information.* If a financial institution's information required pursuant to § 1002.109(b) changes, the financial institution shall provide the new information with the data submission for the collection year of the change. For example, assume two financial institutions that previously reported data under subpart B of this part merge and the surviving institution retained its Legal Entity Identifier but obtained a new TIN in February 2026. The surviving institution must report the new TIN with its data submission for its 2026 data (which is due by June 1, 2027) pursuant to § 1002.109(b)(5). Likewise, if that financial institution's Federal prudential regulator changes in February 2026 as a result of the merger, it must identify its new Federal prudential regulator in its annual submission for its 2026 data.

Paragraph 109(b)(4)

1. *Federal prudential regulator.* For purposes of § 1002.109(b)(4), *Federal prudential regulator* means, if applicable, the Federal prudential regulator for a financial institution that is a depository institution as determined pursuant to section 3q of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Board of Governors of the Federal Reserve System; or the National Credit Union Administration Board for financial institutions that are Federal credit unions.

Paragraph 109(b)(6)

1. *Legal Entity Identifier (LEI).* A Legal Entity Identifier is a utility endorsed by the LEI Regulatory oversight committee, or a utility endorsed or otherwise governed by the Global LEI Foundation (GLEIF) (or any successor of the GLEIF) after the GLEIF assumes operational governance of the global LEI system. A financial institution complies with § 1002.109(b)(6) by reporting its current LEI number. A financial institution that does not currently possess an LEI number must obtain an LEI number, and has an ongoing obligation to maintain the LEI number. The GLEIF website provides a list of LEI issuing organizations. A financial institution may obtain an LEI, for purposes of complying with § 1002.109(b)(6), from any one of the issuing organizations listed on the GLEIF website.

Paragraph 109(b)(7)

1. *RSSD ID number.* The RSSD ID is a unique identifying number assigned to institutions, including main offices and branches, by the Board of Governors of the Federal Reserve System. A financial institution's RSSD ID may be found on the website of the National Information Center, which provides comprehensive financial and structure information on banks and other institutions for which the Federal Reserve Board has a supervisory, regulatory, or research interest including both domestic and foreign banking organizations that operate in the United States. If a financial institution does not have an RSSD ID, it reports that this information is not applicable.

Paragraph 109(b)(8)

1. *Immediate parent entity.* An entity is the immediate parent of a financial institution for purposes of § 1002.109(b)(8)(i) through (iii) if it is a separate entity that directly owns more than 50 percent of the financial institution.

2. *Top-holding parent entity.* An entity is the top-holding parent of a financial institution for purposes of § 1002.109(b)(8)(iv) through (vi) if it ultimately owns more than 50 percent of the financial institution, and the entity itself is not controlled by any other entity. If the immediate parent entity and the top-holding parent entity are the same, the financial institution reports that § 1002.109(b)(8)(iv) through (vi) are not applicable.

3. *LEI.* For purposes of § 1002.109(b)(8)(ii) and (v), a financial institution shall report the LEI of a parent entity if the parent entity has an LEI number. If a financial institution's parent entity does not have an LEI, the financial institution reports that this information is not applicable.

4. *RSSD ID numbers.* For purposes of § 1002.109(b)(8)(iii) and § 1002.109(b)(8)(vi), a financial institution shall report the RSSD ID number of a parent entity if the entity has an RSSD ID number. If a financial institution's parent entity does not have an RSSD ID, the financial institution reports that this information is not applicable.

Paragraph 109(b)(9)

1. *Type of financial institution.* A financial institution complies with § 1002.109(b)(9) by selecting the applicable type or types of financial institution from the list below. A financial institution shall select all applicable types.

i. Bank or savings association.
ii. Minority depository institution.
iii. Credit union.
iv. Nondepository institution.
v. Community development financial institution (CDFI).
vi. Other nonprofit financial institution.
vii. Farm Credit System institution.
viii. Government lender.
ix. Commercial finance company.
x. Equipment finance company.
xi. Industrial loan company.
xii. Online lender.
xiii. Other.

2. *Use of "other" for type of financial institution.* A financial institution reports type of financial institution as "other" where none of the enumerated types of financial institution appropriately describe the applicable type of financial institution, and the institution reports the type of financial institution via free-form text field. A financial institution that selects at least one type from the list is permitted, but not required, to also report "other" (with appropriate free-form text) if there is an additional aspect of its business that is not one of the enumerated types set out in comment 109(b)(9)–1.

3. *Additional types of financial institution.* The Bureau may add additional types of financial institutions via the Filing Instructions Guide and related materials. Refer to the Filing Instructions Guide for any updates for each reporting year.

Paragraph 109(b)(10)

1. *Financial institutions that voluntarily report covered applications under subpart B of this part.* A financial institution that is not a covered financial institution pursuant to § 1002.105(b) but that elects to voluntarily compile, maintain, and

report data under §§ 1002.107 through 1002.109 (see comment 105(b)–10) complies with § 1002.109(b)(10) by selecting ''voluntary reporter.''

Section 1002.110—Publication of Data and Other Disclosures

110(c) Statement of Financial Institution's Small Business Lending Data Available on the Bureau's Website

1. *Statement.* A financial institution shall provide the statement required by § 1002.110(c) using the following, or substantially similar, language:

Small Business Lending Data Notice

Data about our small business lending are available online for review at the Consumer Financial Protection Bureau's (CFPB's) website at https://www.consumerfinance.gov/data-research/small-business-lending/. The data show the geographic distribution of our small business lending applications; information about our loan approvals and denials; and demographic information about the principal owners of our small business applicants. The CFPB may delete or modify portions of our data prior to posting it if doing so would advance a privacy interest. Small business lending data for many other financial institutions are also available at this website.

2. *Website.* A financial institution without a website complies with § 1002.110(c) by making a written statement using the language in comment 110(c)–1, or substantially similar language, available upon request.

3. *Revised location for publicly available data.* The Bureau may modify the location specified in comment 110(c)–1 at which small business lending data are available via the Filing Instructions Guide and related materials. Refer to the Filing Instructions Guide for any updates for each reporting year.

Section 1002.111—Recordkeeping

111(a) Record Retention

1. *Evidence of compliance.* Section 1002.111(a) requires a financial institution to retain evidence of compliance with subpart B of this part for at least three years after its small business lending application register is required to be submitted to the Bureau pursuant to § 1002.109. In addition to the financial institution's small business lending application register, such evidence of compliance is likely to include, but is not limited to, the applications for credit from which information in the register is drawn, as well as the files or documents that, under § 1002.111(b), are kept separate from the applications for credit. This three-year record retention requirement applies to any records covered by § 1002.111(a), notwithstanding the more general 12-month retention period for records related to business credit specified in § 1002.12(b).

2. *Record retention for creditors under § 1002.5(a)(4)(vii) and (viii).* A creditor that is voluntarily, under § 1002.5(a)(4)(vii) and (viii), collecting information pursuant to subpart B of this part complies with § 1002.111(a) by retaining evidence of compliance with subpart B for at least three years after June 1 of the year following the year that data was collected.

111(b) Certain Information Kept Separate From the Rest of the Application

1. *Separate from the application.* A financial institution may satisfy the requirement in § 1002.111(b) by keeping an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19) in a file or document that is discrete or distinct from the application and its accompanying information. For example, such information could be collected on a piece of paper that is separate from the rest of the application form. In order to satisfy the requirement in § 1002.111(b), an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19) need not be maintained in a separate electronic system, nor need they be removed from the physical files containing the application so long as there is some separation between the demographic information and the rest of the application and its accompanying information. However, the financial institution may nonetheless need to keep this information in a different electronic or physical file in order to satisfy the prohibition in § 1002.108(b).

2. *Number of principal owners.* A financial institution is permitted to maintain information regarding the applicant's number of principal owners pursuant to § 1002.107(a)(20) with an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19).

111(c) Limitation on Personally Identifiable Information in Certain Records Retained Under This Section

1. *Small business lending application register.* The prohibition in § 1002.111(c) applies to data in the small business lending application register submitted by the financial institution to the Bureau under § 1002.109, the version of the register that the financial institution maintains under § 1002.111(a), and the separate record of certain information created pursuant to § 1002.111(b).

2. *Examples.* Section 1002.111(c) prohibits a financial institution from including any name, specific address (other than the census tract required under § 1002.107(a)(13)), telephone number, or email address of any individual who is, or is connected with, an applicant in the small business lending application register it reports pursuant to § 1002.109, in the copy of the register the financial institution retains under § 1002.111(a), and in the records of certain information it must retain separately from the application pursuant to § 1002.111(b). It likewise prohibits a financial institution from including any other personally identifiable information concerning any individual who is, or is connected with, an applicant, except as required pursuant to § 1002.107 or § 1002.111(b). Examples of such personally identifiable information that a financial institution may not include in its small business lending application register include, but are not limited to, the following: date of birth, Social Security number, official government-issued driver's license or identification number, alien registration number, government passport number, or employer or taxpayer identification number.

3. *Other records.* The prohibition in § 1002.111(c) does not extend to an application for credit, or any other records that the financial institution maintains that are not specifically enumerated in § 1002.111(c).

4. *Name and business contact information for submission.* The prohibition in § 1002.111(c) does not bar financial institutions from providing to the Bureau, pursuant to § 1002.109(b)(3), the name and business contact information of the person who may be contacted by the Bureau or other regulators with questions about the financial institution's submission under § 1002.109.

Section 1002.112—Enforcement

112(b) Bona Fide Errors

1. *Tolerances for bona fide errors.* Section 1002.112(b) provides that a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of the financial institution's data submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose. The Bureau's thresholds

appear in column C of the table in appendix F. The size of the random sample, set out in column B, shall depend on the size of the financial institution's small business lending application register, as shown in column A of the table in appendix F. A financial institution has not maintained procedures reasonably adapted to avoid errors if either there is a reasonable basis to believe the error was intentional or there is evidence that the financial institution has not maintained procedures reasonably adapted to avoid errors.

2. *Tolerances and data fields.* For purposes of determining whether an error is bona fide under § 1002.112(b), the term ''data field'' generally refers to individual fields. All required data fields, and valid response options for those fields, are set forth in the Bureau's Filing Instructions Guide, available at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/*. Some data fields may allow for more than one response. For example, with respect to information on the ethnicity and race of an applicant's principal owner, a data field may identify more than one race or ethnicity. If there are one or more errors within an ethnicity data field, or within a race data field, for a particular principal owner, they would count as one (and only one) error for that data field. For instance, in the ethnicity data field, if an applicant indicates that one of its principal owners is Cuban, but the financial institution reports that the principal owner is Mexican and Puerto Rican, the financial institution has made one error in the ethnicity data field for that principal owner. For purposes of the error threshold table in appendix F, the financial institution is deemed to have made one error, not two.

3. *Tolerances and safe harbors.* An error that meets the criteria for one of the four safe harbor provisions in § 1002.112(c) is not counted as an error for purposes of determining whether a financial institution has exceeded the relevant error threshold in appendix F for a given data field.

112(c) Safe Harbors

1. *Information from a Federal agency—census tract.* Section 1002.112(c)(2) provides that an incorrect entry for census tract is not a violation of the Act or subpart B of this part, if the financial institution obtained the census tract using a geocoding tool provided by the FFIEC or the Bureau. However, this safe harbor provision does not extend to a financial institution's failure to provide the correct census tract number for a covered application on its small business lending application register, as required by § 1002.107(a)(13), because the FFIEC or Bureau geocoding tool did not return a census tract for the address provided by the financial institution. In addition, this safe harbor provision does not extend to a census tract error that results from a financial institution entering an inaccurate address into the FFIEC or Bureau geocoding tool.

2. *Applicability of NAICS code safe harbor.* The safe harbor in § 1002.112(c)(3) applies to an incorrect entry for the 3-digit NAICS code that financial institutions must collect and report pursuant to § 1002.107(a)(15), provided certain conditions are met. For purposes of § 1002.112(c)(3)(i), a financial institution is permitted to rely on statements made by the applicant, information provided by the applicant, or on other information obtained through its use of appropriate third-party sources, including business information products. See also comments 107(a)(15)–4 and 107(b)–1.

3. *Incorrect determination of small business status, covered credit transaction, or covered application—examples.* Section 1002.112(c)(4) provides a safe harbor from violations of the Act or this regulation for a financial institution that initially collects data under § 1002.107(a)(18) and (19) regarding whether an applicant for a covered credit transaction is a minority-owned, a women-owned, or LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners, but later concludes that it should not have collected this data, if certain conditions are met. Specifically, to qualify for this safe harbor, § 1002.112(c)(4) requires that the financial institution have had a reasonable basis at the time it collected data under § 1002.107(a)(18) and (19) for believing that the application was a covered application for a covered credit transaction from a small business pursuant to §§ 1002.103, 1002.104, and 1002.106, respectively. For example, Financial Institution A collected data under § 1002.107(a)(18) and (19) from an applicant for a covered credit transaction that had self-reported its gross annual revenue as $4.8 million. Sometime after Financial Institution A had collected this data from the applicant, the financial institution reviewed the applicant's tax returns, which indicated the applicant's gross annual revenue was in fact $5.2 million. Financial Institution A is permitted to rely on representations made by the applicant regarding gross annual revenue in determining whether an applicant is a small business (see § 1002.107(b) and comments 106(b)(1)–3 and 107(a)(14)–1). Thus, Financial Institution A may have had a reasonable basis to believe, at the time it collected data under § 1002.107(a)(18) and (19), that the applicant was a small business pursuant to § 1002.106, in which case Financial Institution A's collection of such data would not violate the Act or this regulation.

Section 1002.114—Effective Date, Compliance Date, and Special Transition Rules

114(b) Compliance Date

1. *Application of compliance date.* The applicable compliance date in § 1002.114(b) is the date by which the covered financial institution must begin to compile data as specified in § 1002.107, comply with the firewall requirements of § 1002.108, and begin to maintain records as specified in § 1002.111. In addition, the covered financial institution must comply with § 1002.110(c) and (d) no later than June 1 of the year after the applicable compliance date. For instance, if § 1002.114(b)(2) applies to a financial institution, it must comply with §§ 1002.107 and 1002.108, and portions of § 1002.111, beginning April 1, 2025, and it must comply with § 1002.110(c) and (d), and portions of § 1002.111, no later than June 1, 2026.

2. *Initial partial year collections pursuant to § 1002.114(b).* i. When the compliance date of October 1, 2024 specified in § 1002.114(b)(1) applies to a covered financial institution, the financial institution is required to collect data for covered applications during the period from October 1, 2024 to December 31, 2024. The financial institution must compile data for this period pursuant to § 1002.107, comply with the firewall requirements of § 1002.108, and maintain records as specified in § 1002.111. In addition, for data collected during this period, the covered financial institution must comply with §§ 1002.109 and 1002.110(c) and (d) by June 1, 2025.

ii. When the compliance date of April 1, 2025 specified in § 1002.114(b)(2) applies to a covered financial institution, the financial institution is required to collect data for covered applications during the period from April 1, 2025 to December 31, 2025. The financial institution must compile data for this period pursuant to § 1002.107, comply with the firewall requirements of § 1002.108, and maintain records as specified in § 1002.111. In addition, for data collected during this period, the covered financial institution must

comply with §§ 1002.109 and 1002.110(c) and (d) by June 1, 2026.

3. *Informal names for compliance date provisions.* To facilitate discussion of the compliance dates specified in § 1002.114(b)(1), (2), and (3), in the official commentary and any other documents referring to these compliance dates, the Bureau adopts the following informal simplified names. Tier 1 refers to the cohort of covered financial institutions that have a compliance date of October 1, 2024 pursuant to § 1002.114(b)(1). Tier 2 refers to the cohort of covered financial institutions that have a compliance date of April 1, 2025 pursuant to § 1002.114(b)(2). Tier 3 refers to the cohort of covered financial institutions that have a compliance date of January 1, 2026 pursuant to § 1002.114(b)(3).

4. *Examples.* The following scenarios illustrate how to determine whether a financial institution is a covered financial institution and which compliance date specified in § 1002.114(b) applies.

i. Financial Institution A originated 3,000 covered credit transactions for small businesses in calendar year 2022, and 3,000 in calendar year 2023. Financial Institution A is in Tier 1 and has a compliance date of October 1, 2024.

ii. Financial Institution B originated 2,000 covered credit transactions for small businesses in calendar year 2022, and 3,000 in calendar year 2023. Because Financial Institution B did not originate at least 2,500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1. Because Financial Institution B did originate at least 500 covered credit transactions for small businesses in each of 2022 and 2023, it is in Tier 2 and has a compliance date of April 1, 2025.

iii. Financial Institution C originated 400 covered credit transactions to small businesses in calendar year 2022, and 1,000 in calendar year 2023. Because Financial Institution C did not originate at least 2,500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, and because it did not originate at least 500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 2. Because Financial Institution C did originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is in Tier 3 and has a compliance date of January 1, 2026.

iv. Financial Institution D originated 90 covered credit transactions to small businesses in calendar year 2022, 120 in calendar year 2023, and 90 in both of the calendar years 2024 and 2025. Because Financial Institution D did not originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, Tier 2, or Tier 3. Because Financial Institution D did not originate at least 100 covered credit transactions for small businesses in subsequent consecutive calendar years, it is not a covered financial institution under § 1002.105(b) and is not required to comply with the rule in 2024, 2025, or 2026.

v. Financial Institution E originated 120 covered credit transactions for small businesses in each of calendar years 2022, 2023, and 2024, and 90 in 2025. Because Financial Institution E did not originate at least 2,500 or 500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1 or Tier 2. Because Financial Institution E originated at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is in Tier 3 and has a compliance date of January 1, 2026. However, because Financial Institution E did not originate at least 100 covered credit transactions for small businesses in each of 2024 and 2025, it no longer satisfies the definition of a covered financial institution in § 1002.105(b) at the time of the compliance date for Tier 3 institutions and thus is not required to comply with the rule in 2026.

vi. Financial Institution F originated 90 covered credit transactions for small businesses in calendar year 2022, and 120 in 2023, 2024, and 2025. Because Financial Institution F did not originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, Tier 2, or Tier 3. Because Financial Institution F originated at least 100 covered credit transactions for small businesses in subsequent calendar years, § 1002.114(b)(4), which cross-references § 1002.105(b), applies to Financial Institution F. Because Financial Institution F originated at least 100 covered credit transactions for small businesses in each of 2024 and 2025, it is a covered financial institution under § 1002.105(b) and is required to comply with the rule beginning January 1, 2026.

vii. Financial Institution G originated 90 covered credit transactions for small businesses in each of calendar years 2022, 2023, 2024, and 2025, and 120 in each of 2026 and 2027. Because Financial Institution F did not originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, Tier 2, or Tier 3. Because Financial Institution G originated at least 100 covered credit transactions for small businesses in subsequent calendar years, § 1002.114(b)(4), which cross-references § 1002.105(b), applies to Financial Institution G. Because Financial Institution G originated at least 100 covered credit transactions for small businesses in each of 2026 and 2027, it is a covered financial institution under § 1002.105(b) and is required to comply with the rule beginning January 1, 2028.

114(c) Special Transition Rules

1. *Collection of certain information prior to a financial institution's compliance date.* Notwithstanding § 1002.5(a)(4)(ix), a financial institution that chooses to collect information on covered applications as permitted by § 1002.114(c)(1) in the 12 months prior to its initial compliance date as specified in § 1002.114(b)(1), (2) or (3) need comply only with the requirements set out in §§ 1002.107(a)(18) and (19), 1002.108, and 1002.111(b) and (c) with respect to the information collected. During this 12-month period, a covered financial institution need not comply with the provisions of § 1002.107 (other than §§ 1002.107(a)(18) and (19)), 1002.109, 1002.110, 1002.111(a), or 1002.114.

2. *Transition rule for applications received prior to a compliance date but final action is taken after a compliance date.* If a covered financial institution receives a covered application from a small business prior to its initial compliance date specified in § 1002.114(b), but takes final action on or after that date, the financial institution is not required to collect data regarding that application pursuant to § 1002.107 nor to report the application pursuant to § 1002.109. For example, if a financial institution is subject to a compliance date of October 1, 2024, and it receives an application on September 15, 2024 but does not take final action on the application until October 5, 2024, the financial institution is not required to collect data pursuant to § 1002.107 nor to report data to the Bureau pursuant to § 1002.109 regarding that application.

3. *Has readily accessible the information needed to determine small business status.* A financial institution has readily accessible the information needed to determine whether its originations of covered credit transactions were for small businesses as defined in § 1002.106 if, for instance, it in the ordinary course of business collects data on the precise gross annual revenue of the businesses for which it originates loans, it obtains information sufficient to determine whether an applicant for business credit had gross annual revenues of $5 million or less, or if it collects and reports similar data to

Federal or State government agencies pursuant to other laws or regulations.

4. *Does not have readily accessible the information needed to determine small business status.* A financial institution does not have readily accessible the information needed to determine whether its originations of covered credit transactions were for small businesses as defined in § 1002.106 if it did not in the ordinary course of business collect either precise or approximate information on whether the businesses to which it originated covered credit had gross annual revenue of $5 million or less. In addition, even if precise or approximate information on gross annual revenue was initially collected, a financial institution does not have readily accessible this information if, to retrieve this information, for example, it must review paper loan files, recall such information from either archived paper records or scanned records in digital archives, or obtain such information from third parties that initially obtained this information but did not transmit such information to the financial institution.

5. *Reasonable method to estimate the number of originations.* The reasonable methods that financial institutions may use to estimate originations for 2022 and 2023 include, but are not limited to, the following:

i. A financial institution may comply with § 1002.114(c)(2) by determining the small business status of covered credit transactions by asking every applicant, prior to the closing of approved transactions, to self-report whether it had gross annual revenue for its preceding fiscal year of $5 million or less, during the period October 1 through December 31, 2023. The financial institution may annualize the number of covered credit transactions it originates to small businesses from October 1 through December 31, 2023 by quadrupling the originations for this period, and apply the annualized number of originations to both calendar years 2022 and 2023.

ii. A financial institution may comply with § 1002.114(c)(2) by assuming that every covered credit transaction it originates for business customers in calendar years 2022 and 2023 is to a small business.

iii. A financial institution may comply with § 1002.114(c)(2) by using another methodology provided that such methodology is reasonable and documented in writing.

6. *Examples.* The following scenarios illustrate the potential application of § 1002.114(c)(2) to a financial institution's compliance date under § 1002.114(b).

i. Prior to October 1, 2023, Financial Institution A did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution A chose to use the methodology set out in comment 114(c)–5.i and as of October 1, 2023 began to collect information on gross annual revenue as defined in § 1002.107(a)(14) for its covered credit transactions originated for businesses. Using this information, Financial Institution A determined that it had originated 750 covered credit transactions for businesses that were small as defined in § 1002.106. On an annualized basis, Financial Institution A originated 3,000 covered credit transactions for small businesses (750 originations * 4 = 3,000 originations per year). Applying this annualized figure of 3,000 originations to both calendar years 2022 and 2023, Financial Institution A is in Tier 1 and has a compliance date of October 1, 2024.

ii. Prior to July 1, 2023, Financial Institution B collected gross annual revenue information for some applicants for business credit, but such information was only noted in its paper loan files. Financial Institution B thus does not have reasonable access to information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions for calendar years 2022 and 2023. Financial Institution B chose to use the methodology set out in comment 114(c)–5.i, and as of October 1, 2023, Financial Institution B began to ask all businesses for whom it was closing covered credit transactions if they had gross annual revenues in the preceding fiscal year of $5 million or less. Using this information, Financial Institution B determined that it had originated 350 covered credit transactions for businesses that were small as defined in § 1002.106. On an annualized basis, Financial Institution B originated 1,400 covered credit transactions for small businesses (350 originations * 4 = 1,400 originations per year). Applying this estimated figure of 1,400 originations to both calendar years 2022 and 2023, Financial Institution B is in Tier 2 and has a compliance date of April 1, 2025.

iii. Prior to April 1, 2023, Financial Institution C did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution C chose its own methodology pursuant to comment 114(c)–5.iii, basing it in part on the methodology specified in comment 114(c)–5.i. Starting on April 1, 2023, Financial Institution C began to ask all business applicants for covered credit transactions if they had gross annual revenue in their preceding fiscal year of $5 million or less. Using this information, Financial Institution C determined that it had originated 100 covered credit transactions for businesses that were small as defined in § 1002.106. On an annualized basis, Financial Institution C originated approximately 133 covered credit transactions for small businesses ((100 originations * 365 days)/275 days = 132.73 originations per year). Applying this estimate of 133 originations to both calendar years 2022 and 2023, Financial Institution C is in Tier 3 and has a compliance date of January 1, 2026.

iv. Financial Institution D did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution D determined that it had originated 3,000 total covered credit transactions for businesses in each of 2022 and 2023. Applying the methodology specified in comment 114(c)–5.ii, Financial Institution D assumed that all 3,000 covered credit transactions originated in each of 2022 and 2023 were to small businesses. On that basis, Financial Institution D is in Tier 1 and has a compliance date of October 1, 2024.

v. Financial Institution E did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution E determined that it had originated 700 total covered credit transactions for businesses in each of 2022 and 2023. Applying the methodology specified in comment 114(c)–5.ii, Financial Institution E assumed that all such transactions in each of 2022 and 2023 were originated for small businesses. On that basis, Financial Institution E is in Tier 2 and has a compliance date of April 1, 2025.

vi. Financial Institution F did does not have readily accessible gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution F determined that it had originated 80 total covered credit transactions for businesses in 2022 and

150 total covered credit transactions for businesses in 2023. Applying the methodology set out in comment 114(c)–5.ii, Financial Institution F assumed that all such transactions originated in 2022 and 2023 were originated for small businesses. On that basis, Financial Institution E is not in Tier 1, Tier 2 or Tier 3, and is subject to the compliance date provision specified in § 1002.114(b)(4).

* * * * *

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2023–07230 Filed 5–30–23; 8:45 am]

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Part IV

Department of Transportation

Federal Railroad Administration

49 CFR Part 245

Certification of Dispatchers; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 245

[Docket No. FRA–2022–0019, Notice No. 1]

RIN 2130–AC91

Certification of Dispatchers

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes regulations for the certification of dispatchers, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008.

DATES: Comments on the proposed rule must be received by July 31, 2023. FRA will consider comments received after that date to the extent practicable.

ADDRESSES:

Comments: Comments related to Docket No. FRA–2022–0019 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, docket number (FRA–2022–0019), and Regulatory Identification Number (RIN) for this rulemaking (2130–AC91). All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Curtis Dolan, Railroad Safety Specialist, Dispatch Operating Practices, Federal Railroad Administration, telephone: (470) 522–6633, email: *curtis.dolan@dot.gov;* or Michael C. Spinnicchia, Attorney Adviser, Federal Railroad Administration, telephone: (202) 493–0109, email: *michael.spinnicchia@dot.gov.*

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I. Executive Summary

Purpose of the Regulatory Action

FRA proposes to require railroads to develop programs for certifying individuals who perform dispatching tasks on their networks. Under this proposed rule, railroads would be required to have formal processes for training prospective dispatchers, as well as verifying that each dispatcher has the requisite knowledge, skills, safety record, and abilities to safely perform all of the safety-related dispatcher duties mandated by Federal laws and regulations, prior to certification. In addition, railroads would be required to have formal processes for revoking certification (either temporarily or permanently) for dispatchers who violate specified minimum requirements.

FRA is proposing this regulation in response to the Rail Safety Improvement Act of 2008 (RSIA), which required the Secretary of Transportation (Secretary) to submit a report to Congress addressing whether certification of ''certain crafts or classes'' of railroad employees or contractors, including railroad dispatchers, was necessary to ''reduce the number and rate of accidents and incidents or to improve railroad safety.'' If the Secretary determined it was necessary to require the certification of certain crafts or classes to improve railroad safety, section 402 of the RSIA stated the Secretary *may* prescribe such regulations.

The Secretary submitted a report to Congress on November 4, 2015, stating that, based on FRA's preliminary research, dispatchers were one of the most viable candidate railroad crafts for certification. Given the safety critical role of dispatchers in facilitating safe railroad operations (which includes the coordination of emergency services in response to accidents and incidents), FRA determined that railroad safety is expected to be improved if dispatchers were required to satisfy certain standards and be certified by their employing railroads.

Summary of Major Provisions

This proposed rule would require railroads to develop written programs for certifying individuals who work as dispatchers on their territories and to submit those written certification programs to FRA for approval prior to implementation. FRA would issue a letter to the railroad when it approves a certification program, that explains the basis for approval, and a program will not be considered approved until the approval letter is issued.

FRA is proposing to require Class I railroads (including the National Railroad Passenger Corporation), and railroads providing commuter service, to submit their written certification programs to FRA no later than eight (8) months after the final rule effective date. Class II and Class III railroads would be required to submit their written certification plans sixteen (16) months after the final rule effective date. New railroads that begin operation after the final rule effective date would be required to submit their written certification programs to FRA and obtain FRA approval before commencing operations. In addition, railroads seeking to materially modify their FRA-approved certification programs would be required to obtain FRA approval prior to modifying their programs.

Railroads would be required to evaluate certification candidates in multiple areas, including prior safety conduct as a motor vehicle operator, prior safety conduct as an employee of a different railroad, substance abuse disorders and alcohol/drug rules compliance, and vision and hearing acuity.

The proposed rule also contains minimum requirements for the training provided to prospective dispatchers. The proposed requirements are intended to ensure that certified dispatchers have received sufficient training before they are hired to work as dispatchers on the railroad. The proposed requirements are also intended to ensure that certified dispatchers periodically receive recurring training on railroad safety and operating rules and practices, as well as comprehensive training on the use of new dispatching systems and technology before they are introduced on the railroads in revenue service.

With the exception of individuals designated as certified dispatchers prior to FRA approval of the railroad's

dispatcher certification program, the proposed rule would prohibit railroads from certifying dispatchers for intervals longer than three (3) years. This three-year limitation, which would be consistent with the 36-month maximum period for certifying locomotive engineers in 49 CFR 240.217(c) and conductors in 49 CFR 242.201(c), would allow for periodic re-evaluation of certified dispatchers to verify their continued compliance with FRA's minimum safety requirements.

Subpart D of this proposed rule addresses the process and criteria for denying and revoking certification. Proposed § 245.301 describes the process a railroad would be required to undergo before it denies an individual certification or recertification. This process would include providing the certification candidate with the information that forms the basis for the denial decision and giving the candidate an opportunity to rebut such evidence. When a railroad denies an individual certification or recertification, it must issue its decision in writing, and the decision must comply with certain requirements provided in the proposed rule.

A railroad could only revoke a dispatcher's certification if one of eight events occurs. Generally, for the first revocable event that is not related to a dispatcher's use of drugs or alcohol, the person's certification would be revoked for 30 days. If an individual accumulates more of these violations in a given time period, the revocation period (period of ineligibility) would become increasingly longer.

If a railroad acquires reliable information that a certified dispatcher has violated an operating rule or practice requiring decertification under the proposed rule, it shall suspend the dispatcher's certificate immediately while it determines whether revocation of the certificate is warranted. In such circumstances, dispatchers would be entitled to a hearing. Similar to a railroad's decision to deny an individual certification, a railroad's decision to revoke a dispatcher's certification would be required to satisfy certain requirements. Finally, if an intervening cause prevented or materially impaired a dispatcher's ability to comply with a railroad operating rule or practice, the railroad would not revoke the dispatcher's certification.

Subpart E of this proposed rule discusses the dispute resolution process for individuals who wish to challenge a railroad's decision to deny certification, deny recertification, or revoke certification. This dispute resolution process mirrors the process used for locomotive engineers and conductors under 49 CFR parts 240 and 242, respectively.

Finally, the proposed rule contains two appendices. Appendix A discusses the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B provides guidance on the procedures railroads should employ in administering the vision and hearing requirements under §§ 245.117 and 245.118.

This proposed rule does not revise 49 CFR part 241, United States Locational Requirement for Dispatching of United States Rail Operations. Furthermore, this proposed rule would not apply to dispatchers located outside of the United States as ''[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' '' [1]

Costs and Benefits

FRA analyzed the economic impact of this proposed rule. FRA estimated the costs to be incurred by railroads and the Government. FRA also estimated the benefits of fewer dispatcher-caused accidents.

FRA is proposing regulations establishing a formal certification process for railroad dispatchers. As part of that process, railroads would be required to develop a program meeting specific requirements for training current and prospective dispatchers, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a comprehensive record, including of safety compliance infractions, that other railroads can review when considering individuals for certification.

This proposed regulation would ensure that dispatchers are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

FRA estimates the 10-year costs of the proposed rule to be $5.3 million, discounted at 7 percent. The estimated annualized costs would be $0.8 million discounted at 7 percent. The following table shows the total costs of this proposed rule, over the 10-year analysis period.

TOTAL 10-YEAR DISCOUNTED COSTS (2020 DOLLARS) [2]

Category	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Development of Certification Program	929,395	953,949	132,325	111,832
Certification Eligibility Requirements	55,360	61,963	7,882	7,264
Recertification Eligibility Requirements	65,831	83,877	9,373	9,833
Training	707,334	812,820	100,708	95,287
Knowledge Testing	233,988	281,581	33,315	33,010
Vision and Hearing	1,586,913	1,909,692	225,941	223,874
Monitoring Operational Performance	256,017	305,956	36,451	35,867
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	26,832	32,289	3,820	3,785
Petitions and Hearings	8,198	9,797	1,167	1,149
Government Administrative Cost	1,208,191	1,361,239	172,019	159,579
Total	5,345,589	6,139,877	761,092	719,781

[1] *E.E.O.C.* v. *Arabian American Oil Co.,* 499 U.S. 244, 248 (1991) (*quoting Foley Bros., Inc.* v. *Filardo,* 336 U.S. 281, 284–85 (1949)).

[2] Numbers in this table and subsequent tables may not sum due to rounding.

This rule is expected to reduce the likelihood of an accident occurring due to dispatcher error. FRA has analyzed accidents over the past five years to categorize those where dispatcher training and certification would have impacted the accident. FRA then estimated benefits based on that analysis.

The following table shows the estimated 10-year quantifiable benefits of the proposed rule. The total 10-year estimated benefits would be $0.8 million (PV, 7%) and annualized benefits would be $0.1 million (PV, 7%).

TOTAL 10-YEAR DISCOUNTED BENEFITS (2020 DOLLARS)

Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
785,599	918,450	111,852	107,670

This proposed rule would also provide unquantifiable benefits. FRA has quantified the monetary impact from accidents reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (*e.g.,* environmental impact). That impact may account for additional benefits not quantified in this analysis. If these costs were realized, accidents affected by this proposed rulemaking could have much greater economic impact than the quantitative benefit estimates provided here.

There is also a chance of a high impact event due to a dispatcher error. This could involve fatalities, injuries, and environmental damage, as well as impacting railroads, communities, and the public. FRA has not estimated the likelihood of such an accident, but this proposed rule is expected to reduce the risk that an accident of that magnitude.

II. Legal Authority

Pursuant to the Rail Safety Improvement Act of 2008, Public Law 110–432, sec. 402, 122 Stat. 4848, 4884 (Oct. 16, 2008) (hereinafter ''RSIA''), the Secretary of Transportation (Secretary) was required to submit a report to Congress addressing whether certification of certain crafts or classes of employees, including dispatchers, was necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.[3] If the Secretary determined it was necessary to require the certification of certain crafts or classes of employees to reduce the number and rate of accidents and incidents or to improve railroad safety, section 402 of the RSIA stated the Secretary may prescribe such regulations. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89. In response to the RSIA, the Secretary submitted a report to Congress on November 4, 2015,[4] stating that, based on FRA's preliminary research, dispatchers and signal employees were potentially the most viable candidate railroad crafts for certification. Based on the analysis in Section III below, the Federal Railroad Administrator has determined that it is necessary to require the certification of railroad dispatchers to improve railroad safety.

III. Background

1. Roles and Responsibilities of Dispatchers

Railroad dispatchers play an integral role in railroad safety and operations. They are responsible for allocating and assigning track use, ensuring that trains are routed safely and efficiently, and ensuring the safety of personnel working on and around railroad track. These are cognitively complex tasks that require integrating multiple sources of information (*e.g.,* information from train schedules, computer displays of current track state, radio communication with various personnel such as locomotive engineers, and in some cases, projecting into the future (*e.g.,* estimating when the train will arrive)); and balancing multiple demands placed on track use (*e.g.,* balancing the need for maintenance-of-way workers to have time to work on the track with the need to make sure that the track will be clear when a train is anticipated to arrive). Some of the main tasks [5] dispatchers perform involve: operation monitoring (monitoring a computerized train dispatching model board); information collection and data entry (collecting information about slow orders and any blocking protection required by railroad workers on the track); communication (playing an important role in roadway worker planning and protection); emergency response (working to limit the damage to human life and property during an emergency); and knowledge of territory (knowing the specific characteristics of the territory assigned to them).

Over the past 5 to 10 years, the job of a railroad dispatcher has become more complex and demanding. The number of dispatchers has decreased over the years, and dispatcher territory is expanding due to this decrease. Also, with the advancement of Positive Train Control (PTC), dispatchers must understand the interface between the computer-aided dispatching system and the train control system, with respect to the safe movement of trains and other on-track equipment. Dispatchers need to understand the operating rules applicable to the train control system, including granting permission for movement and protection of roadway workers; unequipped trains; trains with failed or cut-out train control onboard systems; control system fails; and providing for safe operations under the alternative method of operation. The availability of affordable computer systems has made computer-aided dispatching (CAD) feasible for many railroads. The improved communications systems led to the acceptance of radio transmitted directives in place of the traditional paper train orders that had been previously used. These changes in communications and signal technology have also resulted in the closing of block towers, eliminating the job of tower operator, a job that was often on the career path to becoming a dispatcher.

Today, dispatchers are likely to use multiple computer screens and electronic equipment, in addition to a communications system. However, a short line railroad may still use hand-

[3] *See also* 49 U.S.C. 20103 (providing FRA's general authority to ''prescribe regulations and issues orders for every area of railroad safety'').

[4] *www.regulations.gov/document/FRA-2022-0019-0001.*

[5] As part of a contract with FRA, Foster-Miller, Inc., conducted research to develop a tool for assessing railroad dispatcher task load. Task load is defined as the average time demanded of a dispatcher in carrying out all job-related tasks at a particular desk, over a specified period of time (*e.g.,* one shift). Stephen J. Reinach, Toward the Development of a Performance Model of Railroad Dispatching 2042–46 (Proceedings of the Human Factors and Ergonomics Society 50th Annual Meeting, 2006). A copy of this report can be found at *https://railroads.dot.gov/elibrary/proceedings-human-factors-and-ergonomics-society-50th-annual-meeting-2006.*

written or verbal authorities to move trains across dark (unsignalled) territory. The industry's adoption of new dispatching technology, changes in operating rules and methods of operation, and railroad industry restructuring all have potential safety consequences. Additionally, excessive workloads and increases in occupational stress could result from any of these factors. The role of the dispatcher would also significantly increase with a possible increase in one-person crew operations, as more vigilance and attention will be needed to cover these operations. Additional one-person crew operations would introduce increased workloads as the dispatcher will be the direct ''lifeline'' to the multiple one-person operations in a given assigned territory.

2. FRA History of Certification

On January 4, 1987, an Amtrak train collided with a Conrail train in Chase, Maryland, resulting in 16 deaths and 174 injuries. At the time, it was the deadliest train accident in Amtrak's history. The subsequent investigation by the National Transportation Safety Board concluded that the probable cause of the accident was the impairment of the Conrail engineer who was under the influence of marijuana at the time of the collision.[6]

Following this accident, Congress passed the Rail Safety Improvement Act of 1988, Public Law 100–342, 4, 102 Stat. 624, 625 (1988), which instructed the Secretary of Transportation (Secretary) to ''issue such rules, regulations, orders, and standards as may be necessary to establish a program requiring the licensing or certification of any operator of a locomotive, including any locomotive engineer.'' On June 19, 1991, FRA published a final rule establishing a certification system for locomotive engineers and requiring railroads to ensure that they only certify individuals who met minimum qualification standards.[7] In order to minimize governmental intervention, FRA opted for a certification system where the railroads issue the certificates as opposed to a government-run licensing system. This final rule, published in 49 CFR part 240 (part 240), created certification requirements for engineers that addressed various areas, including vision and hearing acuity; training, knowledge, and performance skills; and prior safety conduct.

Seventeen years later, Congress passed the Rail Safety Improvement Act of 2008, Public Law 110–432, 402, 122 Stat. 4848, 4884 (2008) (hereinafter ''RSIA''), which mandated the creation of a certification system for conductors. On November 9, 2011, FRA published a final rule requiring railroads to have certification programs for conductors and to ensure that all certified conductors satisfy minimum Federal safety standards.[8] The conductor certification rule, published in 49 CFR part 242 (Part 242), was largely modeled after Part 240 with some deviations based on the different job classifications. Part 242 also included some organizational improvements which made the regulation more streamlined than Part 240.

3. Statutory Background for Dispatcher Certification

In addition to requiring certification for conductors, the RSIA required the Secretary to submit a report to Congress addressing whether certain other railroad crafts or classes of employees would benefit from certification. Specifically, section 402(b) of the RSIA requires that the Secretary issue a report to Congress ''about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.'' As part of that report, section 402(c) specifically requires the Secretary to consider dispatchers as one of the railroad crafts for certification.

After identifying a railroad craft or class for which certification is necessary, pursuant to the report to Congress discussed above, section 402(d) authorizes the Secretary to ''prescribe regulations requiring the certification of certain crafts or classes of employees that the Secretary determines . . . are necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.''

4. Report to Congress

On November 4, 2015, the Secretary submitted the report to Congress required under the RSIA. The report stated that, based on FRA's preliminary research, dispatchers and signal repair employees were the most viable candidates for certification. In reaching this determination with respect to dispatchers, the Secretary cited a variety of factors.

The report noted that dispatchers perform safety-sensitive work as shown by dispatchers being covered under the hours-of-service laws; and they are subject to regular and pre-employment random drug and alcohol testing. In 2012 and 2013, dispatchers had the highest pre-employment positive drug testing rate among all crafts. Annual drug and alcohol testing data submitted to FRA in 2012 and 2013 showed a 0.68-percent random positive drug testing rate and a 0.79-percent pre-employment positive drug testing rate for dispatch employees compared to a 0.48-percent random positive drug testing rate and a 0.46-percent pre-employment positive drug testing rate for signal employees; and a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.[9] The report noted that 49 CFR parts 240 and 242 require a five-year alcohol and drug background check as well as disqualification of employees for specified alcohol and drug test violations and for refusing such testing. If such requirements were included in a dispatcher certification program, it could help prevent dispatchers with active substance abuse disorders from ''job hopping'' from one employer to another and reduce the safety risk of having individuals with untreated substance abuse disorders working as dispatchers.

Another important factor in the report was the complicated nature of the work dispatchers perform to ensure the safety and efficiency of railroad operations. Dispatchers are responsible for allocating and assigning main track use to trains from their own employer as well as trains from other railroads. They are also responsible for the safety of roadway workers working on or near track. The report summarized the demanding nature of dispatching by stating that it entails performing cognitively complex tasks that require rapid decision making, projecting into the future, and balancing numerous demands on track use.

Additionally, the report cited a ''great amount of turnover'' in the nationwide train dispatching workforce, resulting in a less experienced workforce, as further support for requiring certification. Finally, the report found that, with the

[6] Railroad Accident Report: Rear-end Collision of Amtrak Passenger Train 94, the Colonial and Consolidated Rail Corporation Freight Train ENS–121, on the Northeast Corridor, Chase, Maryland, January 4, 1987 144 (Nat'l Transp. Safety Bd. 1988).

[7] 56 FR 28227 (June 19, 1991).

[8] 76 FR 69801 (Nov. 9, 2011).

[9] Testing results submitted to FRA in 2020 and 2021 showed a 0.94-percent random violation rate (drug and alcohol positives and refusals) rate and a 0.85-percent pre-employment violation rate for dispatch employees compared to a 0.81-percent random violation rate and a 0.79-percent pre-employment violation rate for signal employees; and a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.

exception of train and engine crews, no function of railroad operations is more critical to safety than dispatching. The accumulation of these factors led to the report's conclusion that dispatching was a potentially viable candidate for certification.

5. RSAC Working Group

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task.

On April 21, 2017, a task statement regarding certification of dispatchers was presented to the RSAC by email, but no vote was taken. On April 24, 2019, the RSAC accepted a task (No. 19–02) entitled ''Certification of Train Dispatchers.'' [10] The purpose of the task was ''[t]o consider whether rail safety would be enhanced by developing guidance, voluntary standards, and/or draft regulatory language for the certification of train dispatchers.'' The task called for the RSAC Train Dispatcher Certification Working Group (Working Group) to perform the following:

—Review critical tasks performed by dispatching employees for safe train operations, particularly with the introduction of PTC technology.

—Review training, duration, content, and methodology for new hire and continuing education.

—Review background checks designed to prevent dispatching employees with active substance abuse disorders from ''job-hopping'' from one employer to another.

The task statement also asked the Working Group to address the following issues, if appropriate:

—What requirements for training and experience are appropriate?

—What classifications of dispatchers should be recognized, if any?

—To what extent do existing requirements and procedures for certification of locomotive engineers and conductor certification provide a model for dispatcher certification?

—What types of unsafe conduct should affect a train dispatcher's certification status?

—Do the existing locomotive engineer and conductor certifications provide an adequate model for handling appeals from decertification decisions of the railroads?

The Working Group, which included representatives from the Association of American Railroads (AAR), American Public Transportation Association, American Short Line and Regional Railroad Association (ASLRRA), American Train Dispatchers Association, Brotherhood of Railroad Signalmen, SMART Transportation, Commuter Rail Coalition, and National Railroad Construction & Maintenance Association, held its first and only meeting on September 4, 2019 in Washington, DC. At this meeting, the Working Group reviewed the task statement from the RSAC, discussed some of the safety-critical tasks performed by dispatchers, and debated whether certification of dispatchers would be beneficial to railroad safety. At the end of the meeting, action items were assigned and the next meeting was tentatively scheduled for January 2020.

However, on December 16, 2019, the presidents of the American Train Dispatchers Association, the Brotherhood of Railroad Signalmen, and the International Brotherhood of Electrical Workers (collectively the ''Unions'') sent a letter to the FRA Administrator requesting that this RSAC task be withdrawn from consideration at this time. The letter stated the Unions were currently involved in numerous activities and were not able to give the task proper attention. AAR and ASLRRA advised the Unions that they were not opposed to this request. In response to this letter, FRA withdrew this task from the RSAC, and the Working Group became inactive.

6. Public Outreach

In 2021, FRA revisited the issue of establishing certification requirements for dispatchers. The agency assembled subject matter experts from FRA, the American Train Dispatchers Association (ATDA), the International Brotherhood of Electrical Workers (IBEW), and the Brotherhood of Railroad Signalmen to exchange facts and information regarding the tasks performed by dispatchers. Those parties met virtually several times between May 5, 2021 and June 30, 2021.

As part of FRA's outreach, a list of tasks performed by dispatchers was developed. These tasks generally involved: track authorities; mandatory directives; track worker protection; emergency response coordination; or incident management. FRA reviewed each task to determine whether correctly performing the task was critical to railroad safety; what were the potential consequences if errors were made while performing the task; and whether there were any recent examples of issues or concerns with respect to the task. After performing this analysis, FRA concluded that the vast majority of tasks performed by dispatchers (80–90% of the listed tasks) were critical to railroad safety with potentially catastrophic consequences, such as accidents, injuries, and/or deaths, if the tasks were not performed properly. In addition, because dispatchers provide incident management and emergency response coordination, FRA concluded that by properly performing their tasks, dispatchers can help reduce the consequences of accidents and mitigate injuries.

During FRA's outreach, the benefits of certification based on the experience of stakeholders with engineer and conductor certification under 49 CFR parts 240 and 242 were also discussed. Some of the main benefits of certification that were identified included:

—Creating a minimum standard for training to ensure that the training encompasses all skills and proficiencies necessary to properly perform all safety-related dispatcher functions;

—Establishing a record of safety compliance that will follow a dispatcher if they wish to become certified by another railroad and that can be used to review a dispatcher's performance and potential training needs;

—Requiring certain safety checks, such as identifying active substance abuse disorders, that can minimize the risks posed by job hopping; and

—Establishing a system for individuals to dispute a railroad's decision to deny or revoke certification with the aim of creating a fair and consistent process for all parties.

Further, some parties noted that they had witnessed industry trends to reduce the length and level of training for dispatchers which would make certification even more beneficial. Based on these meetings, FRA concluded that requiring certification for dispatchers would be an important tool to ensure dispatchers are adequately trained and qualified; have a documented record of performance; and are not able to job hop without a new employer having knowledge of the dispatcher's safety performance record.

[10] At the same meeting, the RSAC also accepted a task (No. 19–03) titled ''Certification of Railroad Signal Employees.'' A separate RSAC Working Group was formed to address this task, and FRA plans to issue a related proposed rule that would establish certification requirements for signal employees.

Following this initial outreach, FRA held a follow-up conversation with ATDA and IBEW, on March 3, 2022, and individuals from ATDA and IBEW informed FRA of elements that they believe would be beneficial in a dispatcher certification program. During this conversation, which was held in videoconference format, FRA asked the attendees to provide individualized feedback on how similar or different a dispatcher certification rule should be to FRA's locomotive engineer and conductor certification rules found in 49 CFR parts 240 and 242.

FRA heard that the agency needs to ensure that comprehensive training is provided to dispatchers as the current training is inadequate. FRA also heard that railroads are not providing enough training on new technology and in some cases, training only consists of a PowerPoint presentation or watching a video. It was also noted that dispatchers are often told to ask their managers if they have questions, but managers are not always knowledgeable about the craft and often do not have sufficient expertise to answer such questions.

On March 7, 2022, FRA had a conversation with the railroad industry, including the Norfolk Southern Corporation (NS), AAR, and ASLRRA. During this conversation, which was conducted in a videoconference format, FRA also asked for individualized feedback on how FRA's locomotive engineer and conductor certification regulations in 49 CFR parts 240 and 242 could be improved upon with respect to dispatcher certification. Specifically, FRA asked for feedback on any regulatory provisions in 49 CFR parts 240 and 242 that, in their experience, may have been difficult to implement, as well as whether FRA should explore any changes to these regulatory provisions.

AAR expressed opposition to FRA's proposal to issue regulations requiring certification of dispatchers arguing that there was not a safety benefit to certification. In addition, NS questioned the need for certification regulations in the absence of any identified gaps in coverage by existing railroad training programs. ASLRRA expressed concern that FRA's proposal to issue regulations requiring dispatcher certification would result in a large paperwork burden with little benefit.

After this conversation, FRA provided a short list of written questions to AAR and ASLRRA. While AAR did not provide additional feedback in response to FRA's list of questions, ASLRRA responded to FRA's list of written questions by email on April 13, 2022, a copy of which has been placed in the docket.[11]

On March 10, 2022, FRA staff had a follow-up conversation with ATDA and IBEW to receive information on the types of errors and operating practice violations that should result in a railroad revoking a dispatcher's certification. During this conversation, which was conducted in a video conference format, FRA heard that a dispatcher's certification should not be revoked during an operations test, and that a person training a dispatcher should not have their certification revoked if a person they are training commits a revocable offense, as long as the trainer took appropriate action. However, a list of prospective revocable events was not generated during this meeting.

7. Contractors

FRA considered whether railroad contractors (and subcontractors) should be authorized to certify their employees. FRA did not, however, include that option in this proposed rule. Instead, consistent with FRA's engineer and conductor certification regulations, this proposed rule requires railroads to develop and submit certification programs to FRA for approval and then implement their FRA-approved certification programs. FRA is proposing to adopt this approach because railroads are ultimately held responsible for the actions (or failure to act) of their employees, contractors, and subcontractors when engaged in railroad operations.

FRA acknowledges that dispatcher functions are increasingly being contracted out by railroads to companies that specialize in this work. However, railroads are most knowledgeable about the unique characteristics of their territories. Therefore, railroads are best suited to develop certification programs that are needed to ensure that all employees responsible for allocating and assigning main track use, routing trains safely and efficiently, and ensuring the safety of roadway workers who are working on or near the railroad tracks have been properly trained and certified on: (a) the railroad's rules and practices for the safe movement of trains; (b) physical characteristics of the territory for which the employee will be working as a dispatcher; and (c) the dispatching systems and technology used by that railroad. In addition, by keeping certification programs in-house, railroads can implement quality control measures to ensure that their FRA-approved certification programs are being implemented properly.

Nonetheless, FRA is soliciting comment on the approach adopted in this proposed rule, which would require railroads to develop and implement FRA-approved dispatcher certification programs. To ease any potential burden, especially on Class III railroads, the proposed rule would allow all railroads to choose between conducting the training or using a training program conducted by a third-party, which would be adopted and ratified by the railroad. In addition, contractors that employ dispatchers could help railroads comply with the requirements in this proposed rule by providing information about their dispatchers' compliance with some of the proposed regulatory requirements. For example, contractors could provide information about their dispatchers' compliance with the vision and hearing acuity requirements in the proposed rule. Under this proposed rule, however, railroads would ultimately be liable for ensuring that only certified dispatchers are permitted to perform dispatching tasks on their networks.

8. Interaction With Other FRA Regulations

While developing this proposed rule, FRA has been mindful of other regulations that may touch upon topics covered in this proposed rule, including FRA's training, qualification, and oversight regulations in 49 CFR part 243 (part 243); railroad safety risk reduction programs (SSP/RRP) in 49 CFR parts 270 and 271 (part 270 and part 271); and fatigue risk management programs (FRMP) in parts 270 and 271. However, FRA finds that this proposed rule would complement, rather than duplicate, those regulations.

Dispatchers are currently included in part 243's requirements for training, qualification, and oversight for safety-related railroad employees. However, part 243 does not require employees to undergo a performance skill evaluation conducted by a qualified instructor to verify adequate knowledge transfer. Therefore, even though railroads (and third-party entities that employ dispatchers) are required to have training programs in place for dispatchers, railroads are not required to have effective processes in place to require prospective dispatchers to exhibit the extent to which they have developed the necessary skills to serve as an effective dispatcher.

[11] A record of public contact summarizing this meeting has been posted in the rulemaking docket at: *https://www.regulations.gov/document/FRA-2022-0019-0002.*

Part 243 also does not require railroads to have formal processes in place for promptly removing dispatchers from service if they violate one or more basic regulatory standards that could have a significant negative impact on the safety of rail operations. FRA's proposed dispatcher certification regulatory requirements have been drafted to help address this void, as well as prevent dispatchers who have been fired for committing one or more of the revocable events discussed in the proposed rule from "job hopping" and quickly resuming safety-sensitive service at a different railroad that is unaware of the dispatcher's prior violation(s) of FRA's rail safety requirements.

As codified in parts 270 and 271, FRA requires Class I railroads, railroads with inadequate safety performance, and passenger rail operations to implement railroad safety risk reduction programs. A railroad safety risk reduction program is a comprehensive, system-oriented approach to safety that determines an operation's level of risk by identifying and analyzing identified hazards and developing strategies to mitigate risks associated with those hazards. In this background, FRA is using the term "railroad safety risk reduction programs" to include both a "system safety program" (SSP) that is required for certain passenger rail operations [12] and a "risk reduction program" (RRP) that is required for a limited number of other rail operations.[13]

Although a railroad safety risk reduction program might address a railroad's safety hazards and risks associated with its dispatchers, the framework established by these programs neither directly addresses the risks associated with dispatching nor establishes an industry-wide approach.

First, not every railroad is required to have a railroad safety risk reduction program. Indeed, FRA estimates that fewer than 100 railroads (out of approximately 750 under FRA's jurisdiction) will be required to develop a railroad safety risk reduction program over the next 10 years.

Second, even if a railroad is required to have a railroad safety risk reduction program through which it identifies the risks associated with dispatching, the railroad may decide not to implement mitigations to eliminate or reduce those specific risks. Parts 270 and 271 permit railroads to prioritize risks.[14] Whether a railroad that is required to have a program mitigates risks associated with dispatching will depend on how the railroad prioritizes risks for mitigation and how effectively that mitigation would promote continuous safety improvement compared to mitigation of other identified hazards and risks. Thus, even if aspects of dispatching are identified as a risk, a railroad may not implement mitigations to eliminate or reduce that risk.

Accordingly, while the SSP/RRP requirements may complement this proposed rule, they do not address the need for FRA and the railroads to consider and address the safety risks of dispatching across the entire industry.

With respect to FRMPs,[15] an FRMP is a comprehensive, system-oriented approach to safety in which a railroad determines its fatigue risk by identifying and analyzing applicable hazards, and developing plans to mitigate, if not eliminate, those risks. Like the SSP/RRP rules, the FRMP rule is part of FRA's continual efforts to improve rail safety and will satisfy the statutory mandate of Section 103 of the Rail Safety Improvement Act of 2008.[16]

Like the SSP/RRP requirements, there is no guarantee that any railroad covered by the regulation will use an FRMP to address dispatching issues. As with the SSP/RRP rules, a covered railroad must identify fatigue hazards, assess the risks associated with those fatigue hazards, and prioritize those risks for mitigation purposes. It is possible that other fatigue risks, not associated with dispatching, might rank higher, in which case the risk associated with dispatching might not be promptly mitigated. Further, because the FRMP requirements would apply only to those railroads required to comply with the SSP/RRP requirements, an FRMP would not be required of every railroad that performs dispatch tasks. Thus, like the SSP/RRP rules, this proposed rule is complementary to the FRMP final rule and is not duplicative.

IV. Section-by-Section Analysis

Subpart A—General

Subpart A of the proposed rule contains general provisions, including a formal statement of the proposed rule's purpose and scope. The subpart also provides that this proposed rule does not constrain the ability of a railroad to prescribe additional or more stringent requirements for its dispatchers that are not inconsistent with this proposed rule.

Section 245.1 Purpose and Scope

This section, derived from 49 CFR 240.1 and 242.1, indicates that the purpose of the proposed rule is to ensure that only those persons who meet minimum Federal safety standards serve as dispatchers, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

Even though a person may have a job title other than dispatcher, the requirements of this proposed rule would apply to that person if they meet the definition of "dispatcher." The definition of "dispatcher," and an explanation of who is covered by the definition, are discussed in more detail in the section-by-section analysis for § 245.7, below.

Section 245.3 Application and Responsibility for Compliance

The extent of FRA's jurisdiction, and the agency's exercise of that jurisdiction, is well-established. *See* 49 CFR part 209, appendix A. This proposed application and responsibility for compliance section is consistent with FRA's *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws in appendix A to 49 CFR part 209.*

This section, derived from 49 CFR 240.3 and 242.3, provides that the proposed rule would apply to all railroads with four exceptions. Paragraph (a)(1) of this section notes that this proposed rule would not apply to railroads that do not perform any dispatch tasks. In paragraph (a)(2), FRA proposes to exempt operations that occur within the confines of industrial installations commonly referred to as "plant railroads" and typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves. Further explanation of what is meant by the term "plant railroad" is provided in the section-by-section analysis for § 245.7.

Paragraph (a)(3) of this section excludes "tourist, scenic, historic, and excursion operations that are not part of the general railroad system of transportation" (as defined in § 245.7) from compliance with this rule. Excluding these types of operations from this rule is consistent with FRA's jurisdictional policy that excludes these operations from all but a limited

[12] 49 CFR 270.3 (requiring the application of the system safety rule to certain passenger rail operations).

[13] 49 CFR 271.3 (requiring the application of the risk reduction program rule to certain rail operations).

[14] *See e.g.,* 49 CFR 270.5 (definition of "risk-based hazard management") and 271.103(b)(3).

[15] On June 13, 2022, FRA published a final rule adding a FRMP to the railroad safety risk reduction program requirements in Parts 270 and 271. 85 FR 83484.

[16] Codified at 49 U.S.C. 20156.

number of Federal safety laws, regulations, and orders.

The final proposed exclusion covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. It should, however, be noted that FRA exercises jurisdiction over some rapid transit type operations, given their links to the general railroad system of transportation, such as rapid transit operations conducted on track used for freight, intercity passenger, or commuter passenger railroad operation, during a block of time during which a general system railroad is not operating (temporal separation). Thus, this proposed rule would apply to persons who perform dispatch tasks for those rapid transit type operations.

Paragraph (b) is intended to clarify that any person, as defined in § 245.7, (including a railroad employee, employee of a railroad contractor, or employee of a railroad subcontractor) who performs a function required by this part will be held responsible for compliance. Therefore, this proposed regulation would cover all dispatchers regardless of whether they are employed by a railroad or a contractor. Covering employees of both railroads and contractors is consistent with other FRA regulations (such as FRA's training regulations in 49 CFR part 243) and the general trend in the railroad industry. In many instances, employees performing dispatch tasks for a railroad may be employed by a company other than the railroad upon which the person is working. In the interest of railroad safety, it is vital that all dispatchers are properly trained and qualified regardless of whether they are employed by a railroad or a contractor.

Section 245.5 Effect and Construction

This section is derived from 49 CFR 240.5 and 242.5. Paragraph (a) addresses the relationship of this proposed rule to preexisting legal relationships. Paragraph (b) states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this proposed rule.

Paragraph (c) of this section is intended to note that, as a general matter, FRA does not intend to create or prohibit the right to ''flowback'' or take a position on whether ''flowback'' is desirable. The term ''flowback'' has been used in the industry to describe a situation where an employee leaves their current position to return to a previously held position or craft. The reasons for reverting back to the previous craft may derive from personal choice or a less voluntary nature (such as downsizing). Many collective bargaining agreements address the issue of flowback. However, paragraph (c) must be read in conjunction with § 245.213, which limits flowback in certain situations (*i.e.,* when a certificate is revoked due to an alcohol or drug violation).

Paragraph (d) of this section addresses employee rights. The proposed rule would explicitly preserve any remedy already available to the person and would not create any new entitlements.

Section 245.7 Definitions

This section, derived from 49 CFR 240.7 and 242.7, defines a number of terms that have specific meaning in this proposed part. A few of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter.

Dispatch

FRA proposes to use the definition of ''dispatch'' found in 49 CFR 241.5. This definition sets the limits of what constitutes a dispatcher and provides examples of the types of activities FRA intends to cover and not cover under this definition. Under this definition, the function that the individual is performing determines whether a person is dispatching. Factors such as an individual's job title, location, and whether the individual is employed by a railroad, are irrelevant to the determination of whether the individual is dispatching. Furthermore, FRA does not intend for yardmasters, as a job category, to fall within the scope of this definition. Yardmasters are only covered by this part when they are performing dispatching functions.

Paragraph (1)(i) of the definition gives specific examples of the types of functions that an individual would perform in order to be considered dispatching. In particular, FRA intends that anyone controlling the movement of on-track equipment requiring a power brake test under 49 CFR parts 232 or 238, would be considered dispatching and, therefore, would fall within the scope of the rule. Another type of movement that FRA intends to include is the movement of certain other on-track equipment, such as specialized maintenance-of-way equipment, that is not subject to the power brake regulations. However, as expressed in proposed paragraph (2)(iii), FRA intends to exclude movements of on-track equipment used in the process of sorting and grouping rail cars inside a railroad yard in order to assemble or disassemble a train.

Paragraph (1)(i) also explicitly notes two methods of controlling movements that fall within the scope of the definition. The first method that FRA considers dispatching is controlling movements by the issuance of a written or verbal authority or permission that affects a railroad operation, such as through movement authorities and speed restrictions, and includes the following: Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other methods of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a dispatcher.

The second method that falls within the scope of the definition of ''dispatch'' is to control a movement ''by establishing a route through the use of a signal or train control system but not merely by aligning or realigning a switch.'' This provision makes clear that the act of aligning or realigning a switch alone is not sufficient to constitute dispatching. In order to constitute dispatching under this part, aligning or realigning a switch must be accompanied by the act of setting a signal authorizing movement over a track segment.

Paragraph (1)(ii) of the definition of ''dispatch'' clarifies that those railroad employees who issue an authority for either a roadway worker or stationary on-track equipment, or both, to occupy a certain stretch of track while performing repairs, inspections, etc., will also be covered by this rule. FRA included this section to distinguish this activity from that of authorizing movement of trains or other on-track equipment onto track, which is covered by paragraph (1)(i) above.

Paragraph (1)(iii) of the definition of ''dispatch'' states another function of a dispatcher, which is to issue an authority for working limits to a roadway worker.

Finally, paragraph (2) of the definition of ''dispatch'' clarifies that the term excludes several types of activities. Paragraph (2) limits the exclusions, however, to personnel in the field. Paragraph (2)(i) specifically excludes from the scope of the definition the carrying out of a written or verbal authority or permission or an authority for working limits. As further clarification, paragraph (2)(i) notes two examples of activities that would fall under the exclusion, provided they were carried out by field personnel: initiating an interlocking timing device and authorizing a train to enter working limits. Paragraph (2)(ii) specifically excludes from the scope of the definition the operation by field personnel of a function of a signal

system intended to be used by those field personnel, such as initiating an interlocking timing device.

Drug

Consistent with parts 240 and 242, FRA proposes to define ''drug'' as any substance (other than alcohol) that has known mind- or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances. This term is intended to refer to substances that have a significant potential for abuse and/or dependence. Normal ingestion of caffeine in beverages and use of nicotine from tobacco products, even though involving some degree of habituation or dependence, are not intended to be included within the definition.

Person

In this proposed part, *person* takes on the same meaning as it does in FRA's other safety rules. The term means ''an entity of any type covered under 1 U.S.C. 1'' and the definition goes into detail regarding the types of people and entities that are covered.

Plant Railroad

FRA proposes a definition of *plant railroad* consistent with FRA's longstanding policy. *See* 49 CFR part 209, app. A.

Substance Abuse Disorder

Consistent with parts 240 and 242, the term ''substance abuse disorder'' is defined as a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation.

This proposed definition would include drug and alcohol users who engage in abuse patterns which result in ongoing safety risks and violations.

A substance abuse disorder is ''active'' within the meaning of this proposed rule if the person: (1) is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter; or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a Substance Abuse Professional (SAP) or Drug and Alcohol Counselor (DAC).

Section 245.9 Waivers

This section, derived from 49 CFR 240.9 and 242.9, provides the proposed requirements for a person seeking a waiver of any section of this proposed rule.

Section 245.11 Penalties and Consequences for Noncompliance

This section, derived from 49 CFR 240.11 and 242.11, explains that FRA may impose civil penalties on any person, including a railroad or an independent contractor or subcontractor providing goods or services to a railroad, that violates any requirement of this proposed rule. Any person who violates a requirement of this proposed rule may be subject to civil penalties between the minimum and maximum amounts authorized by statute and adjusted for inflation per violation. Individuals may be subject to penalties for willful violations only. Where a pattern of repeated violations, or a grossly negligent violation creates an imminent hazard of death or injury, or causes death or injury, an aggravated maximum penalty may be assessed.[17] In addition, each day a violation continues constitutes a separate offense. Finally, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these proposed regulations.

Consistent with FRA's final rule regarding the removal of civil penalty schedules from the CFR (84 FR 23730 (May 23, 2019)), FRA will not publish a civil penalty schedule for this rule in the CFR, but plans to publish a civil penalty schedule on its website. Penalty schedules are statements of agency policy, thus notice and comment are not required prior to their issuance, nor are they required to be published in the CFR. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to suggest the types of actions or omissions under each regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalty amounts may be appropriate, based upon the relative seriousness of each type of violation.

Subpart B—Program and Eligibility Requirements

Section 245.101 Certification Program Required

This section, derived from 49 CFR 240.101 and 242.101, would require railroads to have written certification programs comprised of at least seven elements, each of which comports with specific regulatory provisions in the proposed rule related to that element.

[17] Please visit FRA's website for the current aggravated maximum penalty amount at *https://railroads.dot.gov/*.

Section 245.103 FRA Review of Certification Programs

This proposed section, derived from 49 CFR 240.103 and 242.103, describes the process for the submission and review of dispatcher certification programs. Paragraph (a) of this section would only apply to railroads that have existing dispatching operations on the effective date of the final rule and provides the deadlines for when these railroads would be required to submit their certification programs to FRA. The submission schedule would require Class I railroads and commuter service railroads to submit their programs earlier than Class II railroads, Class III railroads, and railroads not otherwise classified. The separate deadlines would help space out the initial influx of programs FRA will receive after the final rule goes into effect, to allow FRA to issue approval and disapproval decisions in a more timely manner. FRA also presumes that, in general, Class I railroads and commuter service railroads will have more resources to devote to creating these programs and will be better positioned to create and draft them more quickly.

Paragraph (b) of this section would only apply to railroads that do not have existing dispatching operations on the effective date of the final rule. If such railroads wish to begin dispatching operations, they would be required to submit their program to FRA, and FRA must approve their program, before they begin dispatching operations.

Paragraph (c) of this section provides that railroads would submit their programs and their requests for approval (which are described in greater detail in § 245.107(a)) by uploading them to a secure document submission site. This will allow for more efficient processing and will significantly reduce the risk of a program submission getting lost. FRA will need basic information from each railroad before setting up the user's account. In order to provide secure access, information regarding the points of contact is required. It is anticipated that FRA will be able to approve or disapprove all or part of a program and generate automated notifications by email to a railroad's points of contact.

FRA does not intend to develop a secure document submission site so that confidential materials are identified and not shared with the general public. This is because FRA does not expect the information in a program to be of such a confidential or proprietary nature, particularly since each railroad would be required to share the program submission, resubmission, or material modification all of its dispatchers as

well as with the president of each labor organization that represents the railroad's certified dispatchers, and the programs will be available on FRA's website. *See* § 245.103(d) and (j). Accordingly, FRA does not at this time believe it is necessary to develop a document submission system which addresses confidential materials.

When a railroad submits its certification program to FRA, paragraph (d) of this section requires the railroad to also submit a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part. The railroad's submission to FRA must include a statement affirming that it has provided a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part. In addition, the submission must include a list of the names and email addresses of each labor organization president who received a copy of the program. Paragraph (e) of this section provides instruction on who is allowed to comment on these programs. For dispatchers who are members of a labor union, any comments must be submitted by a designated representative. For dispatchers who are not members of a labor union, they can personally submit a comment on their railroad's certification program. FRA anticipates that comments submitted under this process will assist the agency in determining whether a program conforms to the requirements set forth in this rule, and thus, FRA will not make a decision on a program until after the 45-day comment period in paragraph (e)(1) has passed.

Paragraph (f) of this section states FRA's aspirational goal to decide on whether to approve a program within 90 days of the date that the program is submitted. However, this is only a goal and not a deadline for the agency. Paragraph (f)(3) makes clear that if FRA is unable to issue a decision on the program within 90 days, the program is not considered approved on the 91st day. A certification program will not be approved until FRA issues a letter notifying the railroad that its program has been approved. While FRA will make every effort to issue approval and disapproval letters within 90 days, FRA recognizes that this will not always be possible. It may be especially difficult for FRA to meet this goal during the initial implementation of this rule when FRA expects to receive many certification programs within a relatively short period of time.

Paragraph (g) of this section addresses the process for railroads who wish to materially modify their previously approved programs. If a railroad wishes to materially modify its program, it must submit two documents to FRA: (1) a description of how it intends to modify its current program (this constitutes the request for approval required under § 245.107(a)); and (2) a copy of the modified program. Paragraph (g)(1) defines a ''material modification'' as a modification that ''would affect the program's conformance with this part.'' This definition is taken from 49 CFR 240.103(h)(1) and 242.103(i)(1) and is intentionally broad to cover the innumerable modifications to a program that could be considered material. FRA recognizes that there may be a desire among some interested parties to have a more specific definition of ''material modification'' in the regulation. Thus, FRA welcomes any comments on suggested changes to the ''material modification'' definition.

Paragraph (g)(3) notes that the process for submission and review of material modifications mirrors the process for submission and review of initial certification programs. Railroads shall submit their material modifications to FRA in conformance with paragraph (c) of this section and shall send a copy of the material modification description and the modified program to all required parties referenced in paragraph (d) of this section. Certain interested parties may comment on the modification in conformance with paragraph (e) of this section, and FRA will issue a letter either approving or disapproving the material modification in conformance with paragraph (f) of this section. If FRA approves the material modification, the railroad can begin implementing the modification and the modified program will replace the original program. If FRA disapproves the material modification, the railroad cannot implement the modification, and the original program must remain in effect. If a railroad's material modification submission contains multiple modifications, FRA reserves the right to approve some modifications while disapproving other modifications. In such an instance, the railroad can only begin implementing those modifications that FRA has approved.

Paragraph (h) of this section describes the process to resubmit a program or material modification that was previously disapproved by FRA. Paragraph (h)(2) notes that the process for submission and review of resubmitted programs and material modifications mirrors the process for submission and review of initial certification programs. Railroads shall resubmit their initial programs or material modifications to FRA in conformance with paragraph (c) of this section and shall send a copy of the resubmitted program or material modification to all required parties referenced in paragraph (d) of this section. Certain interested parties may comment on the resubmitted program or material modification in conformance with paragraph (e) of this section and FRA will issue a letter either approving or disapproving the resubmitted program or material modification in conformance with paragraph (f) of this section.

Paragraph (h)(3) provides the deadlines, if any, for when a railroad must resubmit its program or material modification to FRA. Railroads with existing dispatching operations on the effective date of the final rule (legacy railroads), whose initial programs are disapproved by FRA, must resubmit their program within 30 days of the date FRA notified the railroad that its program was deficient. If a legacy railroad fails to resubmit its program within 30 days and continues its dispatching operations, FRA will determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order.

FRA believes a 30-day deadline is needed for legacy railroads because § 245.105(a) allows legacy railroads to continue dispatching operations while they await FRA approval of their programs. Thus, without a deadline, legacy railroads could purposely delay coming into compliance with this proposed rule by taking months or even years to resubmit their programs. In contrast, railroads that begin dispatching operations after the effective date of this proposed rule cannot begin such operations until FRA approves their program. Likewise, any railroad (both legacy and non-legacy) cannot implement a material modification to its program until FRA has approved the modification. Therefore, in these scenarios, FRA decided that a deadline is unnecessary because the railroads have every incentive to resubmit their programs or material modifications in a timely manner. However, while there is no FRA-imposed deadline in these scenarios, FRA still recommends that railroads provide their resubmissions within 30 days of being notified of deficiencies.

Paragraph (i) of this section acknowledges that FRA reserves the right to revisit a prior approval of a certification program. In certain circumstances, including an audit of a certification program, FRA may discover that it made an error when it previously approved a program. This paragraph allows FRA to rescind a prior approval while also providing the railroads with certain rights. Paragraph (i)(3) notes that the process for submission and review of programs whose prior approval has been rescinded mirrors the process for submission and review of initial certification programs, and resubmission of initially disapproved programs. Railroads shall resubmit their programs to FRA in conformance with paragraph (c) of this section and they shall send a copy of the resubmitted program to all required parties referenced in paragraph (d) of this section. Certain interested parties may comment on the resubmitted program in conformance with paragraph (e) of this section and FRA will issue a letter either approving or disapproving the resubmitted program in conformance with paragraph (f) of this section.

Paragraphs (i)(6) and (7) allow for a grace period where a rescinded program may remain in effect for a certain period of time. However, once FRA approves a resubmitted program, the resubmitted program must replace the rescinded program. In addition, a rescinded program can no longer remain in effect if FRA has twice disapproved the railroad's resubmitted program. This latter scenario is best explained through an example: On February 10th, FRA notifies ABC Railroad (ABC) that FRA is rescinding its prior approval of its dispatcher certification program. On March 10th, ABC resubmits its program to FRA. On June 10th, FRA disapproves ABC's resubmitted program. On July 10th, ABC sends FRA its second resubmitted program. On October 10th, FRA issues a letter once again disapproving ABC's program. In this example, ABC's rescinded program could remain in effect between February 10th and October 10th. However, after October 10th, the rescinded program could no longer be in effect. If ABC continued to perform dispatching operations after October 10th, while it did not have an FRA-approved certification program, FRA could find that the railroad failed to implement a program. In such cases, FRA will determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising its enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to address the deficiencies in its resubmissions.

Finally, paragraph (j) of this section notes that the following documents will be available on FRA's website (*railroads.dot.gov*): (1) submitted programs and material modifications from the railroads; (2) any comments to the submissions from the railroads; and (3) the letters from FRA either approving or disapproving a program or a material modification. While parts 240 and 242 do not currently require the posting of these documents on FRA's website, the current practice, with respect to locomotive engineer and conductor certification programs, has been for FRA to post comments to a railroad's submission and FRA approval and disapproval letters on its website. FRA is proposing this paragraph (j) in an effort to make the review and approval process of dispatcher certification programs as transparent as possible.

Section 245.105 Implementation Schedule for Certification Programs

This section, derived from 49 CFR 240.201 and 242.105, contains the timetable for the implementation of this proposed rule. Paragraph (a) of this section acknowledges that railroads with existing dispatching operations on the effective date of this proposed rule (legacy railroads) may continue their dispatching operations while they await FRA's approval of their certification programs. However, if FRA disapproves a legacy railroad's certification program on two occasions (the initial submission and the first resubmission), the railroad will no longer be in compliance with the rule if it continues its dispatching operations without an FRA-approved program. In such a scenario, FRA could find that the railroad has failed to implement a program and would determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising this enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to comply with the requirements of the rule through its submitted program. Paragraph (b) of this section provides that any non-legacy railroad (a railroad that did not have existing dispatching operations on the effective date of this proposed rule) may not commence dispatching operations until FRA has approved its dispatcher certification program.

Paragraphs (c) and (d) of this section require that railroads, in writing, designate as certified dispatchers all persons authorized by the railroad to perform the duties of a dispatcher as of the effective date of the final rule, or authorized between the effective date of the final rule and the date FRA approves the railroad's certification program. Railroads must also issue a certificate to each person they designate. This designation system is modeled after the system used when parts 240 and 242 first went into effect. This system allows such ''legacy dispatchers'' to obtain a certificate so that once their railroad's program is approved, they will be considered a ''previously certified dispatcher'' when it comes time for them to be recertified through the railroad's certification program. Therefore, the recertifying railroad will not have to provide legacy dispatchers with the kind of basic training that would be given to individuals with no dispatching experience. In other words, a person with 20 years of experience as a dispatcher most likely does not need to take a ''Dispatching 101'' course that goes over the basics of dispatching. Instead, this person would be better served by undergoing continuing education training as described in §§ 245.107(b)(2) and 245.119(j).

Paragraph (e) of this section states that after this rule has been in effect for eight months, no person may serve as a dispatcher unless that person is certified. Paragraph (f) of this section requires each railroad to make formal determinations concerning those individuals it has designated as dispatchers within three years after FRA's approval of the railroad's certification program. Pursuant to this paragraph, a designated dispatcher may serve as a dispatcher for up to three years from the date of FRA's approval of the program. At the end of the three years, however, the designated dispatcher can no longer serve as a dispatcher unless they successfully complete the tests and evaluations provided in subpart B of this rule (*i.e.,* the full certification process).

Thus, individuals who are designated as dispatchers and certified under paragraphs (c) or (d) of this section could be certified for more than three years before they have to complete the railroad's full certification process. For example, if a person is designated (and certified) as a dispatcher on September 1, 2024, and FRA approves the railroad's certification program on September 1, 2025, this dispatcher would not have to go through the full certification process and get recertified until September 1, 2028 (four years from

the date the individual was designated by the railroad as a certified dispatcher). Railroads should note that they may not test and evaluate a designated dispatcher or dispatcher candidate under subpart B of this rule until they have a certification program approved by FRA pursuant to § 245.103.

In order to test and evaluate all of its designated dispatchers by the end of the three-year period, a large railroad will likely have to begin that process well in advance of the end of the three years. For example, paragraph (f), which is derived from part 240 and part 242's designation provisions, would permit a railroad to test and evaluate one-third of its designated dispatchers within one year of the approval date of the railroad's certification program; another one-third within two years of the program's approval date; and the final one-third within three years of the program's approval date.

To address the issue of designated dispatchers who would be eligible to retire within three years of the date FRA approves their railroad's certification program, FRA is proposing paragraphs (f)(1) through (3) in this section since it would not be an efficient use of a railroad's resources to perform the full certification process on a designated dispatcher who is going to retire before the end of their designation period. Paragraph (f)(1) provides that a designated dispatcher, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date FRA approves the railroad's certification program, may request, in writing, that the railroad not perform the full certification process on that designated dispatcher until three years from the date FRA approves the railroad's program.

Paragraph (f)(2) provides that, upon receipt of that written request, a railroad may wait to perform the full certification process on the person making the request until the end of the dispatcher's designation period. Thus, paragraphs (f)(1) and (2) allow designated dispatchers to serve as dispatchers for the full designation period and then retire before being subjected to the full certification process. While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the designation period expires, and thus, in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of designated dispatchers on a railroad properly request that the railroad wait to recertify them at the end of the designation period, but then do not, in fact, retire by the expiration of the designation period, the railroad might not be able to recertify everyone in time and would risk violating this rule. In recognition of that risk and the need to give the railroads some flexibility to comply with the rule, paragraph (f)(2) also provides that a railroad that grants any request must grant the request of all eligible persons ''to every extent possible.''

In addition, paragraph (f)(3) provides that a designated dispatcher, who is also subject to recertification under part 240 or 242, may not make a request under paragraph (f)(1) of this section. This provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified dispatcher and a certified locomotive engineer or conductor. Thus, it would not be appropriate, in that instance, for a designated dispatcher who is already subject to recertification under part 240 or 242 to make a request to delay the full dispatcher certification process.

Paragraph (g) of this section provides that, after FRA approves a railroad's certification program, the railroad cannot certify or recertify a person as a dispatcher unless that person has been tested and evaluated in accordance with the procedures provided in subpart B of this rule. In other words, after FRA approves a railroad's program, that railroad can no longer designate individuals as certified dispatchers under paragraphs (c) or (d) of this section.

Section 245.107 Requirements for Certification Programs

This section, derived from appendix B to part 240 and appendix B to part 242, provides both the organizational requirements and a narrative description of the submission required under §§ 245.101 and 245.103. FRA is not requiring railroad submissions to be made on a specific form. Instead, FRA is prescribing only minimal constraints on the organization and manner of presenting information.

Paragraph (a) of this section addresses what must be included in a railroad's submission to FRA. Specifically, the railroad must include two documents in its submission: (1) a request for approval; and (2) the certification program. If a railroad is submitting its initial certification program, the request for approval can be a brief document that simply states that the railroad is submitting its initial certification program for approval by FRA. However, if a railroad is making a material modification or modifications to a program that has previously been approved by FRA, the request for approval must mention all of the material modifications that the railroad is making to its program and the copy of the certification program will include all of the modifications.

Paragraph (b) of this section requires that the program be divided into six sections, each dealing with a different subject matter, and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program. Section 1 of a certification program shall include basic contact information and will address whether the railroad accepts responsibility for training previously uncertified dispatchers. Section 2 of a program addresses how the railroad will handle training dispatchers who have been previously certified. The main focus in Section 2 is how the railroad will address its requirement to provide continuing education for its previously certified dispatchers. Continuing education is essential because time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. Therefore, dispatchers need to have their fundamental knowledge of operating rules and practices refreshed periodically. While a railroad has latitude to select the specific subject matters to be covered, the duration of the training, the methods of presenting the information, and the frequency with which the training will be provided, the railroad must describe in this section how it will use that latitude to ensure that its dispatchers remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the standard set forth in § 245.119(j).

A matter of particular concern to FRA is how each railroad acts to ensure that dispatchers remain knowledgeable about the territory over which they are authorized to dispatch, but from which the dispatcher has been absent. Paragraph (b)(2)(v) requires that Section 2 of the program addresses how long a person may be absent from dispatching over a territory before familiarization training is required and how the dispatcher will acquire that familiarization training. This time period can be less than 12 months, but

it cannot exceed 12 months in accordance with § 245.120(c).

Section 3 of the program includes requirements for the testing and evaluation procedures for previously certified dispatchers. Paragraph (b)(3)(i) notes that railroads must address how their programs will comply with the standards found in § 245.121. Section 245.121 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions that cover the following subject matters: (i) safety and operating rules; (ii) timetable instructions; (iii) compliance with all applicable Federal regulations; (iv) physical characteristics of the territory on which a person will be serving as a dispatcher; and (v) dispatching systems and technology. The test must accurately measure the person's knowledge of all of these areas. Paragraph (b)(3)(ii) requires the program to detail the railroad's procedures for testing vision and hearing acuity and for ensuring that its medical examiners have sufficient knowledge to make a determination as to whether a person can safely work as a dispatcher.

Section 4 of the program includes the requirements for training, testing, and evaluating persons not previously certified. Railroads who elect, in Section 1 of the program, to not take responsibility for training previously uncertified dispatchers can skip this section. However, all other railroads must provide details for how they will train, test, and evaluate previously uncertified persons to ensure that they acquire and demonstrate sufficient knowledge and skills to safely perform the job of a dispatcher. Paragraph (b)(4)(ii) requires the same level of detail in this section that is required in Sections 2 and 3 of the program. This encompasses addressing both the training requirements found in § 245.119 and the knowledge testing requirements in § 245.121. If a railroad relies on another entity to conduct its training away from the railroad's own territory and dispatching systems, paragraph (b)(4)(iii) states that the railroad must explain in its program how dispatching students will be given the required training on the physical characteristics of the railroad's territory and its dispatching systems and technology.

Section 5 of the program addresses how the railroad will monitor the operational performance of its certified dispatchers in accordance with § 245.123. In particular, the railroad must discuss the processes and procedures it will use for ensuring that such monitoring and testing is performed. This includes a description of the scoring system the railroad will employ during such testing. Finally, Section 6 of the program addresses how the railroad will perform its routine administration of the program. This section must include summaries of how the program will comply with the various provisions listed in paragraph (b)(6) that contain certain procedural requirements for a railroad's certification program.

Section 245.109 Determinations Required for Certification and Recertification

This proposed section lists the determinations that would be required for evaluating a candidate's eligibility to be certified or recertified. The reference to § 245.303 in paragraph (a)(2) of this section is to ensure railroads determine whether a candidate is eligible to hold a certification by reviewing any prior revocations addressed in subpart D of this rule.

Despite the reference to provisions in §§ 245.111 and 245.113 requiring a review of safety conduct information from the preceding five years, § 245.113(h)(1) would not permit a railroad to consider information concerning safety conduct that occurred prior to the effective date of the final rule issued in this rulemaking. Even though this provision would result in a railroad's evaluation of less than five years' worth of information for some dispatchers early on in the rule's effective period, it is included in Part 245 for the same reason similar provisions were included in parts 240 and 242. Namely, that all dispatchers should be permitted to start with a ''clean slate'' for certification purposes as a matter of basic fairness. See 56 FR 28228, 28242 (June 19, 1991).

Paragraph (b) of this section would provide flexibility to railroads and dispatchers or dispatcher candidates in obtaining the information required by §§ 245.111 and 245.113.

Section 245.111 Prior Safety Conduct as Motor Vehicle Operator

This section, derived from 49 CFR 240.111, 240.115, and 242.111, would provide the requirements and procedures that a railroad would be required to follow when evaluating a dispatcher or dispatcher candidate's prior safety conduct as a motor vehicle operator. FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a dispatcher would be required to request in writing that the chief of each driver licensing agency that issued them a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this proposed rule would not require individuals to also request motor vehicle operator information from the National Driver Register (NDR). Based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR part 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified dispatchers.

Paragraphs (b) and (c) of this section would require a railroad to certify or recertify a person for 60 days if the person: (1) requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 245.109(a)(2) through (5). If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (b) and (c) but is unable to obtain and evaluate the required information during those 60 days, the person would be ineligible to perform as a dispatcher until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would be required to certify or recertify a person if the person otherwise meets the eligibility requirements of § 245.109(a)(2) through (5).

Paragraph (k) of this section would require certified dispatchers or persons seeking initial certification as dispatchers to notify the certifying railroad (or the prospective certifying railroad, if applicable) of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section within 48 hours of the conviction or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for such incidents. This proposed paragraph would also prohibit railroads from having a more restrictive company rule requiring certified dispatchers to report a conviction or completed State action to cancel, revoke, or deny a motor vehicle driver's license in less than 48 hours.

The reasoning behind proposed paragraph (k) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person

ineligible for certification until that person has received due process from the State agency taking the action against the motor vehicle license. Further, by not requiring reporting until 48 hours after the completed State action, the proposed rule would have the practical effect of ensuring that a required referral to a drug and alcohol counselor (DAC) under paragraph (n) of this section would not occur prematurely. However, proposed paragraph (k) would not prevent an eligible person from choosing to voluntarily self-refer. Nor would it prevent the railroad from referring the person for an evaluation under an internal railroad policy, if other information exists that identifies the person as possibly having a substance abuse disorder.

Paragraph (n) of this section would provide that, if a motor vehicle incident described in paragraph (m) is identified, the railroad would be required to provide the data to its DAC along with ''any information concerning the person's railroad service record.'' Furthermore, the person would have to be referred for evaluation to determine whether the person has an active substance abuse disorder. If the person has an active substance abuse disorder, the person would not be eligible for certification. However, even if it is determined that the person is not currently affected by an active substance abuse disorder, the railroad would be required, if recommended by a DAC, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs or both. The intent of this proposed provision is to use motor vehicle records to identify dispatchers or candidates for dispatcher certification who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service. Any testing performed as a result of a DAC's recommendation under paragraph (n) would be done under company authority, not Federal authority. However, the testing would be required to comply with the ''technical standards'' of part 219, subpart H, and part 40.

Paragraph (n)(5) is intended to clarify that failure to cooperate in the DAC evaluation discussed in paragraph (n)(2) of this section would result in the person being ineligible to perform as a certified dispatcher until such time as the person cooperates in the evaluation.

Section 245.113 Prior Safety Conduct With Other Railroads

This proposed section, which is derived from 49 CFR 240.113, 240.205, and 242.113, would establish a process for certification candidates to request information about their prior safety conduct when employed or certified by another railroad. Except as otherwise provided by the retroactive time limit contained in paragraph (g) of this section, this section would require railroads to review records provided by railroads that previously employed or certified the certification candidate regarding the candidate's prior compliance with §§ 245.115 and 245.303 within the previous five years, as well as the candidate's prior compliance with § 245.111 within the previous three years.

Paragraph (b) of this section contains an exception that if a certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request pursuant to paragraph (c) of this section. Such candidates, however, must notify the railroad to which they are seeking certification of this fact. This exception should help minimize any burden arising from these proposed requirements.

For certification candidates who do not qualify for the exception provided in paragraph (b), paragraph (c) would require the certification candidate to submit a written request to each railroad that employed or certified the candidate within the previous five years. As indicated earlier, the written request would direct the previous railroad employer or certifying railroad to provide information about the certification candidate's prior compliance with §§ 245.115 and 245.303 within the previous five years, as well as the candidate's prior compliance with § 245.111 within the previous three years from the date of the written request.

In addition, railroads would be required by paragraph (e) of this section to comply with written requests for records of prior safety conduct submitted by former employees or certified persons pursuant to this section within 30 days after receipt of such requests. Railroads that are unable to provide information about prior safety conduct within 30 days would be required, by paragraph (f) of this section, to either: (1) provide a written explanation of why the railroad cannot provide the information within the requested time frame, along with an estimate of how much time will be needed to supply the requested information; or (2) provide an adequate explanation for why the railroad cannot provide the information requested.

In the event a railroad seeking to certify or recertify a certification candidate receives a written statement from another railroad pursuant to paragraph (f) of this section, which explains that the railroad cannot provide the information requested, the railroad seeking to certify or recertify the certification candidate would be deemed to have complied with the eligibility determination required by paragraph (a) of this section provided it retains a copy of the other railroad's written statement in its records.

Similarly, in the event a railroad seeking to certify or recertify a certification candidate does not receive any written response from other railroads, the railroad would be deemed to have complied with the eligibility determination required by paragraph (a) of this section provided it retains a copy of the written request for this information in its records.

Section 245.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance

This proposed section, which is derived from 49 CFR 240.119, 240.205, and 242.115, addresses: (1) active substance abuse disorders and (2) specific alcohol/drug regulatory violations. As noted earlier, annual drug and alcohol testing data submitted to FRA revealed that dispatch employees had a random violation rate (drug and alcohol positives and refusals) and a pre-employment violation rate that was considerably higher than their train and engine service counterparts.

Therefore, this section and § 245.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not eliminate the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance, and other indicators may, to the extent not immediately explicable, indicate the need for an evaluation under internal policies of the railroad.

The purpose of identifying conditions is not to require (and does not require) a railroad to order an evaluation any time a listed condition is exhibited. Rather, FRA is simply providing guidance here as to conditions that may, given the context, call for an evaluation under internal policies of the railroad.

Moreover, FRA remains vigilant of harassment and intimidation and will take appropriate action if such conduct is discovered.

Paragraph (a) of this section would require railroads to determine that a person initially certifying, or a dispatcher recertifying, meets the eligibility requirements of this section. In addition, each railroad would be required by § 245.203 to retain the documents used to make that determination.

Paragraph (c) of this section would prohibit a person with an active substance abuse disorder from being certified as a dispatcher. This means appropriate action must be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (c) would also provide a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (d) would address conduct constituting a violation of § 219.101 or § 219.102 of FRA's alcohol/drug regulations. Section 219.101(a)(1) prohibits regulated employees from using or possessing alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad. Section 219.101(a)(2) prohibits regulated employees from reporting for regulated service, or going on or remaining on duty in regulated service, while under the influence of (or impaired by) alcohol or while having a breath or blood alcohol concentration of 0.04 or more. A regulated employee is also prohibited from using alcohol either within four hours of reporting for regulated service or after receiving notice to report for regulated service, whichever is less. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a regulated employee at any time, whether on or off duty, except for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established, based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after an SAP evaluation, any needed treatment and/or education, and a negative return-to-duty test, and follow-up testing (as required by § 219.104). These requirements constitute an absolute minimum standard for action when a dispatcher is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has had prior violations.

This proposed rule would require railroads to consider conduct that occurred within the period of five consecutive years prior to the review. This is the same period provided in this proposed rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in parts 240 and 242. Use of a five-year cycle reflects railroad industry experience indicating that conduct committed as much as five years before may tend to predict future alcohol or drug abuse behavior. For example, in analyzing data submitted to FRA between 2017 and 2021, FRA found that railroad employees returning to duty from previous drug or alcohol violations were approximately five times more likely to test positive than other railroad employees. Of course, railroads would retain the flexibility to consider prior conduct (including conduct more than five years prior) in determining whom they will hire as dispatchers.

Conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a dispatcher in order to be considered. For instance, a person who violated § 219.101 while working as a locomotive engineer and then sought dispatcher certification six months later (under the provision described below) would not be eligible for certification. The same is true under Part 240—an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The responsibility of the railroad would therefore not be limited to periodic recertification. This proposed rule would require a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The proposed rule would require a determination of ineligibility for a period of nine months for an initial violation of § 219.101. This would parallel the nine-month disqualification in §§ 240.119(c)(4)(iii) and 242.115(e)(4)(iii).

Specifying a period of ineligibility serves the interest of deterrence while giving further encouragement to deal with the problem before it is detected by management. In order to preserve and encourage referrals, the nine-month period could only be waived in the case of a qualifying referral (*see* § 219.1001). FRA believes that this distinction in treatment, which is also found in part 242, is warranted as a strong inducement to participation because referral programs help identify troubled employees before those employees get into accidents and incidents. Although FRA does not know how many actual referrals may be generated, the intended result would be reached if an atmosphere of intolerance for drug and/or alcohol abusing behavior is reinforced in the workplace and violators know that they may be reported by their colleagues or others if they report for duty while impaired.

In the case of a second violation of § 219.101, the dispatcher would be ineligible for a period of five years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely that any individual so situated may also be permanently dismissed from employment. However, it would be important that the employing railroad follow through and revoke the certificate under this proposed rule, so the dispatcher could not go to work for another railroad (or railroad contractor) within the five-year period using the unexpired certificate issued by the first railroad as the basis for certification. These proposed sanctions mirror the sanctions in §§ 240.119 and 242.115.

Under this proposed rule, one violation of § 219.102 within the five-year window would require only temporary suspension and the minimum response described in § 245.115(e) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach taken in parts 240 and 242 and reflects FRA's intent to not undercut the therapeutic approach to drug abuse employed by many railroads. This approach permits first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances, and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the

employee to a mandatory two-year period of ineligibility. A third violation within five years would lead to a five-year period of ineligibility.

This proposed rule also addresses violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for three years; and the same would be true for the reverse sequence. This mirrors the ineligibility period for locomotive engineers and conductors who have one § 219.101 violation and one § 219.102 violation. *See* 49 CFR 240.119(e)(4)(ii) and 242.115(e)(4)(ii).

Refusals to participate in chemical tests would be treated as if the test were positive. A refusal to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative would be treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal to provide a breath sample for alcohol testing, or a blood specimen for mandatory post-accident toxicological testing; or (2) § 219.102, in the case of a refusal to provide a body fluid specimen for drug testing. Interested parties should, however, note that 49 CFR part 40, subpart I, discusses medical conditions under which an individual's failure to provide a sufficient sample would not be deemed a refusal. In addition, subpart G of FRA's alcohol and drug regulations excuses employees from compliance with the requirement to participate in random drug and alcohol testing if the employee can substantiate a medical emergency involving the employee or an immediate family member. *See* 49 CFR 219.617.

If an employee covered by 49 CFR part 219 refuses to provide a breath or body fluid specimen or specimens when required to by a railroad pursuant to a mandatory provision of 49 CFR part 219, then the railroad (apart from any action it takes under part 245) would be required to remove that employee from regulated service and disqualify the employee from working in regulated service for nine months. *See* 49 CFR 219.104 and 219.107; *see also,* 49 CFR part 219, subpart H, and 49 CFR 40.191 and 40.261.

Paragraph (e) prescribes the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of FRA's alcohol/drug regulations. These conditions are derived from the conditions in §§ 240.119(d) and 242.115(f) and closely parallel the return-to-duty provisions of the alcohol/drug rule. The proposed regulation would not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, the railroad that intends to withdraw its conditional certification would be required to afford the dispatcher the hearing procedures provided by § 245.307 if the dispatcher does not waive their right to the hearing.

Paragraph (f) would ensure that a dispatcher, like any other covered employee, can self-refer for treatment under the alcohol/drug rule (49 CFR 219.1003) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice from the DAC of any substance abuse disorder identified as a result of a voluntary self-referral under 49 CFR 219.1003. However, paragraph (f) would also require that the railroad policy provide that confidentiality is waived if the dispatcher at any time refuses to cooperate in a recommended course of counseling or treatment, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this proposed provision is that the certification status of a dispatcher who seeks help and cooperates in treatment would not be affected, unless the dispatcher fails to follow through.

Section 245.117 Vision Acuity

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for vision acuity testing that a railroad would have to incorporate in its dispatcher certification program. This section differs from its analogous sections in 49 CFR parts 240 and 242 in that 49 CFR parts 240 and 242 address the requirements for vision and hearing acuity in the same section. However, FRA determined that for this proposed rule, it could more clearly present these requirements if they were in two separate sections: one section for vision acuity (§ 245.117) and one section for hearing acuity (§ 245.118).

Paragraph (c) of this section contains the general vision standards that a person must satisfy in order to be certified as a dispatcher unless they are determined to have sufficient vision acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the vision acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. In drafting this proposed rule, FRA discussed whether vision acuity standards were necessary for dispatchers and if so, whether they needed to be as stringent as the standards for engineers and conductors. Ultimately, FRA concluded that dispatchers should have to satisfy certain vision standards with a dispatcher's ability to distinguish between colors being particularly important. FRA requests comments on whether vision acuity standards for dispatchers are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section permits a railroad to have procedures whereby medical examiners can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a dispatcher, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect. If necessary, medical examiners can condition their opinion on certain circumstances or restrictions, such as the use of corrective lens for example.

Paragraph (e) of this section describes what documents the railroad must keep on file with respect to vision acuity testing. Such records must be retained for both individuals who the railroad certifies as dispatchers and those individuals who the railroad denies certification. Paragraph (g) of this section addresses the issue of vision deterioration. Once certified dispatchers become aware that their vision has deteriorated, they must notify the railroad before performing any subsequent service as a dispatcher. FRA presumes that certified dispatchers would most likely become aware of deterioration in their vision either through their own personal observation or through examination by a medical professional. Should this occur, before a certified dispatcher can return to

service, they must be reexamined. If upon reexamination, the railroad's medical examiner concludes that the certified dispatcher still satisfies the vision acuity standards in this part, the dispatcher can return to service. However, if the medical examiner concludes that the dispatcher no longer satisfies these requirements, the railroad must deny the person's certification in accordance with § 245.301, regardless of how much time remains before the dispatcher's current certificate expires. Certified dispatchers should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 245.118 Hearing Acuity

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for hearing acuity testing that a railroad would have to incorporate in its dispatcher certification program.

Paragraph (c) of this section contains the general hearing standards that a person must satisfy in order to be certified as a dispatcher unless they are determined to have sufficient hearing acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the hearing acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. FRA discussed whether hearing acuity standards were necessary for dispatchers and if so, whether they needed to be as stringent as the standards for engineers and conductors. Ultimately, FRA concluded that dispatchers should have to satisfy certain hearing standards and it was logical for these standards to be consistent with the hearing standards for engineers and conductors. FRA requests comments on whether hearing acuity standards for dispatchers are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section permits a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a dispatcher, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect. If necessary, medical examiners can condition their opinion on certain circumstances or restrictions, such as the use of a hearing aid for example.

Paragraph (e) of this section describes what documents the railroad must keep on file with respect to hearing acuity testing. Such records must be retained for both individuals who the railroad certifies as dispatchers and those individuals who the railroad denies certification. Paragraph (g) of this section addresses the issue of hearing deterioration. Once certified dispatchers become aware that their hearing has deteriorated, they must notify the railroad before performing any subsequent service as a dispatcher. FRA presumes that certified dispatchers would most likely become aware of deterioration in their hearing either through their own personal observation or through examination by a medical professional. Should this occur, they must be reexamined before returning to service. If upon reexamination, the railroad's medical examiner concludes that the certified dispatcher still satisfies the hearing acuity standards in this part, the dispatcher can return to service. However, if the medical examiner concludes that the dispatcher no longer satisfies these requirements, the railroad must deny the person's certification in accordance with § 245.301, regardless of how much time remains before the dispatcher's current certificate expires. Certified dispatchers should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 245.119 Training Requirements

This proposed section, derived from 49 CFR 240.123, 240.213, and 242.119, would require railroads to provide initial and periodic training to dispatchers. Such training is necessary to ensure that dispatchers have the knowledge, skills, and abilities necessary to safely perform all of the safety-related duties mandated by Federal laws, regulations, and orders.

Paragraph (b) of this section requires a railroad's certification program to address whether the railroad will accept responsibility for training dispatchers and thus be able to initially certify dispatchers or whether the railroad will only be recertifying dispatchers who were previously certified by other railroads. If a railroad accepts responsibility for training dispatchers, paragraph (c) of this section notes that the railroad must state in its certification program whether it will conduct the training program for dispatchers or it will have another entity perform the training on its behalf.

Under this section, railroads have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) of this section provide requirements for railroads that elect to train a previously untrained person to be a dispatcher. Pursuant to paragraph (d), a railroad that makes this election would be required to determine how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training. Paragraph (d)(3) also requires railroads to review and modify their training programs whenever new safety-related railroad laws, regulations, orders, technologies, procedures, software, or equipment are introduced into the workplace.

Paragraph (f) of this section provides the requirements a previously untrained person must satisfy in order to become certified. Paragraph (f)(2) states the person must demonstrate on-the-job proficiency by successfully completing dispatching tasks and using the necessary dispatching systems and technology. These tasks may be performed under the direct onsite supervision of a person who has the necessary dispatching experience and at least one year of experience as a dispatcher. FRA requests comments, including any supporting data, on whether this ''one year of experience'' requirement for persons supervising a certification candidate is sufficient. The final requirement, found in paragraph (f)(3), is that the previously untrained person shall demonstrate their knowledge of the physical characteristics of any assigned territory by successfully completing a test. FRA understands that a railroad may assign dispatchers additional territories after they become certified and the dispatchers can go through the process for becoming qualified on those territories after they are already certified. However, paragraph (f)(3) establishes the basic requirement that before a previously untrained person can become certified, they must demonstrate that they are qualified on at least one territory. Paragraph (f)(3) also requires railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory,

to explain a test question. This requirement is equivalent to 49 CFR 242.119(f) and is included so that certification candidates being tested would be able to obtain clarification of test questions from someone who possesses knowledge of the relevant territory.

Paragraph (g) of this section requires railroads to retain written documentation of the listed determinations. Paragraph (g)(1) only applies to individuals who have not been previously certified as dispatchers whereas paragraphs (g)(2) and (3) apply to all certified dispatchers.

Paragraph (h) of this section requires a railroad's certification program to explain the methods for acquiring familiarity with the physical characteristics of a territory and becoming qualified or requalified on a territory. Paragraph (h)(3) requires railroads to designate in their programs the maximum amount of time that a dispatcher can be absent from a territory before requalification is required. To conform with § 245.120(c), this time period cannot exceed 12 months. However, railroads can choose a shorter time period if they desire. For example, if a railroad wants to require that a dispatcher get requalified on a territory if they have not dispatched over that territory in six months, the railroad is allowed to do so, but it must include this requirement in its certification program.

Section 245.120 Requirements for Territorial Qualification

This proposed section, derived from 49 CFR 240.231 and 242.301, explains the requirements for territorial qualifications. Paragraph (a) of this section prohibits railroads from permitting or requiring a person to serve as a dispatcher on a particular territory, unless the railroad determines that the person is a certified dispatcher who is either qualified on that particular territory or assisted by a Dispatcher Pilot who is qualified on the territory. Paragraph (b) of this section requires a person to immediately notify the railroad if they are called to serve on a territory on which the person is not qualified. In such scenarios, the dispatcher could only dispatch over the territory if they were assisted by a Dispatcher Pilot who is qualified on the territory. Paragraph (c) of this section establishes that the maximum amount of time that a dispatcher can be absent from a territory before requalification on that territory is required is 12 months. However, railroads have the option, under § 245.119(h)(3), to make this time period shorter.

Section 245.121 Knowledge Testing

This proposed section, derived from 49 CFR 240.125, 240.209, and 242.121, would require railroads to provide for the initial and periodic testing of dispatchers. Paragraph (b) of this section outlines the general requirements for such testing. This testing will have to effectively examine and measure a dispatcher's knowledge of five subject areas: safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; physical characteristics of the territory on which a person will be or is currently working as a dispatcher; and dispatching systems and technology.

Under this section, railroads have discretion to design the tests that will be employed; for most railroads that will entail some modification of their existing ''book of rules'' examination to include new subject areas. This section does not specify the number of questions to be asked or the passing score to be obtained. However, it does require that the test be conducted without open reference books unless use of such materials is part of a test objective. A railroad may not give an all-open book exam. Some portion of the test must be closed book. Since the testing procedures and requirements selected by the railroad would be submitted to FRA for approval, FRA would monitor the exercise of discretion being afforded railroads by this section.

Paragraph (c) of this section mirrors 49 CFR 242.121(e) by requiring railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a test question.

Paragraph (d) of this section states that if a person fails a test, the railroad cannot allow that person to serve as a dispatcher until they achieve a passing score on reexamination. The railroad would decide how much time, if any, must pass after a test failure before a certification candidate can be reexamined. Furthermore, the railroad would decide what additional training, if any, a candidate would receive after a test failure. The railroad would also decide whether there should be a limit on the number of times a candidate could retake a test, and if so, the maximum number of test retakes the railroad will allow.

Section 245.123 Monitoring Operational Performance

This proposed section, derived from 49 CFR 240.129 and 242.123, contains the requirements for conducting unannounced compliance tests.

Paragraph (a) of this section requires each railroad to describe in its certification program how it will monitor the conduct of its certified dispatchers by performing unannounced compliance tests on railroad and Federal rules, as well as territorial and dispatch systems. Paragraph (a)(3) requires railroads to indicate the types of actions they will take in the event they find deficiencies with a dispatcher's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies with a dispatcher's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this regulation to be as flexible as possible. There are a variety of actions and approaches that a railroad could take such as developing and providing formal remedial training for dispatchers who fail tests or have deficiencies in their performance. Each railroad could also consider implementing a formal procedure whereby a dispatcher is given the opportunity to explain, in writing, the factors that they believe caused their test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could be considered and evaluated by railroads and their dispatchers, and FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization.

Paragraph (b) of this section provides the requirements for these unannounced compliance tests, including the operational tests that must be performed and who is allowed to conduct the test. Paragraph (b)(3) specifies that each railroad must give each of its certified dispatchers at least one unannounced compliance test each calendar year, except as provided in paragraph (c) of this section. FRA recognizes that before these unannounced compliance tests can be performed in conformance with this section, a railroad's certification program must first be approved by FRA. Thus, at the latest, FRA expects railroads to perform these unannounced compliance tests on all of their certified

dispatchers during the calendar year immediately following the year their certification program is first approved by FRA. For example, if FRA approves one railroad's program in January 2025 and another railroad's program in December 2025, both of these railroads would have to perform unannounced compliance tests on all of their certified dispatchers starting in 2026. While FRA would encourage these railroads to commence the unannounced tests after their programs are approved in 2025, FRA recognizes it may not be practical to perform unannounced tests on all of their certified dispatchers by the end of 2025, especially for the railroad whose program was not approved until December 2025.

Paragraph (c) of this section recognizes that some certified dispatchers may not be performing a service that requires a dispatcher certificate, and thus, a railroad may not be able to provide those dispatchers with the annual, unannounced compliance test. For example, a certified dispatcher may be on furlough, in military service, off with an extended illness, or working in another service. In situations like these where a dispatcher is not performing service that requires certification, the railroad does not have to give an unannounced compliance test. However, when the certified dispatcher returns to dispatcher service, they will have to be given an unannounced compliance test within 30 days of their return. Moreover, the railroad will have to retain a written record that documents the date the dispatcher stopped performing service requiring certification, the date the dispatcher returned to service requiring certification, and the date the dispatcher received their unannounced compliance test following their return to service requiring certification.

Section 245.125 Certification Determinations Made by Other Railroads

This section of the proposed rule, derived from 49 CFR 240.225 and 242.125, contains requirements that would apply when a certified or previously certified dispatcher is about to begin work for a different railroad. This section would permit a railroad to rely on determinations made by another railroad concerning a person's certification. However, this section would require railroads to address in their certification programs how they will administer training for previously uncertified dispatchers with extensive dispatching experience or previously certified dispatchers who have had their certification expire. In both scenarios, FRA would allow the railroad to reduce the on-the-job training that might otherwise be required if the person were treated as having no dispatching experience. However, if a railroad's certification program fails to specify how the railroad will train a dispatcher who was previously certified by another railroad, all dispatchers and dispatcher candidates will be required to take the railroad's entire training program (regardless of the dispatcher's prior certification status).

Subpart C—Administration of the Certification Program

Section 245.201 Time Limitations for Certification

This proposed section, derived from 49 CFR 240.217 and 242.201, contains various time constraints to preclude railroads from relying on stale information when evaluating candidates for certification or recertification. For example, when making a determination of eligibility based on prior safety conduct as an employee of a different railroad pursuant to § 245.113, paragraph (a) would prohibit a railroad from relying on data provided more than one year before the date of the railroad's certification decision. However, paragraph (b) goes on to explain that the time constraints listed in paragraph (a) would not apply to railroads who are not evaluating candidates for certification or recertification, but simply relying on eligibility determinations that have already been made by another railroad in accordance with § 245.125.

Paragraph (c) prohibits a railroad from certifying a person as a dispatcher for more than three years except for those individuals who are designated as certified dispatchers under § 245.105(c) or (d). When a railroad designates an individual as a certified dispatcher under § 245.105(c) or (d), that certification can last for three years after the date that FRA initially approves the railroad's certification program. This could lead to situations where a certificate could be valid for more than three years. For example, if a railroad designates an individual as a certified dispatcher in January 2025, but FRA does not approve the railroad's certification program until January 2026, the dispatcher's certification could last until January 2029 (four years in total). However, any subsequent recertifications for that dispatcher could only last for three years. In other words, if the dispatcher in the previous example got recertified in January 2029, that certificate would expire no later than January 2032.

Paragraph (d) would require railroads to issue certificates that comply with § 245.207 to their certified dispatchers within 30 days from the date of the railroad's decision to certify or recertify that person.

Section 245.203 Retaining Information Supporting Determinations

This proposed section, derived from 49 CFR 240.215 and 242.203, contains recordkeeping requirements for railroads that certify dispatchers. Paragraph (b) lists the information that railroads would be required to retain for each of their certified dispatchers and certification candidates, while paragraph (e) provides that all records required to be retained must be retained for six years from the date of the railroad's certification, recertification, denial, or revocation decision. Paragraph (e) would also require railroads to make these records available to FRA representatives, upon request, in a timely manner.

Paragraph (f) would prohibit railroads and individuals from falsifying records that railroads are required to retain pursuant to this section. Paragraph (g) contains minimum standards for electronic recordkeeping with which railroads would be required to comply, in order to maintain electronic versions of the required records. These minimum standards for electronic recordkeeping are virtually identical to the electronic recordkeeping standards contained in 49 CFR 242.203.

Section 245.205 List of Certified Dispatchers and Recordkeeping

This proposed section, derived from 49 CFR 240.221 and 242.205, would require a railroad to maintain a list of its certified dispatchers. Paragraph (b) of this section would also require a railroad to update its list of certified dispatchers at least annually and to make its list of certified dispatchers available, upon request, to FRA representatives in a timely manner.

Paragraph (c) contains minimum standards for electronic recordkeeping with which railroads would be required to comply, in order to maintain an electronic version of the list of certified dispatchers required by this section. These minimum standards are similar to the electronic recordkeeping standards contained in 49 CFR 242.205.

Paragraph (d) would prohibit railroads and individuals from falsifying the list of certified dispatchers that railroads are required to maintain pursuant to this section.

Section 245.207 Certificate Requirements

This proposed section contains requirements for the certificate that each certified dispatcher would be required to carry. The requirements in paragraphs (a)–(e) of this section, which pertain to the required minimum content for certificates and authorization of the person designated by the railroad to sign the certificates, are derived from 49 CFR 240.223 and 242.207.

Paragraph (a) of this section specifies that railroads have the option of issuing certificates electronically or in paper form. Paragraph (a)(1) would require that the dispatcher certificate identify the railroad issuing the certificate. Therefore, a certified dispatcher who works for more than one railroad would be required to have a separate certificate for each railroad with which the dispatcher is currently certified. Paragraph (a)(7) would require the certificate to be signed by an individual who has been designated by the railroad as an authorized signatory of dispatcher certificates, as described in paragraph (c) of this section. Electronic signatures are permitted under this proposed rule. In addition, paragraph (e) of this section would prohibit railroads and individuals from falsifying dispatcher certificates.

Paragraphs (f) and (i) are derived from 49 CFR 240.305 and 242.209. These paragraphs would require dispatchers to have their certificates in their possession while on duty as a dispatcher, to display their certificates when requested to do so by FRA representatives, State inspectors [18] authorized under 49 CFR part 212, and certain railroad officers, and to notify a railroad if they are called to serve as a dispatcher in a service that would cause them to exceed their certificate limits.

Paragraph (g), derived from 49 CFR 240.301 and 242.211(a), would require railroads to promptly replace a dispatcher's certificate at no cost to the dispatcher, if the certificate is lost, stolen, or mutilated. However, unlike § 242.211(b), this section does not contain detailed requirements for temporary replacement certificates. Temporary replacement certificates generally contain most of the information provided on official certificates. Therefore, it does not appear to be especially burdensome for railroads to issue temporary certificates to replace certificates that have been lost, stolen, or mutilated. Nonetheless, by refraining from proposing a formal process for the issuance of temporary dispatcher replacement certificates, FRA would allow railroads to decide how and when to issue temporary replacement certificates to dispatchers. FRA is soliciting comment on this proposed approach.

Section 245.213 Multiple Certifications [19]

This proposed section, derived from 49 CFR 240.308 and 242.213, establishes how railroads should handle certified dispatchers who are certified with multiple railroads, attempting to become certified with multiple railroads, or certified in another railroad craft. FRA recognizes that while it is fairly common for an individual to work as both a locomotive engineer and a conductor, it is less common for a dispatcher to also work in another craft that requires certification. However, because situations may arise where a dispatcher is also certified to work in another craft, such as a locomotive engineer or conductor, FRA wanted to address how to handle such situations.

Paragraph (a) of this section would allow a certified dispatcher to become certified in one or more of the other railroad crafts that require certification such as locomotive engineer or conductor. If a person is certified in multiple crafts by the same railroad, paragraph (b) would require the railroad to coordinate the expiration dates of the certificates, to the extent possible. While railroads are not required to have all of a person's certificates expire at the same time, it would be beneficial, from the standpoint of administrating the certification programs, if railroads followed this practice. Thus, FRA encourages railroads to coordinate these expiration dates when possible.

Paragraph (c) of this section would pertain to individuals who are certified dispatchers for multiple railroads or who are seeking to become certified dispatchers for multiple railroads. Paragraph (c)(1) would require a dispatcher to notify all railroads with which the dispatcher holds a current dispatcher certificate, if another railroad denies, suspends, or revokes the dispatcher's certification. Paragraph (c)(2) would prohibit an individual from working as a dispatcher for *any* railroad while their dispatcher certification is suspended or revoked by a railroad. For example, if a person is a certified dispatcher with Railroad ABC and Railroad DEF, and ABC suspends and/or revokes the person's certificate, that person would not be able to work as a dispatcher for DEF, or any other railroad, during the period of suspension and/or revocation. Furthermore, paragraph (c)(3) states that if a person has their dispatcher certification suspended or revoked by one railroad, and they attempt to become a certified dispatcher with another railroad while their certification is suspended or revoked, they must notify the railroad they are seeking certification from of their current suspended or revoked certification status. Therefore, if a person is seeking dispatcher certification with Railroad XYZ while their dispatcher certificate is suspended or revoked by Railroad ABC, they must notify XYZ of their current suspended or revoked certification status.

Paragraphs (d), (e), and (f) of this section address how the revocation of a dispatcher's certification would affect an individual's ability to work in another railroad craft requiring certification, and vice versa. If a person's dispatcher certification was revoked because of a drug or alcohol violation, as described in § 245.303(e)(8), then that person would be ineligible to work in any craft requiring certification, such as a locomotive engineer or conductor, for any railroad during the period of revocation. Such person would also not be able to obtain a certificate in any of those crafts from any railroad while their dispatcher certificate is revoked. Likewise, if a person's non-dispatcher certification(s), such as locomotive engineer or conductor, are revoked because of an alcohol or drug violation, that person will be ineligible to work as a certified dispatcher or obtain a dispatcher certificate from any railroad during the revocation period. In contrast, if a dispatcher's certification is revoked for a violation that does not involve alcohol or drugs, such as § 245.303(e)(1) through (7), that person would still be able to work in any other craft requiring certification, such as a locomotive engineer or conductor, during the period of revocation, as long as the person is certified in that craft. Likewise, a person could still work as a certified dispatcher if their certificate for another craft, such as locomotive engineer or conductor, was revoked due

[18] Although State inspectors authorized under 49 CFR part 212 could be considered ''FRA representatives,'' they are mentioned separately in this section to ensure that there is no dispute regarding their authority.

[19] To the extent possible, FRA has attempted to match the section numbers in this proposed rule to the analogous sections in the conductor certification rule (49 CFR part 242). Since 49 CFR 242.213 addresses multiple certification issues, FRA is proposing section number 245.213 for the multiple certification section in this proposed rule instead of the next sequential section number which would be 245.209.

to a violation that did not involve drugs or alcohol.

FRA's reasoning for this line of delineation between revocable events that involve alcohol and drugs and those that do not is rooted in railroad safety. If someone shows up to work as a dispatcher under the influence of alcohol or drugs, it stands to reason that they could likely show up to work for another certified craft, such as a locomotive engineer or conductor, under the influence as well. Thus, it makes sense for an individual's alcohol or drug violations as a dispatcher to impact their eligibility to work in another craft that requires certification and vice versa. With respect to revocable events that do not involve alcohol or drugs, FRA finds that the tasks performed by a dispatcher are so inherently different from the tasks performed in another certified craft, such as an operating crew member, that it does not automatically follow that a person's revocable event as a dispatcher indicates that they are more likely to also have a revocable event while performing in another certified craft. Thus, FRA is taking the position that a revocation of a dispatcher certificate which does not involve alcohol or drugs should not affect that person's eligibility to work in another railroad craft requiring certification, and vice versa. However, FRA requests comments on this issue.

Paragraphs (g) and (h) of this section would prohibit a railroad from denying or revoking a dispatcher's certification just because their attempt at certification or recertification in another railroad craft, such as locomotive engineer or conductor, was denied, and vice versa. Paragraph (i) of this section would allow a railroad to issue a single certificate to a person who is certified in multiple railroad crafts that require certification. If a railroad exercises this option, it must ensure that the single certificate contains all of the components required for each craft. Alternatively, railroads are also welcome to issue multiple certificates to a person who is certified in multiple crafts (one certificate for each craft). Thus, if a person is certified as both a dispatcher and conductor, the railroad could issue the person a single certificate containing both crafts or it could issue one dispatcher certificate and one conductor certificate.

Finally, paragraph (j) of this section denotes that if a person is certified in multiple crafts and they are involved in a revocable event, that event can only lead to the revocation of a certificate for a single railroad craft. The railroad must determine which certificate should be revoked based on the work the individual was performing at the time of the event. In such instances, while the railroad may only revoke a certificate for a single craft, that revocation could affect a person's eligibility to perform other crafts. For example, if a person who is certified as a dispatcher and a conductor, violates 49 CFR 219.101 while on duty as a dispatcher, the railroad should only revoke the individual's dispatcher certification. The person's conductor certificate cannot be revoked for the incident that occurred while the person was on duty as a dispatcher. However, as discussed in paragraph (d)(1) of this section, this person would not be able to work as a conductor while their dispatcher certificate was revoked for this offense.

Section 245.215 Railroad Oversight Responsibilities

This proposed section, derived from 49 CFR 240.309 and 242.215, would require each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified dispatchers. FRA has formulated the information collection requirements of this proposed section to ensure that railroads collect data on dispatcher safety behavior and feed that information into their operational monitoring efforts, thereby enhancing safety.

This section would require each Class I railroad (including the National Railroad Passenger Corporation), railroad providing commuter service, and Class II railroad to have an internal auditing plan to keep track of eight distinct events that involve poor safety conduct by dispatchers. For each event, the railroad would be required to indicate what response it took to that situation. The railroad would then be required to evaluate this information, together with data showing the results of annual operational testing and causation of FRA reportable train accidents, to determine what additional or different efforts, if any, are needed to improve the safety performance of that railroad's certified dispatchers. FRA would not require railroads to furnish this data or their analysis of the data to FRA. Instead, FRA would require that railroads be prepared to submit such information when requested.

As set forth in paragraph (i), an instance of poor safety conduct involving a person who is a certified dispatcher and is certified in another railroad craft (such as a locomotive engineer or conductor) need only be reported once under the appropriate section of this chapter (*e.g.,* under § 240.309, § 242.215, or under this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred. This determination is similar to the determination made under part 225, in which railroads determine whether an accident was caused by poor performance of what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, etc.) or whether it was caused by poor performance of what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, etc.)

Denial and Revocation of Certification

This subpart parallels part 240 and part 242's approach to adverse decisions concerning certification (*i.e.,* decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this rule is predicated principally on the theory that decisions to deny certification or recertification will come at the conclusion of a prescribed evaluation process which will be conducted in accordance with the provisions set forth in this subpart. Thus, this proposed rule contains specific procedures designed to ensure that a person in jeopardy of being denied certification or recertification will be given a reasonable opportunity to examine and respond to the negative information that might serve as the basis for being denied certification or recertification.

When considering revocation, this proposed rule contemplates that decisions to revoke certification will only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions will only come after a certified dispatcher has been afforded an opportunity for an investigatory hearing at which the presiding officer will determine whether there is sufficient evidence to establish that the dispatcher's conduct warranted revocation of their certification.

This subpart also provides for certificate suspension in certain circumstances. Certificate suspension would be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension is applicable in instances where a person

is awaiting an investigatory hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules, or committed a violation of certain operating rules or practices, and situations in which the person is being evaluated or treated for an active substance abuse disorder.

Section 245.301 Process for Denying Certification

This proposed section, derived from 49 CFR 240.219 and 242.401, establishes minimum procedures that must be offered to a certification candidate before a railroad denies the candidate certification or recertification. Paragraph (a) of this section gives a certification candidate a reasonable opportunity to explain or rebut adverse information, including written documents or records, that the railroad intends to use as the basis for its decision to deny certification or recertification.

Paragraph (b) of this section requires that a written explanation of an adverse decision be 'served' on a certification candidate within 10 days of the railroad's decision. Paragraph (b) also requires that the basis for a railroad's denial decision address any explanation or rebuttal information that the dispatcher candidate may have provided pursuant to paragraph (a) of this section.

Paragraph (c) of this section prohibits a railroad from denying certification based on a failure to comply with a railroad operating rule or practice which constitutes a violation under § 245.303(e)(1) through (7) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with that railroad operating rule or practice. This paragraph is derived from the intervening cause exception for revocation in § 245.307(h).

Section 245.303 Criteria for Revoking Certification

This proposed section, derived from 49 CFR 240.117, 240.305, and 242.403, provides the circumstances under which a dispatcher may have their certification revoked. In addition, paragraph (a) of this section makes it unlawful to fail to comply with any of the railroad rules or practices described in paragraph (e) of this section. Paragraph (a) is needed so that FRA can initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person who is not a certified dispatcher violates a railroad rule or practice described in paragraph (e) of this section. (Railroads should, however, note that they may not revoke a dispatcher's certificate, including a designated dispatcher's certificate, until they have obtained FRA approval of their certification programs pursuant to § 245.103.)

Paragraph (b) of this section provides that a certified dispatcher who fails to comply with a railroad rule or practice described in paragraph (e) would have their dispatcher certification revoked. Paragraph (c) provides that a certified dispatcher who is monitoring, piloting, or instructing another dispatcher could have their certification revoked if the certified dispatcher fails to take appropriate action to prevent a violation of a railroad rule or practice described in paragraph (e) of this section. As explained in paragraph (c), ''appropriate action'' does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the dispatcher, as appropriate, of a potential or foreseeable violation.

Paragraph (d) provides that a certified dispatcher who is called by a railroad to perform a duty other than that of a dispatcher would not have their dispatcher certification revoked based on actions taken or not taken while performing that duty. In general, this paragraph would apply regardless of whether the individual was called to perform a certified craft, such as locomotive engineer or conductor, or a non-certified craft. However, this exemption would not apply to violations described in paragraph (e)(8) of this section. Therefore, certified dispatchers working in other capacities, that do not require certification, who violate certain alcohol and drug rules would have their certification revoked for the appropriate period pursuant to § 245.115. However, if the certified dispatcher was working in another certified craft, such as a locomotive engineer or conductor, at the time of the alcohol or drug violation, their certificate for the craft that they were performing at the time of the violation would be revoked as opposed to their dispatcher certificate. If a certified dispatcher who is also certified in another craft, such as locomotive engineer or conductor, violates § 219.101 while performing a craft that does not require certification, the railroad shall pick one, and only one, certificate to revoke. For example, if a person, who is a certified dispatcher and conductor, violates § 219.101 while working as a brakeman, the railroad must decide to revoke either their dispatcher certificate or their conductor certificate, but it cannot revoke both certificates. Regardless of which certificate the railroad chooses to revoke, the person will be unable to work as a dispatcher or conductor during the period of revocation. *See* § 245.213(d)(1) and (3).

Paragraph (e) provides the eight types of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1) through (8) are derived in part from the revocable events provided in 49 CFR 242.117(e) but have been modified to account for the duties and responsibilities of a dispatcher.

Paragraph (e)(1) refers to a dispatcher's failure to properly protect the public and railroad personnel after receiving a report of highway-rail grade crossing warning system malfunction. Depending on the type of warning system malfunction at issue, this violation could involve the dispatcher's failure to issue a mandatory directive that restricts speed or imposes a stop and flag order for train crews approaching the highway-rail grade crossing.

Paragraph (e)(2) refers to violations that could include a dispatcher granting authority or permission for a train or on-track equipment to enter an out of service or blue flag protected track.

Paragraph (e)(3) refers to violations that could include a dispatcher granting authority or permission for a train or on-track equipment to enter established Roadway Worker In Charge (RWIC) limits without authorization from the RWIC who owns the limits.

Paragraph (e)(4) refers to the removal of blocking devices or established protection of RWIC working limits, prior to the RWIC releasing the limits. Similar to the previous paragraph, this entry is directly correlated to the protection of personnel and equipment on controlled track. In setting up protected limits for an RWIC, dispatchers apply blocking devices which are used to isolate the limits owned by the RWIC. Removing these devices and established protection exposes the RWIC to movements of trains, engines, and on-track equipment.

Paragraph (e)(5) refers to violations that could include the failure of a dispatcher to properly apply blocking devices or establish appropriate protection necessary to protect working limits or the movement of trains or on-track equipment.

Paragraph (e)(6) references a dispatcher's failure to properly issue or apply mandatory directives when warranted. Mandatory directives are defined in § 245.7 as any movement authority or speed restriction that affects a railroad operation. Therefore, any form used to authorize the use of, or

provide protection for, controlled track is a mandatory directive. Mandatory directives can be in the form of speed restrictions/slow orders, track authorities, track warrants, and various other movement orders.

Paragraph (e)(7) refers to violations that could include a dispatcher circumventing train control systems by granting permission or authorizing a train or engine with inoperative or malfunctioning PTC or cab signal equipment onto territory requiring the use of these systems.

Paragraph (f) proposes a three-year period for considering certified dispatcher conduct that failed to comply with a railroad operating rule or practice described in paragraphs (e)(1) through (7) of this section. However, when alcohol and drug violations are at issue, the time period for evaluating prior operating rule misconduct would be dictated by § 245.115, which would establish a period of 60 consecutive months prior to the date of review for such evaluations.

Paragraph (g) provides that if a single incident contravenes more than one railroad operating rule or practice listed in paragraph (e) of this section, the incident would be treated as a single violation. FRA considers a single incident to be a unique identifiable occurrence caused by a certified dispatcher's violation of one or more railroad operating rules or practices listed in paragraph (e). However, a certified dispatcher could be involved in more than one incident during a single tour of duty, if the incidents are separated by time, distance, or circumstance.

Paragraph (h) provides that a certified dispatcher may have their certification revoked for violation of a railroad operating rule or practice listed in paragraph (e) that occurs during a properly conducted operational compliance test. However, as reflected in paragraph (i), violations of railroad operating rules or practices that occur during operational tests that are not conducted in compliance with this part, the railroad's operating rules, or the railroad's program under § 217.9 will not be considered for revocation purposes.

Section 245.305 Periods of Ineligibility

This section of the proposed rule, derived from 49 CFR 240.117 and 242.405, describes how a railroad would determine the period of ineligibility (*e.g.,* for revocation or denial of certification) for a dispatcher or dispatcher candidate. Paragraph (a) of this section provides the starting date for a period of ineligibility. For persons who are not currently certified as dispatchers, a period of ineligibility would begin on the date of the railroad's written determination that the most recent incident has occurred. For example, if the railroad made a written determination on March 10th that the most recent incident occurred on March 1st, the period of ineligibility would begin on March 10th. For persons who are currently certified dispatchers, a period of ineligibility would begin on the date the railroad notifies the person that their recertification has been denied or their certification has been suspended. For dispatchers who have their certification revoked, the period of ineligibility would begin on the date the railroad notifies the dispatcher of the certificate suspension as opposed to the notification date of certificate revocation because once a person's certificate is suspended, they are ineligible to work as a dispatcher pending a determination as to whether the certificate should be revoked.

With respect to revocation, paragraph (b) of this section provides that once a railroad determines that a dispatcher has failed to comply with its safety rule concerning one or more events listed in § 245.303(e), two consequences will occur. First, the railroad will be required to revoke the dispatcher's certification for a period of time provided in this section. Second, that revocation will initiate a period during which the dispatcher will be subject to an increasingly more severe period of revocation if additional revocable events occur in the next 24 to 36 months. The standard periods of revocation proposed in this section track the revocation periods provided in parts 240 and 242. One revocable event would result in revocation for 30 days. Two revocable events within 24 months of each other would result in revocation for six (6) months. Three revocable events within 36 months of each other would result in revocation of one (1) year. Four revocable events within 36 months of each other would result in revocation for three (3) years.

While paragraph (c) of this section contains a provision that parallels § 242.405(b) and provides that all periods of revocation may consist of training, paragraph (d) contains a provision that parallels §§ 240.117(h) and 242.405(c). Paragraph (d) provides that a person whose dispatcher certification is denied or revoked will be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if they satisfy all of the criteria listed in the paragraph.

Section 245.307 Process for Revoking Certification

This proposed section, derived from 49 CFR 240.307 and 242.407, provides the procedures a railroad must follow if it acquires reliable information regarding a dispatcher's violation of an operating rule or practice listed in §§ 245.303(e) or 245.115(d). Paragraph (b)(1) of this section provides that, upon receipt of reliable information regarding a violation of a railroad operating rule or practice described in §§ 245.303(e) or 245.115(d), a railroad must suspend the person's certificate immediately. Paragraph (b)(2) provides that, prior to or upon suspending the person's certificate, the railroad would have to provide either oral or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice would have to be promptly confirmed in writing. The amount of time the railroad has to confirm the notice in writing would depend on whether or not a collective bargaining agreement is in effect and applicable. In the absence of such an agreement, a railroad would have four days to provide written notice. If a notice of suspension is amended after a hearing is convened and/or does not contain citations to all railroad rules and practices that may apply to a potentially revocable event, the Certification Review Board (CRB or Board), if asked to review the revocation decision, might subsequently find that this constitutes procedural error pursuant to § 245.405.

Pursuant to paragraph (b)(4) of this section, no later than the convening of a hearing, the railroad must provide the dispatcher with a copy of the written information and a list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing shall be granted if the copy of the written information and list of witnesses is not provided until just prior to the convening of the hearing. If the information that led to the suspension of a dispatcher's certificate pursuant to paragraph (b)(1) of this section is provided through statements of an employee of the convening railroad, the railroad must make that employee available for examination during the hearing. Examination may be telephonic or virtual when it is impractical to provide the witness at the hearing. These provisions in paragraph (b)(4) of this section were added to ensure that dispatchers are provided with information and/or witnesses necessary to defend themselves at their hearing. Even if a railroad conducts a

hearing pursuant to the procedures in an applicable collective bargaining agreement, the railroad will still have to comply with the provisions of paragraph (b)(4). It is not, however, FRA's intent to require railroads to call every witness included on the railroad's list of witnesses to testify at the hearing. If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case, and that calling a witness on its list to testify would be unduly repetitive, the railroad would not be obligated to call that witness to testify. Of course, the opposing party could request that the witness be produced to testify, but the hearing officer would have the authority pursuant to paragraph (d)(4) of this section to determine whether the witness's testimony would be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

Paragraph (d)(2) of this section provides the presiding officer with the powers necessary to regulate the conduct of the hearing. Thus, a presiding officer would be permitted to deny excessive hearing request delays by the dispatcher. Moreover, a presiding officer could find implied consent to postpone a hearing when a dispatcher's witnesses are not available within 10 days of the date the certificate is suspended. However, the CRB may grant a petition on review if the CRB finds that the hearing schedule caused the petitioner substantial harm.

Paragraph (e) of this section contains requirements regarding the written decision in a railroad hearing. FRA believes these requirements will ensure that railroads issue clear and detailed decisions. In turn, clear and detailed decisions will allow a dispatcher to understand exactly why their certification was revoked and will allow the CRB to have a more detailed understanding of the case if it is asked to review the revocation decision pursuant to subpart E of this proposed rule.

Paragraph (f) credits the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of § 245.305. For example, if a dispatcher's certificate is suspended on July 1st and on July 11th, the railroad issues a decision to revoke the dispatcher's certificate for 30 days, the time between July 1st and July 11th would count towards the 30-day revocation period. Thus, the dispatcher's certificate would only be revoked for an additional 20 days after the railroad issued its revocation decision.

Paragraph (g) requires a railroad to revoke a dispatcher's certification if it discovers that another railroad has revoked that person's dispatcher certification. The revocation period shall coincide with the revocation period of the railroad that initially revoked the dispatcher's certification. For example, if a dispatcher is certified by Railroad ABC and Railroad XYZ, and ABC revokes the dispatcher's certification from November 1st through November 30th, XYZ must revoke the dispatcher's certification through November 30th once it learns of ABC's revocation. The revocation hearing requirement in this rule is satisfied when any single railroad holds a revocation hearing for a dispatcher that arises from the same set of facts.

Paragraphs (h) and (i) provide two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to these provisions, either defense would have to be proven by sufficient evidence. Paragraph (h) prohibits railroads from revoking a dispatcher's certificate when there is sufficient evidence of an intervening cause that prevented or materially impaired the dispatcher's ability to comply. For example, a railroad should consider assertions that a Dispatcher Pilot or Dispatcher Trainer failed to take appropriate action to prevent an uncertified dispatcher or dispatcher trainee from using defective equipment. Similarly, a railroad should consider assertions that a train crew member relayed incorrect information to the dispatcher who reasonably relied on it, thus causing a revocable event. However, FRA does not intend to imply that all equipment failures and errors caused by others will serve to absolve dispatchers from certification revocation under this proposed rule. The factual issues presented by each incident would need to be analyzed on a case-by-case basis.

Paragraph (i) would allow railroads to exercise discretion when determining whether to revoke a dispatcher's certification ''if sufficient evidence exists to establish that the violation of the railroad operating rule or practice described in § 245.303(e) was of a minimal nature and had no direct or potential effect on rail safety.'' However, FRA acknowledges that the determination as to whether an incident meets this criterion could be subject to different interpretations. For this reason, paragraph (j) would require railroads to retain information about the evidence relied upon when exercising this discretion. Unless a railroad fails to retain information as required in paragraph (j) or acts in bad faith, FRA does not anticipate taking enforcement action against the railroad even if FRA believes the railroad could have revoked the dispatcher's certification.

Paragraph (j) of this section requires railroads to keep records of those violations in which they must not or elect not to revoke a dispatcher's certificate pursuant to paragraph (h) or (i) of this section. Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a dispatcher's certificate for an alleged violation of an operating rule or practice pursuant to § 245.303(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad will have immunity from civil enforcement for making what the agency believes to be an incorrect determination. However, if railroads do not conduct a reasonable inquiry or act in good faith, they could be subject to civil penalty assessment under this rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against an individual responsible for the noncompliance by assessing a civil penalty against the individual or issuing an order prohibiting the individual from performing safety-sensitive functions in the rail industry for a specified period pursuant to part 209, subpart D.

Subpart E—Dispute Resolution Procedures

This subpart details the opportunities and procedures for a person to challenge a railroad's decision to deny certification or recertification or to revoke a dispatcher's certification. While the proposed dispute resolution process for dispatchers largely mirrors the processes for engineers under part 240 and conductors under part 242, FRA has made some modifications that will be discussed below. In addition, FRA has undertaken efforts to simplify these regulations so that they are clear and comprehensible to all interested parties.

Section 245.401 Review Board Established

This proposed section, derived from 49 CFR 240.401 and 242.501, provides that a person who is denied certification or recertification or has had their dispatcher certification revoked may petition FRA to review the railroad's decision. Pursuant to this section, FRA

delegates initial responsibility for adjudicating such disputes to the CRB. Although creation of the CRB will require issuance of an internal FRA order, FRA anticipates that the CRB will mirror the Operating Crew Review Board (OCRB) which currently adjudicates disputes under parts 240 and 242.[20] Under this proposed rule, this newly created Board would adjudicate certification disputes for all certified crafts, including locomotive engineers, conductors, and dispatchers. FRA is fully aware that these different job disciplines require different knowledge bases and skill sets. While the specific process for selecting CRB members would be delineated in an FRA order or other internal document, FRA would ensure that the CRB is composed of employees with sufficient backgrounds in these various disciplines. Only those CRB members with sufficient knowledge of dispatching would be able to participate as a voting member on a petition filed under this part.

Section 245.403 Petition Requirements

This proposed section, derived from 49 CFR 240.403 and 242.503, provides the requirements for obtaining FRA review of a railroad's decision to deny certification, deny recertification, or revoke certification. The requirements contained in paragraph (b) of this section include the need to seek review in a timely fashion once the adverse decision is served on the petitioner. In the interest of consistency and uniformity with parts 240 and 242, petitioners under this part would have 120 days, from the date the adverse decision was served upon them, to file a petition for review by the CRB.

Paragraph (b)(3) provides that a petitioner must file their petition through *https://www.regulations.gov.* Petitioners and their representatives should save some form of proof of their filing in case an error occurs in the *Regulations.gov* system and they have to submit proof that their petition was timely filed. All documents associated with a CRB petition will be posted to the docket for that case on *Regulations.gov* and all DOT dockets on *Regulations.gov* are available to the public. You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477–78).

Paragraph (b)(4) requires that a petition contain certain contact information, including an email address, for the petitioner and their representative, if any. The OCRB solely communicates with parties via email. FRA anticipates that the CRB will operate in a similar manner, and will only send communications to the parties via email. If a petition only contains an email address for the petitioner's representative, but not the petitioner, the CRB will only send any necessary communications to the representative. Because all communications will be performed via email, FRA has determined that it is unnecessary for a petition to include a mailing address for petitioner or their representative. Thus, unlike in parts 240 and 242, this information will not be required.[21] Lastly, if any required contact information for petitioner or their representative, such as a phone number or email address, changes during the pendency of a petition before the CRB, it is the responsibility of the petitioner or their representative to provide the CRB and the railroad with the new contact information.

Paragraph (b)(6) requires petitioners or their representatives to state the facts and arguments in support of their petition. In other words, they need to explain to the CRB why they think the railroad was incorrect in denying or revoking the petitioner's certification. Paragraph (b)(7) requires petitioners to submit all documents related to the railroad's decision that are in their possession or reasonably available to them. This potentially includes the transcript and exhibits from the petitioner's denial or revocation hearing. In most cases, these documents will be essential to the Board's ability to make an informed decision on the petition. If neither the petitioner nor the railroad provides these documents, the Board may have to specifically request these documents. Such a request is likely to delay the Board's adjudication of the petition. Therefore, it is in the petitioner's interest to provide the Board with these documents as part of their petition.

Paragraph (c) of this section was added to clarify a petitioner's responsibilities, if requested by the CRB, with respect to a petition seeking review of a railroad decision that is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement. It provides that, if requested by the CRB, a petitioner must supplement the petition with ''a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees.'' This paragraph also provides that a petitioner must provide a written explanation in response to a CRB request if they do not supply the Board with the written documents that should be reasonably available under 49 CFR 40.329.

Paragraph (d) of this section gives the CRB discretion to grant a request for additional time to file a petition if certain circumstances are met. As an initial matter, the petitioner must put forth good cause for granting the extension. Thus, a petitioner will have to demonstrate a reasonable justification for granting the extension of time. This justification should be as detailed as possible to assist the Board in its determination. In addition to showing good cause for an extension, a petitioner must either submit their extension request before the deadline for filing their petition or, if the deadline has already passed, they must allege facts constituting ''excusable neglect'' for failing to meet the deadline. The mere assertion of excusable neglect, unsupported by facts, will be insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time, and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied. The Board will make determinations on whether ''good cause'' and/or ''excusable neglect'' has been shown on a case-by-case basis.

Paragraph (e) of this section explains that a decision by the CRB to deny a petition for untimeliness or lack of compliance with the requirements of § 245.403 may be appealed directly to the FRA Administrator. Normally an appeal to the Administrator can only occur after a case has been heard by FRA's hearing officer. However, petitions that the Board finds to be untimely or incomplete are the two exceptions where a party can skip petitioning the hearing officer and go directly to filing an appeal with the Administrator.

Section 245.405 Processing Certification Review Petitions

This section of the proposed rule, derived from 49 CFR 240.405 and 242.505, details how petitions for review by the CRB will be handled. Paragraph (a) of this section notes that when FRA receives a CRB petition, it will send a written notification to the parties involved in the petition. FRA will send these acknowledgments via email. If a representative files a petition

[20] In a future rulemaking, FRA expects to revise parts 240 and 242 to refer to the CRB instead of the OCRB.

[21] In a future rulemaking, FRA expects to revise Parts 240 and 242 to conform to the electronic communication requirements of this rulemaking.

on behalf of a petitioner, the petition must include the petitioner's email address, if the petitioner also wants to receive the acknowledgment email and any other correspondence (including the Board's decision) from FRA. The acknowledgment email will include the docket number for the petition so that both parties can access the documents in the case on *https://www.regulations.gov.* FRA will not send a copy of the petition to the railroad.

Paragraph (b) of this section provides railroads with the opportunity to respond to a petition. While it is always optional for a railroad to respond to a petitioner's arguments, if the petitioner did not include relevant documents in their petition, such as hearing transcripts or exhibits, the railroad is required to provide FRA with those documents, even if it does not otherwise respond to the arguments in the petition. Railroads would have 60 days, from the date FRA sends the acknowledgment email, to file a response in the docket on *https://www.regulations.gov.* Railroads may submit responses after the 60-day deadline, but the Board will only review such late filings if it is practicable. In other words, there is no guarantee that the Board will review a late response prior to issuing a decision; thus, if a railroad wishes to respond to a petition, it should meet the 60-day deadline. The railroad can fulfill its requirement to serve a copy of its response on the other party by sending its response to petitioner and/or petitioner's representative via email.

Paragraph (c) of this section specifies when a case will be referred to the Board, and what authority the Board has to decide on a petition. If a railroad files a response before the 60-day deadline in paragraph (b) of this section, the petition will be referred to the Board upon receipt of the response. Otherwise, the petition will be referred to the Board 60 days after the date the acknowledgment email was sent. The Board has the authority to grant a petition (rule in favor of the petitioner), deny a petition (rule in favor of the railroad), or dismiss a petition. An example of when the Board would dismiss a petition would be if the railroad did not deny or revoke the petitioner's certification, and thus, there was no case or controversy before the Board. If there is insufficient evidence of record for the Board to make a decision on the merits of a petition, the Board may choose to remand a petition or issue an interim order, so that additional fact-finding can occur.

Paragraphs (d), (e), and (f) of this section provide the standards of review that the Board will employ for procedural issues, factual issues, and legal issues, respectively. These standards mirror the standards of review used by the OCRB to review locomotive engineer and conductor petitions. It is not the Board's intention to correct all procedural errors committed by a railroad. Instead, the Board will only grant a petition if the railroad's procedural error caused substantial harm to the petitioner. For factual issues, the petitioner must show that the railroad did not have substantial evidence to support its decision to deny or revoke the petitioner's certification. If the Board must decide a legal issue, it will perform *de novo* review, meaning that it will not give deference to any decision or interpretation made by the railroad.

Paragraph (g) of this section acknowledges that the Board's decision-making power is limited to granting or denying a petition. In other words, the Board is only empowered to make determinations concerning qualifications under this regulation. The Board is not empowered to mitigate the consequences of a railroad decision if the decision was valid under this regulation. The contractual consequences, if any, of these determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay, in the event of a finding that a railroad wrongfully denied certification.

Paragraph (h) of this section notes that the Board will issue a written decision that will be served on both parties. FRA will send the decision to the parties by email and it will also be posted in the case's docket on *https://www.regulations.gov.*

Section 245.407 Request for a Hearing

This proposed section, derived from 49 CFR 240.407 and 49 CFR 242.507, provides that a party who has been adversely affected by a CRB decision will have the opportunity to request an administrative proceeding as prescribed in § 245.509. Paragraph (b) of this section gives the instructions and the deadline for submitting a hearing request. Just like with CRB petitions, parties must file hearing requests electronically. To file a hearing request, the adversely affected party should upload the request to the docket on *https://www.regulations.gov* that was used while the case was before the Board. This docket will also be used to file documents while the case is before the hearing officer. After the 20-day deadline to file a hearing request has passed, FRA will check the docket on *https://www.regulations.gov* to see if a hearing request was filed. Paragraph (c) of this section contains the requirements for a hearing request, which includes the docket number for the case while it was before the Board. Paragraph (c) also requires the signature of the requesting party or their representative. FRA will accept electronic signatures for purposes of satisfying this requirement.

Paragraph (d) of this section notes that FRA will arrange for the appointment of a presiding officer, and it will be the presiding officer's duty to schedule a hearing for the earliest practicable date. Paragraph (e) of this section provides that a party who fails to request an administrative hearing in a timely fashion will lose the right to further administrative review and the CRB's decision will constitute final agency action.

Section 245.409 Hearings

This section of the proposed rule, derived from 49 CFR 240.409 and 49 CFR 242.509, describes the authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing will be governed. Paragraph (b) of this section provides that the proceeding will afford an aggrieved party a *de novo* hearing at which the relevant facts will be adduced, and the correct application of this part will be determined. In instances when the issues are purely legal, or when only limited factual findings are necessary to determine issues, the presiding officer may determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer can therefore grant full or partial summary judgment.

Paragraph (d) of this section provides that the presiding officer may authorize discovery. It also authorizes the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) of this section requires that documents in the nature of pleadings be signed. This signature can be electronic and will constitute a certification of factual and legal good faith. Paragraph (f) of this section provides the requirement for service and for certificates of service. Paragraph (g) of this section expresses the presiding officer's authority to address noncompliance with a law or directive. This provision is intended to ensure that the presiding officer will have the authority to control the proceeding so that an efficient and fair hearing is conducted.

Paragraph (h) of this section states the right of each party to appear and be represented. Paragraph (i) of this section protects witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) of this section allows any party to request consolidation or separation of hearings of two or more petitions when to do so would be appropriate under established jurisprudential standards. This option is intended to allow more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k) of this section, the presiding officer could, with certain exceptions, extend periods for action required in the proceedings, provided substantial prejudice would not result to a party. The authority to deny an extension request submitted after a deadline has already passed shows the preference for use of this authority to provide extensions of time as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) of this section establishes a motion as the appropriate method for requesting action by the presiding officer. This paragraph also provides the form of motions and the response period for written motions. Paragraph (m) of this section provides rules for the mode of hearing and record maintenance, including requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) of this section directs the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence, and permits the presiding officer to determine what evidence may be received. Further, paragraph (o) of this section provides additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) of this section provides that the petitioner before the CRB, the railroad that took the certification action at issue, and FRA are mandatory parties to the administrative proceeding. Paragraph (q) of this section states what party will be the hearing petitioner and what parties will be the respondents. If the Board granted the petition, the railroad will be the hearing petitioner and the dispatcher or dispatcher candidate will be a respondent. If the Board denied the petition, the dispatcher or dispatcher candidate will be the hearing petitioner and the railroad will be a respondent. The actions of the dispatcher and the railroad will be at issue in the hearing—not the actions of the CRB. Thus, it is appropriate that the dispatcher and the railroad fill the roles of petitioner and respondent for the hearing.

Paragraph (q) also provides that FRA will be a mandatory party in the proceeding. In all proceedings, FRA will initially be considered a co-respondent. If, based on evidence acquired after the filing of a hearing petition, FRA concludes that the public interest in safety is more closely aligned with the position of the petitioner than the respondent, FRA can request that the hearing officer exercise their inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would rarely occur. FRA represents the interests of the government; hence, parties and their representatives will have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself. Paragraph (q) also notes that the party requesting the hearing has the burden of proving its case by the preponderance of evidence.

Paragraph (r) of this section gives the presiding officer authority to close the record in a case. Paragraph (s) of this section provides the presiding officer with the authority to issue a decision and includes requirements for that decision.

Section 245.411 Appeals

This proposed section, derived from 49 CFR 240.411 and 49 CFR 242.511, permits any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) of this section provides that if no appeal is timely filed, the presiding officer's decision will constitute final agency action. The appeal shall be filed in the same docket on *https://www.regulations.gov* used when the case was before the Board and the presiding officer.

Paragraph (b) of this section allows for a party to reply to the appeal. Paragraphs (c) and (d) of this section describe the Administrator's authority to conduct the proceedings of an appeal. Paragraph (e) of this section addresses the Administrator's different options for ruling on an appeal. The phrase "except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted" is included in this rule so that parties understand that a remand, or other intermediate decision, will not constitute final agency action. The inclusion of this phrase clarifies this potential outcome to those parties that are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Paragraph (f) of this section provides instructions for how appeals to the Administrator that come directly from the CRB should be handled. The only cases that can go directly from the Board to the Administrator are cases where the Board denied a petition for being untimely or incomplete. If the Administrator vacates and remands the Board's decision, the case will return to the Board. If the Administrator affirms the Board's decision, that will constitute final agency action.

Appendices

FRA has included two appendices with this proposed rule.

Appendix A, derived from appendix C to part 240 and appendix C to part 242, provides a narrative discussion of the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B, derived from appendix D to part 240 and appendix D to part 242, provides a narrative discussion of the procedures that a railroad is required to employ in administering the vision and hearing requirements of § 245.117 and § 245.118. The main issue addressed in this appendix is discussing test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

V. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This proposed rule is not a significant regulatory action within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review. Details on the estimated costs of this NPRM can be found in the Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket (FRA–2022–0019).

FRA is proposing regulations establishing a formal certification process for railroad dispatchers. As part of that process, railroads would be required to develop a program for training current and prospective dispatchers, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a record of safety compliance infractions that other railroads can review when considering individuals for certification. This proposed regulation would ensure that dispatchers are properly trained, are

qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

The RIA presents estimates of the costs likely to occur over the first 10 years of the proposed rule. The analysis includes estimates of costs associated with development of certification programs, initial and periodic training, knowledge testing, and monitoring of operational performance. Additionally, costs are estimated for vision and hearing tests, review of certification determinations made by other railroads, and Government administrative costs.

FRA estimated 10-year costs of $5.3 million discounted at 7 percent. The annualized cost would be $0.8 million discounted at 7 percent. The following table shows the estimated 10-year costs of the proposed rule.

TOTAL 10-YEAR DISCOUNTED COSTS

[2020 dollars]

Category	10-Year cost ($)	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Development of Certification Program	976,996	929,395	953,949	132,325	111,832
Certification Eligibility Requirements	67,860	55,360	61,963	7,882	7,264
Recertification Eligibility Requirements	101,515	65,831	83,877	9,373	9,833
Training	910,415	707,334	812,820	100,708	95,287
Knowledge Testing	327,028	233,988	281,581	33,315	33,010
Vision and Hearing	2,217,910	1,586,913	1,909,692	225,941	223,874
Monitoring Operational Performance	353,656	256,017	305,956	36,451	35,867
Railroad Oversight Responsibilities	383,510	267,530	326,714	38,090	38,301
Certification Card	37,501	26,832	32,289	3,820	3,785
Petitions and Hearings	11,325	8,198	9,797	1,167	1,149
Government Administrative Cost	1,505,376	1,208,191	1,361,239	172,019	159,579
Total	6,893,092	5,345,589	6,139,877	761,092	719,781

The primary benefit of this proposed rule is that it would ensure that railroads properly train and monitor dispatcher performance to reduce the risk of accidents caused by dispatcher error. This rule would allow railroads to revoke certification of dispatchers who make serious safety-related violations. This includes failure to protect a malfunctioning highway-rail grade crossing or incorrectly granting permission to proceed through a protected track segment.

This rule is expected to reduce the likelihood of an accident occurring due to dispatcher error. FRA has analyzed accidents over the past five years to categorize those where dispatcher training and certification would have impacted the accident. FRA estimated that this rule would prevent 30% of accidents that were caused or likely caused by the dispatcher. FRA estimated that this rule would prevent 10% of accidents where a dispatcher may have contributed to the accident.

The following table shows the estimated 10-year benefits of the proposed rule. The total 10-year estimated benefits would be $0.8 million (PV, 7%) and annualized benefits would be $0.1 million (PV, 7%).

TOTAL 10-YEAR DISCOUNTED BENEFITS

[2020 dollars]

Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
785,599	918,450	111,852	107,670

FRA has quantified the monetary impact from accidents reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (*e.g.,* environmental impact). For example, the cost of property damage represents a portion of the total cost of train accidents, such as, the cost of direct labor and damage to on-track equipment, track, track structures, and roadbed. Other direct accident costs, such as accident clean up, third party property damage, lost lading, environmental damage, loss of economic activity to the community, and train delays are not included in FRA's accident/incident reportable damages from the railroads. That impact may account for additional benefits not quantified in this analysis. If these costs not covered by FRA data were realized, accidents affected by this proposed rulemaking could have much greater economic impact than the quantitative benefit estimates provided here.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA prepared this IRFA to facilitate public comment on the potential small business impacts of the requirements in this NPRM.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from adoption of the proposals in this NPRM. FRA particularly encourages small entities that could potentially be impacted by the proposed rule to participate in the public comment process. FRA will consider all information and comments received in the public comment process when making a determination of the economic impact on small entities.

1. Reasons for Considering Agency Action

FRA is concerned with the potential for accidents caused by dispatcher error. Railroads' dispatcher training programs may not be covering all aspects of a dispatcher's job responsibility. Additionally, railroads may not be testing dispatchers and ensuring that their knowledge is maintained continuously. The risk from job-hopping of a dispatcher with a substance abuse problem is also addressed by the proposed rule.

This NPRM would require railroads to develop a dispatcher certification program. This proposed rule would ensure that railroads examine railroad safety with respect to dispatchers. If FRA did not issue the rule as proposed, railroads would be free to hire and train dispatchers as they see fit.

2. A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

This proposed rule is expected to help reduce the rate of dispatcher-caused accidents. The annual operational performance monitoring would ensure that dispatchers maintain their knowledge after the initial certification process.

FRA is proposing regulations concerning dispatcher certification based on the general statutory authority of the Secretary. The general authority states, in relevant part, that the Secretary ''as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.'' [22] The Secretary delegated this authority to the Federal Railroad Administrator.[23] In addition, section 402 of the RSIA grants the Secretary authority to prescribe regulations requiring the certification of certain crafts or classes, including dispatchers, to improve railroad safety.

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. ''Small entity'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a ''small entity'' in the railroad industry is a for profit ''line-haul railroad'' that has fewer than 1,500 employees, a ''short line railroad'' with fewer than 1,500 employees, a ''commuter rail system'' with annual receipts of less than $16.5 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than $16.5 million.[24]

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA has published a proposed statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues,[25] and commuter railroads or small Governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209). FRA is using this definition for the proposed rule.

When developing the proposed rule, FRA considered the impact that the proposed rule would have on small entities.

The proposed rule would be applicable to all railroads who perform dispatching operations. However, the majority of small railroads do not have a dispatching function as part of their operations. The remaining small railroads would only be minimally impacted as most of their dispatch operations are contracted out to third parties. FRA estimates there are 744 Class III railroads, of which 704 operate on the general system. These railroads are of varying size, with some belonging to larger holding companies. Approximately 140 Class III railroads would be impacted by this rulemaking because they have dispatchers on staff or use third parties to dispatch trains for their operation. The remaining Class III railroads operate on track owned by Class I railroads or do not have a dispatching function as part of their operation. For those railroads operating on Class I track, the host railroad would be responsible for the dispatching on those tracks; therefore, the smaller railroad would not require a dispatcher certification program.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Would Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

Railroads would be required to submit information to FRA for approval of dispatching certification programs. For small railroads that choose to develop their own certification programs, they would likely be less complex than larger railroads' operations. This would ease some of the burden on small railroads.

The training program, and annual railroad responsibilities would be prepared by a professional or administrative employee. The type of professional skills needed by an employee responsible for submitting a special approval request includes the

[22] 49 U.S.C. 20103.

[23] 49 CFR 1.89(a).

[24] U.S. Small Business Administration, ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes, August 19, 2019. *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019,%202019.pdf.*

[25] The Class III railroad revenue threshold is $40.4 million or less, for 2021. (The Class II railroad threshold is between $40.4 million and $900 million.) Surface Transportation Board (STB), available at *https://www.stb.gov/news-communications/latest-news/pr-21-16/.*

ability to plan and organize work. Such an employee would also need good verbal and written communication skills and attention to detail.

Summary of Class III Railroad Costs

Class III Railroads would have all the same cost components as larger railroads except they would not be required to perform annual railroad oversight responsibilities in accordance with the proposed rule. Therefore, that cost has been excluded for Class III railroads.

The following table shows the annualized cost for Class III railroads over the 10-year analysis period. The total estimated 10-year costs for Class III railroads would be $0.8 million and the annualized cost for all Class III railroads would be $118,984 (PV, 7 percent).

TOTAL 10-YEAR AND ANNUALIZED COSTS, CLASS III RAILROADS

Category	Present value 7% ($)	Annualized 7% ($)
Development of Certification Program	100,579	14,320
Certification Eligibility Requirements	13,840	1,971
Recertification Eligibility Requirements	16,458	2,343
Training	176,834	25,177
Knowledge Testing	58,497	8,329
Vision and Hearing	396,728	56,485
Monitoring Operational Performance	64,004	9,113
Certification Card	6,708	955
Petitions and Hearings	2,050	292
Total	835,697	118,984

The industry trade organization representing small railroads, ASLRRA, reports the average freight revenue per Class III railroad is $4.75 million.[26] The following table summarized the average annual costs and revenue for Class III railroads.

AVERAGE CLASS III RAILROADS' COSTS AND REVENUE

Total cost for class III railroads, annualized 7% ($)	Number of class III railroads with dispatcher plans	Average annual cost per class III railroad ($)	Average class III annual revenue ($)	Average annual cost as a percent of revenue
A	B	c = a ÷ b	d	e = c ÷ d
118,984	140	850	4,750,000	0.02

The average annual cost for a Class III railroad impacted by this rule would be $850. This represents a small percentage (0.02%) of the average annual revenue for a Class III railroad.

The estimates above show that the burden on Class III railroads would not be a significant economic burden. FRA requests comments on this estimate and will consider all comments when making a determination for the final rule.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant Federal rule that duplicates, overlaps with, or conflicts with this NPRM. This proposed rule is complementary to, rather than duplicative of, other recent regulatory initiatives FRA has issued or is in the process of developing. These initiatives include: the implementation of positive train control (PTC) systems by required railroads;[27] training, qualification, and oversight;[28] railroad safety risk reduction programs;[29] and the development of fatigue risk management programs.[30]

6. A Description of Significant Alternatives to the Rule

This analysis considered two alternatives to the rule: the baseline approach, and an approach that would certify just the training program. The baseline alternative (no action) would not ensure that dispatchers are being properly trained. Without this rule, railroad operations may be less safe if railroads are not providing adequate training to their dispatchers.

The alternative of certifying only the training program would require a railroad to enhance their training of dispatchers. Training, however, is only a part of the certification process. The additional requirements of this proposed rule would ensure that dispatchers' hearing, vision, prior safety conduct at other railroads, and other aspects have been reviewed and are consistent with railroad safety.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and

[26] American Short Line and Regional Railroad Association, *Short Line and Regional Railroad Facts and Figures,* p. 10 (2017 pamphlet).

[27] *See generally* 49 CFR part 236, subpart I; and press release in which FRA announces full implementation of positive train control (Dec. 29, 2020), *available at https://railroads.dot.gov/sites/fra.dot.gov/files/2020-12/fra1920.pdf.*

[28] 49 CFR part 243.

[29] 49 CFR parts 270 and 271.

[30] 87 FR 35660 (Jul. 13, 2022) (final rule amending 49 CFR parts 270 and 271 to require certain railroads to develop and implement a Fatigue Risk Management Program as one component of the railroads' larger railroad safety risk reduction programs).

Budget (OMB) for approval under the Paperwork Reduction Act of 1995.[31] The entire table contains the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Wage rate	Total cost equivalent
		(A)	(B)	(C) = A * B	(D) [32]	(E) = C * D
245.9—Waivers—Petitions	203 railroads	.33 petitions	3 hours	1.00	$77.44	$77.44
245.101/.103—Certification program required and FRA review of certification program—Development of certification program in accordance with this Part and procedures contained under § 245.107—Railroads with Current Dispatching Operations and New Dispatching Railroads (Note: Each certification program includes procedure requirements under § 245.111 through § 245.121.).	203 railroads + ASLRRA and holding companies.	71 plans (14.33 Class I and commuter railroads plans + 3.33 generic program developed by ASLRRA and holding companies plans + 53.33 Class II and III railroads plans).	120 hours + 120 hours + 6 hours.	2,439.18	115.24	281,091.10
—(d)(1) Dispatcher certification submission—Copies of the program provided to the president of each rail labor organization (RLO) that represents the railroad's employees that are subject to this part.	203 railroads	3 copies	15 minutes	.75	77.44	58.08
—(d)(2) Affirmative statements that the railroad has provided a copy of the program to RLOs.	203 railroads	3 affirmative statements.	15 minutes	.75	77.44	58.08
—(e) Comment Period—Affirmed comments on a railroad's program by any designated representative of employees subject to this part or any directly affected employee who does not have a designated representative.	203 railroads	12 comments	4 hours	48.00	77.44	3,717.12
—(g) Material Modifications of FRA-approved program—Railroad to submit a description of how it intends to modify the program and a copy of the modified program to FRA.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(h) Resubmission—Railroad can resubmit its program or material modification as described in paragraph (f)(2) of this section after addressing all of the deficiencies noted by FRA and the resubmission must conform with the procedures and requirements contained in § 245.107.	203 railroads + ASLRRA and holding companies.	4.67 revised plans (3.67 revised plans Class I and commuter railroads + 1 revised plan ASLRRA and holding companies).	20 hours	94.00	77.44	7,279.36
—(i) Rescinding Prior Approval of Program—Railroad to resubmit its certification program and the program must conform with the procedures and requirements contained in § 245.107.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
245.105 (c)(1)–(d)(1)—Implementation schedule for certification programs—Designation of certified dispatcher.	203 railroads	522 designated lists	5 minutes	43.50	77.44	3,368.64
—(c)(2)–(d)(2) Issue a certificate that complies with § 245.207 to each person that it designates.	203 railroads	522 issued certificate cards.	3 minutes	26.10	77.44	2,021.18
—(f) Written requests for delayed certification—Railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program.	FRA anticipates zero submissions.					
—(g) Testing and evaluation—Railroad shall only certify or recertify a person as a dispatcher if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.	The paperwork burden for testing and evaluation is included in the economic burden and the burden for certificates is included under § 245.105.					
245.107—Requirements for Certification Programs—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data.	The paperwork requirements described in this appendix are accounted for throughout this table.					
245.109(a)—Determinations required for certification and recertification—Eligibility requirements.	The paperwork burden for this requirement is covered under § 245.111 through § 245.121 and § 245.303.					

[31] 44 U.S.C. 3501 *et seq.*

[32] Throughout the tables in this document, the dollar equivalent cost is derived from the 2020 Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Wage rate	Total cost equivalent
		(A)	(B)	(C) = A * B	(D) [32]	(E) = C * D
—(b) Person entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 245.111 or § 245.113.	As a condition of employment, dispatchers will sign an agreement upon being hired. There is no paperwork burden since this is the usual and customary procedure.					
245.111(a)–(c)—Prior safety conduct as motor vehicle operator—Eligibility requirements of this section involving prior conduct as a motor vehicle operator.	203 railroads	522 motor vehicle records.	5 minutes	43.50	77.44	3,368.64
—(e) If driver information is not obtained as required pursuant to paragraph (g) of this section, that person or the railroad certifying or recertifying that person may petition for a waiver in accordance with the provisions of part 211 of this chapter.	203 railroads	2 waivers	2 hours	4.00	77.44	309.76
—(f) Individual's duty—Consent to make information concerning driving record available to that railroad.	This is usual and customary procedure. The consent form is signed at the time of hiring to make driving information available to the railroad.					
—(g)–(h) Request to obtain driver's license information from licensing agency.	203 railroads	522 written requests	5 minutes	43.50	59.00	2,566.50
—(i) Requests for additional information from licensing agency.	The paperwork burden for this requirement is included under § 242.111(g)–(h).					
—(j) Notification to railroad by persons of never having a license.	203 railroads	2 notices	10 minutes	.33	77.44	25.56
—(k) Report of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the employing railroad within 48 hours.	203 railroads	10 self-reports	10 minutes	1.67	77.44	129.32
—(l)–(m) Evaluation of person's driving record by railroad.	203 railroads	522 motor vehicle record evaluations.	5 minutes	43.50	71.89	3,127.22
—(n)(1) DAC referral by railroad after report of driving drug/alcohol incident.	203 railroads	9 DAC referrals	5 minutes	.75	115.24	86.43
—(n)(2) DAC request and supply by persons of prior counseling or treatment.	203 railroads	1 request and supplied record.	30 minutes	.50	115.24	57.62
—(n)(3) Conditional certifications recommended by DAC.	203 railroads	3 conditional certification recommendations.	4 hours	12.00	115.24	1,382.88
245.113(b)—Prior safety conduct as an employee of a different railroad—Certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.	This is usual and customary procedure and, therefore, there is no paperwork burden.					
—(c) Person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years.	203 railroads	3.33 requests	15 minutes	.83	77.44	64.28
—(e) and (g) Railroad shall provide the information requested to the railroad designated in the written request.	203 railroads	3.33 records	15 minutes	.83	77.44	64.28
—(f) An explanation shall state why the railroad cannot provide the information within the requested time frame or cannot provide the requested information.	FRA anticipates zero submissions.					
245.115(a)—Substance abuse disorders and alcohol drug rules compliance—Determination that person meets eligibility requirements.	203 railroads	459 determinations	2 minutes	15.30	77.40	1,184.22
—(b) Written documents from DAC that person is not affected by a disorder.	203 railroads	20 filed documents	30 minutes	10.00	115.24	1,152.40
—(c)(3) Fitness requirement—Voluntarily self-referral by dispatcher for substance abuse counseling or treatment under the policy required by § 219.1003 of this chapter.	203 railroads	1 self-referral	10 minutes	.17	115.24	19.59

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C) = A * B	Wage rate (D) [32]	Total cost equivalent (E) = C * D
—(d)(1)–(d)(2) Prior alcohol/drug conduct; Federal rule compliance.	203 railroads	522 certification reviews.	10 minutes	87.00	115.24	10,025.88
—(d)(3)(i) Written determination that most recent incident has occurred.	203 railroads	8 written determinations.	1 hour	8.00	115.24	921.92
—(d)(3)(ii) Notification to person that recertification has been denied.	203 railroads	8 notifications	30 minutes	4.00	77.44	309.76
—(d)(4) Persons/conductors waiving investigation/de-certifications.	203 railroads	5 waived investigations.	10 minutes	.83	77.44	64.28
245.117(a)–(c)—Vision acuity—Determination vision standards met—Medical examiner certificate/record.	203 railroads	522 records	2 minutes	17.40	71.89	1,250.89
—(d)(1) Request for retest and another medical evaluation—Medical examiner certificate/record.	203 railroads	5 records	2 minutes	.17	71.89	12.22
—(d)(2) Railroad to provide a copy of this part to medical examiner.	203 railroads	522 copies	5 minutes	43.50	71.89	3,127.22
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification.	203 railroads	5 consultations + conditional certifications.	30 minutes + 10 minutes.	3.33	71.89	239.39
—(g) Notification by certified dispatcher of deterioration of vision.	203 railroads	1 notification	10 minutes	.17	71.89	12.22
245.118—Hearing acuity—Determination hearing standards met—Medical records.	203 railroads	522 medical records	2 minutes	17.40	71.89	1,250.89
—(d)(1) Request for retest and another medical evaluation—Medical examiner certificate/record.	203 railroads	5 records	2 minutes	.17	71.89	12.22
—(d)(2) Railroad to provide a copy of this part to medical examiner.	203 railroads	522 copies	5 minutes	43.50	71.89	3,127.22
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification.	203 railroads	5 consultations + conditional certifications.	30 minutes + 10 minutes.	3.33	71.89	239.39
—(g) Notification by certified dispatcher of deterioration of hearing.	203 railroads	1 notification	10 minutes	.17	71.89	12.22
245.119(b)–(c)—Training requirements—A railroad's election for the training of dispatchers shall be stated in its certification program.	The paperwork burden for this requirement is covered under § 245.101/.103.					
—(d) Initial training program for previously untrained person to be a dispatcher.	203 railroads	71 training programs	3 hours	213.00	115.24	24,546.12
—(d)(3) Modification to training program when new safety-related railroad laws, regulations and etc. are introduced into the workplace.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(e) Relevant information or materials on safety or other rules made available to certification candidates.	The paperwork burden for this requirement is covered under § 245.101/.103.					
—(f) and (g) Completion of initial training program by a person being certified as a dispatcher—Written documentation showing completed training program that complies with paragraph (d) of this section.	203 railroads	67 written documents or records.	10 minutes	11.17	77.44	865.00
—(f)(3) Employee consultation with qualified supervisory employee if given written test to demonstrate knowledge of physical characteristics of any assigned territory.	The paperwork burden for this requirement is covered under § 245.119.					
—(h) Certification program is submitted in accordance with the procedures and requirements described in § 245.107.	The paperwork burden for this requirement is covered under § 245.101/.103.					
—(i) Familiarization training for dispatcher of acquiring railroad from selling company/railroad prior to commencement of new operation.	FRA anticipates zero submissions.					
—(j) Continuing education of certified dispatchers.	203 railroads	522 training records	15 minutes	130.50	71.89	9,381.65
245.120—Requirements for territorial qualification—Determining eligibility and	The paperwork burden for this requirement is covered under § 245.119.					
—(b) Notification by persons who do not meet territorial qualification.	The paperwork burden for this requirement is covered under § 245.119.					

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C) = A * B	Wage rate (D) [32]	Total cost equivalent (E) = C * D
245.121(a)–(c)—Knowledge testing—Determining eligibility.	203 railroads	522 test records	5 minutes	43.50	77.44	3,368.64
—(d) Reexamination of the failed test	203 railroads	2 examination records	5 minutes	.17	77.44	13.16
245.123(c)—Monitoring operational performance—Unannounced compliance tests—Retention of a written record.	203 railroads	1,822 records	2 minutes	60.73	77.44	4,702.93
245.125—Certification determinations made by other railroads.	203 railroads	3.33 determinations	30 minutes	1.67	77.44	129.32
245.203(b)—Retaining information supporting determination—Records.	203 railroads	522 record retentions	15 minutes	130.50	77.44	10,105.92
—(g) Amended electronic records	203 railroads	1 amended record	15 minutes	.25	77.44	19.36
245.205—List of certified dispatchers and recordkeeping.	The paperwork requirement for this burden is covered under § 245.105(c)(1)–(d)(1).					
245.207(a)–(f)—Certificate requirements	The paperwork requirement for this burden is covered under § 245.105(c)(2)–(d)(2).					
—(b) Notification by dispatchers that railroad request to serve exceeds certification.	203 railroads	30 notifications	30 seconds	.25	71.89	17.97
—(g)–(h) Replacement of certificates	203 railroads	15 replacement certificates.	5 minutes	1.25 hour	77.44	96.80
245.213(a)–(h)—Multiple Certificates—Notification of denial of certification by individuals holding multiple certifications.	203 railroads	3 notifications	10 minutes	.50 hour	77.44	38.72
—(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts.	The paperwork requirement for this burden is covered under § 245.105.					
245.215—Railroad oversight responsibility—Review and analysis of administration of certification program.	203 railroads	17.33 annual reviews and analyses.	8 hours	138.64	115.24	15,976.87
—(d) Report of findings and conclusions reached during annual review by railroad to FRA (if requested in writing by FRA) review and analysis effort.	203 railroads	2 reports	4 hours	8.00	115.24	921.92
245.301(a)—Denial of certification—Notification to candidate of information that and candidate response forms basis for denying certification.	203 railroads	2 notices + 1 response.	1 hour	3.00	77.44	232.32
—(b) Denial Decision Requirements—Written notification of denial of certification by railroad to candidate.	203 railroads	2 notifications	1 hour	2.00	77.44	154.88
245.307(b)(1)–(b)(4)—Process for revoking certification—Immediate suspension of dispatcher's certification.	203 railroads	5 suspended certification letters and documentations.	30 minutes	2.50	77.44	193.60
—(b)(5)–(b)(6) Determinations based on the record of the hearing, whether revocation of the certification is warranted.	The paperwork requirement for this burden is covered under § 245.307(e).					
—(b)(7) Retention of record of the hearing for three years after the date the decision is rendered.	203 railroads	5 records	15 minutes	1.25	77.44	96.80
—(d)(9) Hearing Procedures—Written waiver of right to hearing.	203 railroads	1 written waiver	10 minutes	.17	59.00	10.03
—(e) Revocation Decision Requirements—Written decisions by railroad official.	203 railroads	5 written decisions and service of decisions.	2 hours	10.00	115.24	1,152.40
—(g) Revocation of certification based on information that another railroad has done so.	203 railroads	1 revoked certification	10 minutes	.17	115.24	19.59
—(j) Placing relevant information in record if sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available.	The paperwork requirement for this burden is covered under § 245.307(b)(7).					
—(k) Good faith determination	203 railroads	1 good faith determination.	1 hour	1.00 hour	77.44	77.44
Subpart E—Dispute Resolution Procedures—§ 245.401 through § 245.411.	The requirements under these provisions are exempted from the PRA under 5 CFR 1320.4(a)(2). Since these provisions pertain to an administrative action or investigation, there is no PRA burden associated with these requirements.					
Appendix A to Part 245—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data.	The paperwork requirements described in this appendix are accounted for throughout this table.					

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C) = A * B	Wage rate (D) [32]	Total cost equivalent (E) = C * D
Appendix B to Part 245—Medical Standards Guidelines.	The paperwork requirements described in this appendix are accounted for throughout this table.					
Totals [33]	203 railroads + ASLRRA and holding companies.	9,493 responses	N/A	3,819	N/A	403,937

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Ms. Arlette Mussington, Information Collection Clearance Officer, at (571) 609–1285, or Ms. Joanne Swafford, Information Collection Clearance Officer, at (757) 897–9908.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via email to Ms. Arlette Mussington at *arlette.mussington@dot.gov,* or Ms. Joanne Swafford at *joanne.swafford@dot.gov.*

OMB is required to decide concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, Federalism,[34] requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979 [35] prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This proposed rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act[36] (NEPA), the Council on Environmental Quality's NEPA implementing regulations,[37] and FRA's NEPA implementing regulations [38] and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.[39] Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review.[40]

The main purpose of this rulemaking is to establish certification requirements

[33] Totals may not add due to rounding.

[34] 64 FR 43255 (Aug. 10, 1999).

[35] 19 U.S.C. Ch. 13.

[36] 42 U.S.C. 4321 *et seq.*

[37] 40 CFR parts 1500–1508.

[38] 23 CFR part 771.

[39] 40 CFR 1508.4.

[40] *See* 23 CFR 771.116(c)(15) (categorically excluding ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise'').

for train dispatchers. This rule would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.[41] FRA has concluded that no such unusual circumstances exist with respect to this proposed rule and it meets the requirements for categorical exclusion.[42]

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.[43] FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).[44] Further, FRA reviewed this proposed rulemaking and found it consistent with Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad.''

G. Executive Order 12898 (Environmental Justice)

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' and DOT Order 5610.2C[45] require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,[46] each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act[47] further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and Tribal governments and the private sector. This proposed rule would not result in the expenditure, in the aggregate, of $100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.''[48] FRA evaluated this proposed rule under Executive Order 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *http://www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.transportation.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

K. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this proposed rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The proposed rule would not have a substantial direct effect on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

List of Subjects in 49 CFR Part 245

Administrative practice and procedure, Dispatcher, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

■ For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B, of title 49 of the Code of Federal Regulations, by adding part 245 to read as follows:

PART 245—QUALIFICATION AND CERTIFICATION OF DISPATCHERS

Sec.

Subpart A—General

245.1 Purpose and scope.
245.3 Application and responsibility for compliance.
245.5 Effect and construction.
245.7 Definitions.
245.9 Waivers.
245.11 Penalties and consequences for noncompliance.

Subpart B—Program and Eligibility Requirements

245.101 Certification program required.
245.103 FRA review of certification programs.
245.105 Implementation schedule for certification programs.
245.107 Requirements for certification programs.
245.109 Determinations required for certification and recertification.

[41] 23 CFR 771.116(b).

[42] 23 CFR 771.116(c)(15).

[43] *See* 16 U.S.C. 470.

[44] *See* Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

[45] *Available at: https://www.transportation.gov/sites/dot.gov/files/2021-08/Final-for-OST-C-210312-003-signed.pdf.*

[46] Public Law 104–4, 2 U.S.C. 1531.

[47] 2 U.S.C. 1532.

[48] 66 FR 28355 (May 22, 2001).

245.111 Prior safety conduct as motor vehicle operator.
245.113 Prior safety conduct with other railroads.
245.115 Substance abuse disorders and alcohol drug rules compliance.
245.117 Vision acuity.
245.118 Hearing acuity.
245.119 Training requirements.
245.120 Requirements for territorial qualification.
245.121 Knowledge testing.
245.123 Monitoring operational performance.
245.125 Certification determinations made by other railroads.

Subpart C—Administration of the Certification Program

245.201 Time limitations for certification.
245.203 Retaining information supporting determinations.
245.205 List of certified dispatchers and recordkeeping.
245.207 Certificate requirements.
245.213 Multiple certifications.
245.215 Railroad oversight responsibilities.

Subpart D—Denial and Revocation of Certification

245.301 Process for denying certification.
245.303 Criteria for revoking certification.
245.305 Periods of ineligibility.
245.307 Process for revoking certification.

Subpart E—Dispute Resolution Procedures

245.401 Review board established.
245.403 Petition requirements.
245.405 Processing certification review petitions.
245.407 Request for a hearing.
245.409 Hearings.
245.411 Appeals.

Appendix A to Part 245—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

Appendix B to Part 245—Medical Standards Guidelines

Authority: 49 U.S.C. 20103, 20107, 20162, 21301, 21304, 21311; 28 U.S.C. 2461 note; 49 CFR 1.89; and Public Law 110–432, sec. 402, 122 Stat. 4884.

Subpart A—General

§ 245.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as dispatchers, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification, and monitoring of all dispatchers to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The dispatcher certification requirements prescribed in this part apply to any person who meets the definition of dispatcher contained in § 245.7, regardless of the fact that the person may have a job classification title other than that of dispatcher.

§ 245.3 Application and responsibility for compliance.

(a) This part applies to all railroads except:

(1) Railroads that do not have any dispatch tasks, as defined in § 245.7, performed either by dispatchers employed by the railroad or employed by a contractor or subcontractor;

(2) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 245.7);

(3) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 245.7; or

(4) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, as defined in § 245.7, who performs any function required by this part must perform that function in accordance with this part.

§ 245.5 Effect and construction.

(a) FRA does not intend, by use of the term dispatcher in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who dispatches train.

(b) FRA does not intend, by issuance of these regulations, to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 245.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 245.7 Definitions.

As used in this part:

Administrator means the Administrator of the FRA or the Administrator's delegate.

Alcohol means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

Blocking device means a method of control that either prohibits the operation of a switch or signal or restricts access to a section of track.

Controlled substance has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301 through 1316).

Controlled track means a track upon which movements of trains, engines, and on-track equipment must be authorized by a control station.

Dispatch means:

(1) To perform a function that would be classified as a duty of a ''dispatching service employee,'' as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. The term dispatch includes, but is not limited to, by the use of an electrical or mechanical device:

(i) Controlling the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) Controlling the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

(iii) Issuing an authority for working limits to a roadway worker.

(2) The term *dispatch* does not include the action of personnel in the field:

(i) Effecting implementation of a written or verbal authority or permission affecting a railroad operation or an authority or permission affecting a railroad operation or an authority for working limits to a roadway worker (*e.g.,* initiating an interlocking timing device, authorizing a train to enter working limits); or

(ii) Operating a function of a signal system designed for use by those personnel; or

(iii) Sorting and grouping rail cars inside a railroad yard to assemble or disassemble a train.

Dispatcher means any individual who dispatches.

Dispatcher Pilot means a dispatcher qualified on assigned territory, tasked with overseeing a non-qualified

employee who has not successfully completed all instruction, training and examination programs for the physical characteristics of the territory or position.

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a ''Substance Abuse Professional'' (SAP), as provided in 49 CFR part 40.

File, filed, and *filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified State railroad safety inspector acting under part 212 of this chapter.

Ineligible or *ineligibility* means that a person is legally disqualified from serving as a certified dispatcher. The term covers a number of circumstances in which a person may not serve as a certified dispatcher. Revocation of certification pursuant to § 245.307 and denial of certification pursuant to § 245.301 are two examples in which a person would be ineligible to serve as a dispatcher. A period of ineligibility may end when a condition or conditions are met, such as when a person meets the conditions to serve as a dispatcher following an alcohol or drug violation pursuant to § 245.115.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; or any form of absolute or manual block system.

Mandatory directive means any movement authority or speed restriction that affects a railroad operation.

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

On-the-job training means job training that occurs in the workplace, *i.e.,* the employee learns the job while doing the job.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. Physical characteristics includes *main track physical characteristics* (see definition of ''main track'' in this section) and other than main track physical characteristics.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

Qualified instructor means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary dispatching experience to effectively instruct in the field, and has the following qualifications:

(1) Has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction;

(2) Where applicable, has the necessary experience to effectively instruct in the field;

(3) Is a certified dispatcher under this part; and

(4) If the railroad has designated employee representation, has been selected by a designated railroad officer, in concurrence with the designated employee representative, or has a minimum of one year of service working as a certified dispatcher.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad officer means any supervisory employee of a railroad.

Roadway worker in charge (RWIC) means a roadway worker who is qualified under § 214.353 of this chapter to establish on-track safety for roadway work groups, and lone workers qualified under § 214.347 of this chapter to establish on-track safety for themselves.

Serve or service, in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of ''filing'' in this section.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or

physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is ''active'' within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to complete primary treatment successfully or participate in aftercare successfully as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in 49 CFR part 40.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur as well as the characteristics of the position to include and not limited to the operation and capabilities of dispatch control systems.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

§ 245.9 Waivers.

(a) A person subject to a requirement of this part may petition FRA for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If FRA finds that a waiver of compliance is in the public interest and is consistent with railroad safety, FRA may grant the waiver subject to any conditions FRA deems necessary.

§ 245.11 Penalties and consequences for noncompliance.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, or lessee; or any independent contractor or subcontractor of a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation. However, penalties may be assessed against individuals only for willful violations, and a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed, where:

(1) A grossly negligent violation, or a pattern of repeated violations, has created an imminent hazard of death or injury to persons; or

(2) A death or injury has occurred. See 49 CFR part 209, appendix A.

(b) Each day a violation continues constitutes a separate offense.

(c) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(d) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(e) In addition to the enforcement methods referred to in paragraphs (a) through (d) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

(f) FRA's website at *https://railroads.dot.gov/* contains a schedule of civil penalty amounts used in connection with this part.

Subpart B—Program and Eligibility Requirements

§ 245.101 Certification program required.

(a) Each railroad that this part applies to shall have a written dispatcher certification program.

(b) Each certification program shall include all of the following:

(1) A procedure for evaluating prior safety conduct as a motor vehicle operator that complies with the criteria established in § 245.111.

(2) A procedure for evaluating prior safety conduct as an employee or certified dispatcher of a different railroad that complies with the criteria established in § 245.113.

(3) A procedure for evaluating potential substance abuse disorders and compliance with railroad alcohol and drug rules that complies with the criteria established in § 245.115.

(4) A procedure for evaluating vision and hearing acuity that complies with the criteria established in §§ 245.117 and 245.118.

(5) A procedure for training that complies with the criteria established in § 245.119.

(6) A procedure for knowledge testing that complies with the criteria established in § 245.121.

(7) A procedure for monitoring operational performance that complies with the criteria established in § 245.123.

§ 245.103 FRA review of certification programs.

(a) *Certification program submission schedule for railroads with current dispatching operations.* Each railroad with current dispatching operations, as [EFFECTIVE DATE OF FINAL RULE] shall submit its dispatcher certification program to FRA, in accordance with the procedures and requirements contained in § 245.107, according to the following schedule:

(1) All Class I railroads (including the National Railroad Passenger Corporation) and railroads providing commuter service shall submit their programs to FRA no later than [DATE EIGHT MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

(2) All Class II railroads and Class III railroads (including a switching and terminal or other railroad not otherwise classified) shall submit their programs to FRA no later than [DATE 16 MONTHS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

(b) *Certification program submission for new dispatching railroads.* For each railroad that commences dispatching operations after the effective date of this rule, the railroad shall submit and obtain approval of its written certification program to FRA, in accordance with the procedures and requirements contained in § 245.107, prior to commencing dispatching operations.

(c) *Method for submitting certification programs to FRA.* Railroads must submit their written certification programs and their requests for approval (described in § 245.107(a)) by uploading the program to FRA's secure document submission site.

(d) *Notification requirements.* Each railroad that submits a program to FRA must:

(1) Simultaneously with its submission, provide a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers

and to all of the railroad's dispatchers that are subject to this part; and

(2) Include in its submission to FRA, a statement affirming that the railroad has provided a copy of the program and the request for approval to the president of each labor organization that represents the railroad's dispatchers and to all of the railroad's dispatchers that are subject to this part, along with a list of the names and email addresses of each president of a labor organization who was provided a copy of the program.

(e) *Comment period.* Any designated representative of dispatchers subject to this part or any directly affected person who does not have a designated representative may comment on a railroad's program provided that:

(1) The comment is submitted no later than 45 days after the date the program was submitted to FRA;

(2) The comment includes a concise statement of the commenter's interest in the matter;

(3) The commenter affirms that a copy of the comment was provided to the railroad; and

(4) The comment was emailed to *FRADISPATCHCERTPROG@dot.gov.*

(f) *FRA review period.* Upon receipt of a program, FRA will commence a thorough review of the program to ensure that it satisfies all of the requirements under this part.

(1) If FRA determines that the program satisfies all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been approved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA.

(2) If FRA determines that the program does not satisfy all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been disapproved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA and will identify the deficiencies found in the program that must be corrected before the program can be approved. After addressing these deficiencies, railroads can resubmit their programs in accordance with paragraph (h) of this section.

(3) If a railroad does not receive an approval or disapproval letter from FRA within 90 days of the date the program was submitted to FRA, FRA's decision on the program will remain pending until such time that FRA issues a letter either approving or disapproving the program. A certification program is not approved until FRA issues a letter approving the program.

(g) *Material modifications.* A railroad that intends to make one or more material modifications to its FRA-approved program must submit a description of how it intends to modify the program and a copy of the modified program.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The description of the modification and the modified program must conform with the procedures and requirements contained in § 245.107.

(3) The process for submission and review of material modifications shall conform with paragraphs (c) through (f) of this section.

(4) A railroad cannot implement a material modification to its program until FRA issues its approval of the material modification in accordance with paragraph (f)(1) of this section.

(h) *Resubmissions.* If FRA disapproves a railroad's program or material modification, as described in paragraph (f)(2) of this section, the railroad can resubmit its program or material modification after addressing all of the deficiencies noted by FRA.

(1) The resubmission must conform with the procedures and requirements contained in § 245.107.

(2) The process for submission and review of resubmitted programs and resubmitted material modifications shall conform with paragraphs (c) through (f) of this section.

(3) The following deadlines apply for railroads that have their programs or material modifications disapproved by FRA:

(i) For a railroad that submitted its program pursuant to paragraph (a) of this section, the railroad must resubmit its program within 30 days of the date that FRA notified the railroad of the deficiencies in its program. If a railroad fails to resubmit its program within this timeframe and it continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(ii) For a railroad that submitted its program pursuant to paragraph (b) of this section, there is no FRA-imposed deadline for resubmitting its program. However, pursuant to § 245.105(b), the railroad cannot begin dispatching operations until its program has been approved by FRA.

(iii) For a railroad that submitted a material modification to its FRA-approved program, there is no FRA-imposed deadline for resubmitting the material modification. However, pursuant to paragraph (g)(3) of this section, the railroad cannot implement the material modification until it has been approved by FRA.

(i) *Rescinding prior approval of program.* FRA reserves the right to revisit its prior approval of a railroad's program at any time.

(1) If upon such review, FRA discovers deficiencies in the program such that the program does not comply with subpart B of this part, FRA shall issue the railroad a letter rescinding its prior approval of the program and notifying the railroad of the deficiencies in its program that must be addressed.

(2) Within 30 days of FRA notifying the railroad of the deficiencies in its program, the railroad must address these deficiencies and resubmit its program to FRA. The resubmitted program must conform with the procedures and requirements contained in § 245.107.

(3) The process for submission and review of resubmitted programs under this paragraph shall conform with paragraphs (c) through (f) of this section.

(4) If a railroad fails to resubmit its program to FRA within the timeframe prescribed in paragraph (i)(2) of this section and the railroad continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(5) If FRA issues a letter disapproving the railroad's resubmitted program, the railroad shall continue to resubmit its program in accordance with this paragraph (i).

(6) A program that has its approval rescinded under paragraph (i)(1) of this section may remain in effect until whichever of the following happens first:

(i) FRA approves the railroad's resubmitted program; or

(ii) FRA disapproves the railroad's second attempt at resubmitting its program.

(7) If FRA disapproves a railroad's second attempt at resubmitting its program under this paragraph and the railroad continues its dispatching operations, FRA may consider such actions to be a failure to implement a program.

(j) *Availability of certification program documents.* The following documents will be available on FRA's website (*railroads.dot.gov*):

(1) A railroad's originally submitted program, a resubmission of its program, or a material modification of its program;

(2) Any comments, submitted in accordance with paragraph (e) of this section, to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program; and

(3) Any approval or disapproval letter issued by FRA in response to a

railroad's originally submitted program, a resubmission of its program, or a material modification of its program.

§ 245.105 Implementation schedule for certification programs.

(a) Each railroad that submits its dispatcher certification program to FRA in accordance with § 245.103(a), may continue dispatching operations while it awaits approval of its program by FRA. However, if FRA disapproves a railroad's program on two occasions and the railroad continues dispatching operations, FRA may consider such actions to be a failure to implement a program.

(b) Each railroad that submits its dispatcher certification program to FRA in accordance with § 245.103(b), must have its program approved by FRA prior to commencing dispatching operations. If such railroad commences dispatching operations before its program is approved by FRA, FRA may consider such actions to be a failure to implement a program.

(c) By [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as certified dispatchers all persons authorized by the railroad to perform the duties of a dispatcher as of [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE]; and

(2) Issue a certificate that complies with § 245.207 to each person that it designates.

(d) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as a certified dispatcher any person who has been authorized by the railroad to perform the duties of a dispatcher between [EFFECTIVE DATE OF FINAL RULE] and the date FRA approves the railroad's certification program; and

(2) Issue a certificate that complies with § 245.207 to each person that it designates.

(e) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], no railroad shall permit or require a person to perform service as a dispatcher unless that person is a certified dispatcher.

(f) No railroad shall permit or require a person, designated as a certified dispatcher under the provisions of paragraph (c) or (d) of this section, to perform service as a certified dispatcher for more than three years after the date FRA approves the railroad's certification program unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (f)(3) of this section, a person who has been designated as a certified dispatcher under the provisions of paragraph (c) or (d) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date the certifying railroad's program is approved by FRA, may request in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until three years from the date the certifying railroad's program is approved.

(2) Upon receipt of a written request pursuant to paragraph (f)(1) of this section, a railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 or 242 of this chapter may not make a request pursuant to paragraph (f)(1) of this section.

(g) After a railroad's certification program has been approved by FRA, the railroad shall only certify or recertify a person as a dispatcher if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

§ 245.107 Requirements for certification programs.

(a) *Railroad's certification program submission.* (1) A railroad's certification program submission must include a copy of the certification program and a request for approval.

(2) The request for approval can be in letter or narrative format.

(3) A railroad will receive approval or disapproval notices from FRA by email.

(4) FRA may electronically store any materials required by this part.

(b) *Organization of the certification program.* Each program must be organized to present the required information in paragraphs (b)(1) through (6) of this section. Each section must begin by giving the name, title, telephone number, and email address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

(1) *Section 1 of the program: general information and elections.* (i) The first section of the submission must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and email address) and a statement electing either to accept responsibility for educating previously uncertified persons to be dispatchers or to not accept this responsibility.

(ii) If a railroad elects not to provide initial dispatcher training, the railroad will be limited to recertifying persons initially certified by another railroad. A railroad can change its election by obtaining FRA approval of a material modification to its program in accordance with § 245.103(g).

(iii) If a railroad elects to accept responsibility for training persons not previously certified as dispatchers, the railroad must submit information on how such persons will be trained, but is not required to actually perform such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for ensuring that such other training providers adhere to the training program the railroad submits.

(2) *Section 2 of the program: training persons previously certified.* The second section of the submission must contain information concerning the railroad's program for training previously certified dispatchers, including all of the following information:

(i) As provided for in § 245.119(j), each railroad must have a program for the ongoing education of its dispatchers to ensure that they maintain the necessary knowledge concerning relevant Federal safety regulations, operating rules and practices, familiarity with physical characteristics of the territory, and the dispatching systems and technology. The railroad must describe in this section how it will ensure that its dispatchers remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the standard set forth in § 245.119(j);

(ii) In accordance with the requirements in § 245.119(h), this section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matters covered, the frequency and duration of the training sessions (including the interval between attendance at such trainings), the training environment employed (for example, use of classroom, use of computer-based training, use of film or slide presentations, and use of on-the-job training), and which aspects of the program are voluntary or mandatory;

(iii) How the training will address a certified dispatcher's loss of retention of knowledge over time;

(iv) How the training will address changed circumstances over time such as the introduction of new or modified technology, including software modifications to dispatch systems and related signal and train control systems, new operating rule books, or significant changes in operations including alteration in the territory dispatchers are authorized to work over; and

(v) A plan for familiarization training that addresses how long a person can be absent from dispatching on a territory before needing to be requalified on that territory (a time period that cannot exceed 12 months), and once that threshold is reached, how the person will acquire the needed familiarization training.

(3) *Section 3 of the program: testing and evaluating persons previously certified.* The third section of the submission must contain information concerning the railroad's program for testing and evaluating previously certified dispatchers including all of the following information:

(i) The railroad must describe in this section how it will ensure that its dispatchers demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the standards set forth in § 245.121; and

(ii) The railroad must describe in this section how it will have ongoing testing and evaluation to ensure that its dispatchers have the necessary vision and hearing acuity as provided for in §§ 245.117 and 245.118. This section must also address how a railroad will ensure that its medical examiners have sufficient information concerning the railroad's operations, as well as the dispatcher's safety related tasks, to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a dispatcher.

(4) *Section 4 of the program: training, testing, and evaluating persons not previously certified.* Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be dispatchers, the fourth section of the submission must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously certified as dispatchers including all of the following information:

(i) As provided for in § 245.119(d), a railroad that is issuing an initial dispatcher certification to a person must have a program for the training, testing, and evaluation of its dispatchers to ensure that they acquire the necessary knowledge and skills. A railroad must describe in this section how it will ensure that its dispatchers will acquire sufficient knowledge and skills and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities.

(ii) This section must contain the same level of detail concerning initial training programs and the testing and evaluation of previously uncertified dispatchers as is required for previously certified dispatchers in § 245.107(b)(2) and (3) (Sections 2 and 3 of the program).

(iii) Railroads that elect to rely on other entities to conduct training away from the railroad's own territory and dispatching systems and technology, must indicate how the student will be provided with the required training on the physical characteristics for the railroad's territory and dispatching systems and technology.

(5) *Section 5 of the program: monitoring operational performance by certified dispatchers.* The fifth section of the submission must contain information concerning the railroad's program for monitoring the operation of its certified dispatchers including all of the following information:

(i) Section 245.123 requires that a railroad perform ongoing monitoring of its dispatchers and that each dispatcher has an annual unannounced compliance test. A railroad must describe in this section how it will ensure that the railroad is monitoring that its dispatchers demonstrate their skills concerning the safe discharge of their responsibilities.

(ii) A railroad must describe the scoring system used by the railroad during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 245.123.

(6) *Section 6 of the program: procedures for routine administration of the dispatcher certification program.* The final section of the submission must contain a summary of how the railroad's program and procedures will implement the various aspects of the regulatory provisions that relate to routine administration of its certification program for dispatchers. Specifically, this section must address the procedural aspects of the following provisions and must describe the manner in which the railroad will implement its program so as to comply with each of the following provisions:

(i) Section 245.301 which provides that each railroad must have procedures for review and comment on adverse information;

(ii) Sections 245.111, 245.113, 245.115, and 245.303 which require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers;

(iii) Sections 245.109, 245.201, and 245.301 which place a duty on the railroad to make a series of determinations. When describing how it will implement its program to comply with those sections, a railroad must describe: the procedures it will utilize to ensure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that a person will or will be not certified; and how the railroad will communicate adverse decisions;

(iv) Sections 245.109, 245.117, 245.118, 245.119, and 245.121, which place a duty on the railroad to make a series of determinations. When describing how it will implement its program to comply with those sections, a railroad must describe how it will document the factual basis the railroad relied on in making determinations under those sections;

(v) Section 245.125 which permits reliance on certification determinations made by other railroads; and

(vi) Sections 245.207 and 245.307 which contain the requirements for replacing lost certificates and the conduct of certification revocation proceedings.

§ 245.109 Determinations required for certification and recertification.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad, prior to initially certifying or recertifying any person as a dispatcher, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the prior safety conduct eligibility requirements of §§ 245.111 and 245.113;

(2) The individual meets the eligibility requirements of §§ 245.115 and 245.303;

(3) The individual meets the vision and hearing acuity standards of §§ 245.117 and 245.118;

(4) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 245.121; and

(5) If applicable, the individual has completed a training program that meets the requirements of § 245.119.

(b) Nothing in this section, § 245.111, or § 245.113 shall be construed to prevent persons subject to this part from

entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 245.111 or § 245.113.

§ 245.111 Prior safety conduct as motor vehicle operator.

(a) Except as provided in paragraphs (b) through (e) of this section, after FRA has approved a railroad's dispatcher certification program, the railroad, prior to initially certifying or recertifying any person as a dispatcher, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(b) A railroad shall initially certify a person as a dispatcher for 60 days if the person:

(1) Requested the information required by paragraph (g) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(c) A railroad shall recertify a person as a dispatcher for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (g) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(d) Except as provided in paragraph (e) of this section, if a railroad who certified or recertified a person for 60 days pursuant to paragraph (b) or (c) of this section does not obtain and evaluate the information requested pursuant to paragraph (g) of this section within 60 days, that person will be ineligible to perform as a dispatcher until the information can be evaluated by the railroad.

(e) If a person requests the information required pursuant to paragraph (g) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (a) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 245.109(a)(1) through (5).

(f) Except for persons designated as dispatchers under § 245.105(c) or (d) or for persons covered by paragraph (j) of this section, each person seeking certification or recertification under this part shall, within one year prior to the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (g) through (i) of this section to make information concerning their driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning their driving record available to that railroad.

(g) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (h) of this section provide a copy of that agency's available information concerning their driving record to the railroad that is considering such certification or recertification.

(h) Each person shall request the information required under paragraph (g) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a State or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

(i) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in the files of a State agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

(j) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (g) of this section but shall notify the railroad of that fact in accordance with procedures established by the railroad in its certification program.

(k) Each certified dispatcher or person seeking initial certification shall report motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the employing railroad within 48 hours of being convicted for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, such violations. For purposes of this paragraph and paragraph (m) of this section, ''State action'' means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For purposes of dispatcher certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license.

(l) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule;

(2) More than three years before the date of the railroad's certification decision; or

(3) At a time other than that specifically provided for in § 245.111, § 245.113, § 245.115, or § 245.303.

(m) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; or

(2) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(n) If such an incident, described in paragraph (m) of this section, is identified:

(1) The railroad shall provide the data to the railroad's DAC, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder.

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the DAC in the context of such evaluation.

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or

drugs deemed necessary by the DAC consistent with the technical standards specified in 49 CFR part 219, subpart H, as well as 49 CFR part 40.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 245.115(c) will apply.

(5) If the person fails to comply with the requirements of paragraph (n)(2) of this section, the person shall be ineligible to perform as a certified dispatcher until such time as the person complies with the requirements.

(o) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.113 Prior safety conduct with other railroads.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the certification candidate meets the eligibility requirements of this section.

(b) If the certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.

(c) Except as provided for in paragraph (b) of this section, each person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years to provide the following information to the railroad that is considering whether to certify or recertify that person as a dispatcher:

(1) Information about that person's compliance with § 245.111 within the three years preceding the date of the request;

(2) Information about that person's compliance with § 245.115 within the five years preceding the date of the request; and

(3) Information about that person's compliance with § 245.303 within the five years preceding the date of the request.

(d) Each person submitting a written request required by paragraph (c) of this section shall:

(1) Submit the request no more than one year before the date of the railroad's decision on certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning their service record available to that railroad.

(e) Within 30 days after receipt of a written request that complies with paragraph (c) of this section, a railroad shall provide the information requested to the railroad designated in the written request.

(f) If a railroad is unable to provide the information requested within 30 days after receipt of a written request that complies with paragraph (c) of this section, the railroad shall provide an explanation, in writing, of why it cannot provide the information within the requested time frame. If the railroad will ultimately be able to provide the requested information, the explanation shall state approximately how much more time the railroad needs to supply the requested information. If the railroad will not be able to provide the requested information, the explanation shall provide an adequate explanation for why it cannot provide this information. Copies of this explanation shall be provided to the railroad designated in the written request and to the person who submitted the written request for information.

(g) When evaluating a person's prior safety conduct with a different railroad, a railroad shall not consider information concerning prior safety conduct that occurred:

(1) Prior to [EFFECTIVE DATE OF FINAL RULE]; or

(2) At a time other than that specifically provided for in § 245.111, § 245.113, § 245.115, or § 245.303.

(h) Each railroad shall adopt and comply with a program that complies with the requirements of this section. When any person (including but not limited to a railroad; any manager, supervisor, official, or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor) violates any requirement of a program that complies with the requirements of this subject, that person shall be considered to have violated the requirements of this section.

§ 245.115 Substance abuse disorders and alcohol drug rules compliance.

(a) *Eligibility determination.* After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the eligibility requirements of this section.

(b) *Documentation.* In order to make the determination required under paragraph (c) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which states their professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(c) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a dispatcher.

(2) Except as provided for in paragraph (f) of this section, a certified dispatcher who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (e) of this section.

(3) In the case of a current employee of a railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 245.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(d) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a dispatcher, a railroad shall consider conduct described in paragraph (d)(2) of this section that occurred within a period of five consecutive years prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph (d).

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this section shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of one violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (e) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of nine months (unless identification of the violation was through a qualifying referral program described in § 219.1001 of this chapter and the dispatcher waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (e) of this section). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) If a person refuses to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative, the person shall be ineligible to hold a certificate for a period of nine months.

(e) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had their certification suspended or revoked as a result of conduct described in paragraph (d) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) In accordance with the testing procedures of 49 CFR part 219, subpart H, has had a return-to-duty alcohol test with an alcohol concentration of less than .02 and return-to-duty body fluid sample that tested negative for controlled substances.

(2) A dispatcher placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than five years following return to service. Follow-up tests shall include not fewer than six alcohol tests and six drug tests during the first year following return to service.

(3) Return-to-duty and follow-up alcohol and drug tests shall be performed consistent with the requirements of 49 CFR part 219, subpart H.

(4) This paragraph (e) does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a dispatcher. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(f) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a dispatcher who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its referral policy, as required pursuant to § 219.1003(j) of this chapter, a provision that, at least with respect to a certified dispatcher or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

(g) *Complying with certification program.* Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.117 Vision acuity.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the standards for visual acuity prescribed in this section and Appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each dispatcher shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in appendix B to this part.

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a dispatcher. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a dispatcher.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a dispatcher, the

railroad may conclude that the person satisfies the vision acuity requirements of this section to be a certified dispatcher. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the vision acuity standards prescribed in paragraph (c) of this section.

(2) If needed under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the vision acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's vision acuity prevents the candidate from being able to safely perform as a dispatcher.

(f) If the examination required under this section shows that the person needs corrective lenses to meet the standards for vision acuity prescribed in this section and appendix B to this part, that person shall use corrective lenses at all times while performing as a dispatcher unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a dispatcher without corrective lenses.

(g) When a certified dispatcher becomes aware that their vision has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a dispatcher. The individual cannot return to service as a dispatcher until they are reexamined and determined by the railroad's medical examiner to satisfy the vision acuity standards prescribed in this section and appendix B to this part.

(h) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.118 Hearing acuity.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate, that the person meets the standards for hearing acuity prescribed in this section and Appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each dispatcher shall have hearing acuity that meets or exceeds the following thresholds with or without use of a hearing aid: The person does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram used to show a person's hearing acuity shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and is maintained and used in accordance with a formal industry standard, such as American National Standards Institute (ANSI) S3.6, ''Specifications for Audiometers.''

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a dispatcher. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a dispatcher.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a dispatcher, the railroad may conclude that the person satisfies the hearing acuity requirements of this section to be a certified dispatcher. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the hearing acuity standards prescribed in paragraph (c) of this section.

(2) If needed under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the hearing acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's hearing acuity prevents the candidate from being able to safely perform as a dispatcher.

(f) If the examination required under this section shows that the person needs a hearing aid to meet the standards for hearing acuity prescribed in this section and appendix B to this part, that person shall use a hearing aid at all times while performing as a dispatcher unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a dispatcher without a hearing aid.

(g) When a certified dispatcher becomes aware that their hearing has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a dispatcher. The individual cannot return to service as a dispatcher until they are reexamined and determined by the railroad's medical examiner to satisfy the hearing acuity standards prescribed in this section and appendix B to this part.

(h) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.119 Training requirements.

(a) After FRA has approved a railroad's certification program, the

railroad shall determine, prior to issuing any person a dispatcher certificate, that the person has successfully completed the training, in accordance with the requirements of this section.

(b) A railroad's certification program shall state the railroad's election either:

(1) To accept responsibility for the training of dispatchers and thereby obtain authority for that railroad to initially certify a person as a dispatcher; or

(2) To recertify only dispatchers previously certified by other railroads.

(c) A railroad that elects to accept responsibility for the training of dispatchers shall state in its certification program whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by the railroad.

(d) A railroad that elects to train persons not previously certified as dispatchers shall develop an initial training program which, at a minimum, includes the following:

(1) An explanation of how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with, applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. This training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) An on-the-job training component which shall include the following:

(i) A syllabus describing content, required tasks, and related steps the employee learning the job shall be able to perform within a specified timeframe;

(ii) A statement of the conditions (*e.g.,* prerequisites, dispatch and related dispatch support systems, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(3) A description of the processes to review and modify its training program when new safety-related railroad laws, regulations, orders, technologies, procedures, software, or equipment are introduced into the workplace, including how it is determined if additional or refresher training is needed.

(e) Prior to beginning the initial dispatching related tasks associated with on-the-job exercises discussed in paragraph (d)(2) of this section, each railroad shall make any relevant information or materials, such as operating rules, safety rules, or other rules, available for referencing by certification candidates.

(f) Prior to a person, not previously certified as a dispatcher, being certified as a dispatcher, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to perform the tasks necessary to be a dispatcher;

(2) Demonstrate on-the-job proficiency, with input from a qualified instructor, by successfully completing the tasks and using the dispatching systems and technology necessary to be a dispatcher. A certification candidate may perform such tasks under the direct onsite supervision of a person who has the necessary dispatching experience and at least one year of experience as a dispatcher; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory. If the railroad uses a written test to fulfill this requirement, the railroad must provide the certification candidate with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(g) In making the determination required under paragraph (a) of the section, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section (if the person has not been previously certified as a dispatcher);

(2) The person demonstrated their knowledge by achieving a passing grade under the testing and evaluation procedures of the training program; and

(3) The person achieved a passing score on the physical characteristics exam associated with the territories, or its pertinent segments, over which the person will be performing dispatching service.

(h) The certification program, required under this part and submitted in accordance with the procedures and requirements described in § 245.107, shall include:

(1) The methods that a person may acquire familiarity with the physical characteristics of a territory;

(2) The procedures used to qualify and requalify a dispatcher on a territory; and

(3) The maximum time period in which a dispatcher can be absent from a territory before requalification is required. In accordance with § 245.120(c), this time period cannot exceed 12 months.

(i) If ownership of a railroad is being transferred from one company to another, the dispatchers of the acquiring company may receive familiarization training from the selling company prior to the acquiring company commencing operation.

(j) A railroad shall provide for the continuing education of certified dispatchers to ensure that each dispatcher maintains the necessary knowledge concerning:

(1) Railroad safety and operating rules;

(2) Physical territory:

(3) Dispatching systems and technology; and

(4) Compliance with all applicable Federal regulations including, but not limited to, hazardous materials, passenger train emergency preparedness, emergency response procedures, and physical characteristics of a territory.

(k) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.120 Requirements for territorial qualification.

(a) After FRA has approved a railroad's certification program, a railroad shall not permit or require a person to serve as a dispatcher on a particular territory unless that railroad determines that:

(1) The person is certified as a dispatcher; and

(2) The person either:

(i) Possesses the necessary territorial qualifications for the applicable territory pursuant to § 245.119; or

(ii) Is assisted by a Dispatcher Pilot who is qualified on the territory.

(b) If a person is called to serve on a territory that they are not qualified on, the person must immediately notify the railroad that they are not qualified on the assigned territory.

(c) A person shall no longer be considered qualified on a territory if they have not worked on that territory

as a dispatcher in the previous 12 months.

(d) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.121 Knowledge testing.

(a) After FRA has approved a railroad's dispatcher certification program, the railroad shall determine, prior to issuing any person a dispatcher certificate and in accordance with the requirements of this section, that the person has demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

(b) In order to make the knowledge determination required by paragraph (a) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a dispatcher that shall be:

(1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;

(2) Objective in nature;

(3) In written or electronic form;

(4) Covering the following subjects:

(i) Safety and operating rules;

(ii) Timetable instructions;

(iii) Compliance with all applicable Federal regulations;

(iv) Physical characteristics of the territory on which a person will be or is currently working as a dispatcher; and

(v) Dispatching systems and technology.

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on their ability to use such reference books or materials.

(c) The railroad shall provide the certification candidate with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a test question.

(d) If a person fails the test, no railroad shall permit or require that person to function as a dispatcher prior to that person's achieving a passing score during a reexamination of the test.

(e) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.123 Monitoring operational performance.

(a) Each railroad's certification program shall describe how it will monitor the operational performance of its certified dispatchers by including procedures for:

(1) Giving each certified dispatcher at least one unannounced railroad and Federal rules, territorial and dispatch systems compliance test each calendar year, except as provided for in paragraph (c) of this section;

(2) Giving unannounced compliance tests to certified dispatchers who return to dispatcher service after performing service that does not require certification pursuant to this part, as described in paragraph (c) of this section; and

(3) What actions the railroad will take if it finds deficiencies in a dispatcher's performance during an unannounced compliance test.

(b) An unannounced compliance test shall:

(1) Test certified dispatchers for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter;

(2) Be performed by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter; and

(3) Be given to each certified dispatcher at least once each calendar year, except as provided for in paragraph (c) of this section.

(c) A certified dispatcher who is not performing service that requires certification pursuant to this part does not need to be given an unannounced compliance test. However, when the certified dispatcher returns to service that requires certification pursuant to this part, the railroad shall:

(1) Give the certified dispatcher an unannounced compliance test within 30 days of their return to dispatcher service; and

(2) Retain a written record that includes the following information:

(i) The date the dispatcher stopped performing service that required certification pursuant to this part;

(ii) The date the dispatcher returned to service that required certification pursuant to this part; and

(iii) The date and the result of the unannounced compliance test that was performed following the dispatcher's return to service requiring certification.

(d) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a dispatcher may rely on certain determinations made by another railroad concerning that person's certification.

(b) A railroad's certification program shall address how the railroad will administer the training of previously uncertified dispatchers with extensive dispatching experience or previously certified dispatchers who have had their certification expire. If a railroad's certification program fails to specify how it will train these dispatchers, then the railroad shall require these dispatchers to successfully complete the certifying railroad's entire training program.

(c) A railroad relying on certification determinations made by another railroad shall still be responsible for determining that:

(1) The prior certification is still valid in accordance with the provisions of §§ 245.201 and 245.307;

(2) The person has received training on the physical characteristics of the new territory in accordance with § 245.119; and

(3) The person has demonstrated the necessary knowledge concerning the railroad's operating rules, territory, dispatch systems and technology in accordance with § 245.121.

Subpart C—Administration of the Certification Program

§ 245.201 Time limitations for certification.

(a) After FRA approves a railroad's dispatcher certification program, that railroad shall not certify or recertify a person as a dispatcher if the railroad is making:

(1) A determination concerning eligibility under §§ 245.111, 245.113, 245.115, and 245.303 and the eligibility data being relied on was furnished more than one year before the date of the railroad's certification decision;

(2) A determination concerning visual or hearing acuity and the medical examination being relied on was

conducted more than 450 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than one year before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than two years before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 245.121 at intervals that do not exceed two years.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with § 245.125.

(c) Except if a person is designated as a certified dispatcher under § 245.105(c) or (d), no railroad shall certify a person as a dispatcher for an interval of more than three years.

(d) Each railroad shall issue each certified dispatcher a certificate that complies with § 245.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 245.203 Retaining information supporting determinations.

(a) After FRA approves a railroad's dispatcher certification program, any time the railroad issues, denies, or revokes a certificate after making the determinations required under § 245.109, it shall maintain a record for each certified dispatcher and certification candidate. Each record shall contain the information, described in paragraph (b) of this section, that the railroad relied on in making the determinations required under § 245.109.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct and eligibility;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning their eligibility;

(5) The relevant test results data concerning vision and hearing acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's vision or hearing acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure on knowledge test(s) under § 245.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced tests the railroad performed to monitor the dispatcher's performance in accordance with § 245.123.

(c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

(d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(e) All records required under this section shall be retained by the railroad for a period of six years from the date of the certification, recertification, denial, or revocation decision and shall, upon request, be made available to FRA representatives in a timely manner.

(f) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment; and

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

§ 245.205 List of certified dispatchers and recordkeeping.

(a) After a railroad's certification program has received its initial approval from FRA, pursuant to § 245.103(f)(1), the railroad must maintain a list of each person who is currently certified as a dispatcher by the railroad. The list must include the date of the railroad's certification decision and the date the person's certification expires.

(b) The list shall:

(1) Be updated at least annually;

(2) Be made available, upon request, to FRA representatives in a timely manner; and

(3) Be available either:

(i) In electronic format pursuant to paragraph (c) of this section; or

(ii) At the divisional or regional headquarters of the railroad.

(c) If a railroad elects to maintain its list in an electronic format, it must:

(1) Maintain an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) Have its program and data storage system protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual

after the entry is certified by the employee who created the entry;

(3) Have any amendment to the list either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Ensure that each amendment to the list uniquely identifies the person making the amendment; and

(5) Ensure that the system employed for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

§ 245.207 Certificate requirements.

(a) Each person who becomes a certified dispatcher in accordance with this part shall be issued a paper or electronic certificate that must:

(1) Identify the railroad that is issuing the certificate;

(2) Indicate that it is a dispatcher certificate;

(3) Provide the following information about the certified person:

(i) Name;

(ii) Employee identification number;

(iii) Year of birth; and

(iv) Either a physical description or photograph of the person;

(4) Identify any conditions or limitations, including conditions to ameliorate vision or hearing acuity deficiencies, that restrict, limit, or alter the person's abilities to work as a dispatcher;

(5) Show the effective date of the certification;

(6) Show the expiration date of the certification except as provided for in paragraph (b) of this section;

(7) Be signed by an individual designated in accordance with paragraph (c) of this section; and

(8) Be electronic or be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) A certificate does not need to include an expiration date, as required under paragraph (a)(6) of this section, if the person was designated as a certified dispatcher under § 245.105(c) or (d).

(c) Each railroad shall designate in writing any person it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(d) Nothing in this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(e) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on a certificate; or

(2) Otherwise falsify a certificate through material misstatement, omission, or mutilation.

(f) Except as provided for in paragraph (h) of this section, each certified dispatcher shall:

(1) Have their certificate in their possession while on duty as a dispatcher; and

(2) Display their certificate upon a request from:

(i) An FRA representative;

(ii) A state inspector authorized under part 212 of this chapter;

(iii) An officer of the issuing railroad; or

(iv) An officer of the dispatcher's employer if the dispatcher is not employed by the issuing railroad.

(g) If a dispatcher's certificate is lost, stolen, or mutilated, the railroad shall promptly replace the certificate at no cost to the dispatcher.

(h) A certified dispatcher is exempt from the requirements of paragraph (f) of this section if:

(1) The railroad made its certification or recertification decision within the last 30 days and the dispatcher has not yet received their certificate; or

(2) The dispatcher's certificate was lost, stolen, or mutilated, and the railroad has not yet issued a replacement certificate to the dispatcher.

(i) Any dispatcher who is notified or called to serve as a dispatcher and such service would cause the dispatcher to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that they are not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(j) Nothing in this section shall be deemed to alter a certified dispatcher's duty to comply with other provisions of this chapter concerning railroad safety.

§ 245.213 Multiple certifications.

(a) A person who holds a dispatcher certificate may also be certified in other crafts, such as a locomotive engineer or conductor.

(b) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(c)(1) A person who holds a current dispatcher certificate from more than one railroad shall immediately notify the other certifying railroad(s) if they are denied dispatcher certification or recertification under § 245.301 by another railroad or has their dispatcher certification suspended or revoked under § 245.307 by another railroad.

(2) If a person has their dispatcher certification suspended or revoked by a railroad under § 245.307, they may not work as a dispatcher for any other railroad during the period that their certification is suspended or revoked.

(3) If a person has their dispatcher certification suspended or revoked by a railroad under § 245.307, they must notify any railroad that they are seeking certification from that their dispatcher certification is currently suspended or revoked by another railroad.

(d) Paragraphs (d)(1) through (4) apply to people who are currently certified as a dispatcher and also currently certified in another craft, such as a locomotive engineer or conductor:

(1) If a person's dispatcher certification is revoked under § 245.307 for a violation of § 245.303(e)(8), they may not work in another certified craft, such as a locomotive engineer or conductor, for any railroad during the period of revocation.

(2) If a person's dispatcher certification is revoked under § 245.307 for a violation of § 245.303(e)(1) through (7), they may work in another certified craft, such as a locomotive engineer or conductor, during the period of revocation.

(3) If any of a person's non-dispatcher certifications are revoked for failure to comply with § 219.101 of this chapter, they may not work as a dispatcher for any railroad during the period of revocation.

(4) If any of a person's non-dispatcher certifications are revoked for any reason other than a failure to comply with § 219.101 of this chapter, they may work as a dispatcher during the period of revocation.

(e) A person who has had their dispatcher certification revoked for failure to comply with § 219.101 of this chapter, may not obtain any other certification pursuant to this chapter from any railroad during the period of revocation.

(f) A person who has had any of their non-dispatcher certifications revoked for failure to comply with § 219.101 of this chapter, may not obtain a dispatcher certificate pursuant to this part from any railroad during the period of revocation.

(g) A railroad that denies a person dispatcher certification or recertification under § 245.301 shall not, solely on the basis of that denial, deny or revoke that person's non-dispatcher certifications or recertifications.

(h) A railroad that denies a person any non-dispatcher certification pursuant to this chapter shall not, solely on the basis of that denial, deny or revoke that person's dispatcher certification or recertification.

(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts as long as the single certificate complies with all of the certificate requirements for those crafts.

(j) A person who is certified in multiple crafts and who is involved in a revocable event, as described in this chapter, may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke must be based on the work the person was performing at the time the revocable event occurred.

§ 245.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year [DATE THREE YEARS AFTER EFFECTIVE DATE OF FINAL RULE], each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified dispatchers during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by dispatchers; and

(3) The number and type of operational monitoring test failures recorded by railroad officers who meet the requirements of § 217.9(b)(1) of this chapter.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving failure to provide proper protection of a reported inoperable or malfunctioning highway-rail grade crossing.

(2) Incidents involving granting permission for a train or on-track equipment to enter into an out-of-service or blue flag protected track.

(3) Incidents involving granting permission for a train or on-track equipment to enter into established RWIC limits without authority or permission from the RWIC.

(4) Incidents involving removal of blocking devices or established protection of RWIC working limits prior to the RWIC releasing the limits.

(5) Incidents involving failure to properly apply blocking devices or failure to establish proper protection for specified working limits or movements of trains or on-track equipment.

(6) Incidents involving failure to properly issue or apply mandatory directives when warranted.

(7) Incidents involving granting permission for a train to enter Positive Train Control (PTC) or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment without proper approval.

(8) Incidents involving noncompliance with part 219 of this chapter.

(f) For reporting purposes, each category of detected poor safety conduct identified in paragraph (e) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report under part 225 of this chapter; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

(g) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken, and the number of events subdivided, so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the railroad:

(i) The person was withheld from service;

(ii) The person was dismissed from employment; or

(iii) The person was issued demerits. If more than one form of punishment was imposed, only the punishment deemed the most severe shall be shown.

(h) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment, or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, an instance of poor safety conduct involving a person who is a certified dispatcher and is certified in another craft, such as a locomotive engineer or conductor, need only be reported once (*e.g.,* either under this section or § 240.309 or § 242.215 of this chapter). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

Subpart D—Denial and Revocation of Certification

§ 245.301 Process for denying certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in

writing prior to denying certification. A railroad shall provide the dispatcher candidate with any documents or records, including written statements, related to failure to meet a requirement of this part which support its pending denial decision.

(b) If a railroad denies a person certification or recertification, it shall issue a decision that complies with all of the following requirements:

(1) It must be in writing.

(2) It must explain the basis for the railroad's denial decision.

(3) It must address any explanation or rebuttal information that the certification candidate provided pursuant to paragraph (a) of this section.

(4) It must include the date of the railroad's decision.

(5) It must be served on the candidate no later than 10 days after the railroad's decision.

(c) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice which constitutes a violation under § 245.303(e)(1) through (7) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with that railroad operating rule or practice.

§ 245.303 Criteria for revoking certification.

(a) It shall be unlawful to fail to comply with any of the railroad rules or practices described in paragraph (e) of this section.

(b) A certified dispatcher who has demonstrated a failure to comply with a railroad rule or practice described in paragraph (e) of this section shall have their certification revoked.

(c) A certified dispatcher who is monitoring, piloting, or instructing a dispatcher and fails to take appropriate action to prevent a violation of a railroad rule or practice described in paragraph (e) of this section shall have their certification revoked. Appropriate action does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the dispatcher of a potential or foreseeable violation.

(d) A certified dispatcher who is called by a railroad to perform a duty other than that of a dispatcher shall not have their dispatcher certification revoked based on actions taken or not taken while performing that duty except for violations described in paragraph (e)(8) of this section.

(e) When determining whether to revoke a dispatcher's certification, a railroad shall only consider violations of its operating rules or practices that involve:

(1) Failure to provide proper protection of a reported inoperable or malfunctioning highway-rail grade crossing.

(2) Granting permission for a train or on-track equipment to enter into an out-of-service or blue flag protected track.

(3) Granting permission for a train or on-track equipment to enter into established RWIC limits without authority or permission from the RWIC.

(4) Removal of blocking devices or established protection of RWIC working limits prior to the RWIC releasing the limits.

(5) Failure to properly apply blocking devices or establish proper protection for specified working limits or movements of trains or on-track equipment.

(6) Failure to properly issue or apply mandatory directives when warranted.

(7) Granting permission, without prior approval, for a train to enter Positive Train Control (PTC) or Cab Signal limits with inoperative or malfunctioning PTC or Cab Signal equipment.

(8) Failure to comply with § 219.101 of this chapter. However, such incidents shall be considered as a violation only for the purposes of § 245.305(a)(2) and (b).

(f) In making the determination as to whether to revoke a dispatcher's certification, a railroad shall only consider conduct described in paragraphs (e)(1) through (7) of this section that occurred within the three years prior to the determination.

(g) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(h) A violation of one or more operating rules or practices described in paragraphs (e)(1) through (7) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 245.305.

(i) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for revocation purposes.

(j) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 245.305 Periods of ineligibility.

(a) The starting date for a period of ineligibility described in this section shall be:

(1) For a person not currently certified, the date of the railroad's written determination that the most recent incident has occurred; or

(2) For a person currently certified, the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(b) A period of ineligibility shall be determined according to the following standards:

(1) In the case of a single incident involving a violation of one or more of the operating rules or practices described in § 245.303(e)(1) through (7), the person shall have their certificate revoked for a period of 30 calendar days.

(2) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in § 245.303(e)(1) through (7), that occurred within 24 months of each other, the person shall have their certificate revoked for a period of 6 months.

(3) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in § 245.303(e)(1) through (8), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of 1 year.

(4) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in § 245.303(e)(1) through (8), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of 3 years.

(5) Where, based on the occurrence of violations described in § 245.303(e)(8), different periods of ineligibility may result under the provisions of this section and § 245.115, the longest period of revocation shall control.

(c) Any or all periods of revocation provided in paragraph (b) of this section may consist of training.

(d) A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the

provisions of paragraph (b) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (b) of this section has elapsed.

§ 245.307 Process for revoking certification.

(a) If a railroad determines that a dispatcher, who is currently certified by the railroad, has violated a railroad operating rule or practice described in § 245.303(e), the railroad shall revoke the dispatcher's certification in accordance with the procedures and requirements of this section.

(b) Except as providing for in § 245.115(f), if a railroad acquires reliable information that a dispatcher, who is currently certified by the railroad, has violated a railroad operating rule or practice described in §§ 245.303(e) or 245.115(d), the railroad shall undergo the following process to determine whether revocation of the dispatcher's certification is warranted:

(1) The dispatcher's certification shall be suspended immediately.

(2) Prior to or upon suspending the dispatcher's certification, the railroad shall provide the dispatcher with notice of: the reason for the suspension; the pending revocation; and an opportunity for a hearing before a presiding officer other than the investigating officer. This notice may initially be given either orally or in writing. If given orally, the notice must be subsequently confirmed in writing in a manner that conforms with the notification provisions of the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement notification provision, the written notice must be made within four days of the date the certification was suspended.

(3) The railroad must convene the hearing within the time frame required under the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement or the applicable collective bargaining agreement does not include such a requirement, the hearing shall be convened within 10 days of the date the certification is suspended unless the dispatcher requests or consents to a delay to the start of the hearing.

(4) No later than the start of the hearing, the railroad shall provide the dispatcher with a copy of the written information and a list of witnesses the railroad will present at the hearing. If this information was provided just prior to the start of the hearing and the dispatcher requests a recess to the start of the hearing, such request must be granted. If this information was provided by an employee of the railroad, the railroad shall make that employee available for examination during the hearing.

(5) Following the hearing, the railroad must determine, based on the record of the hearing, whether revocation of the certification is warranted. The railroad shall have the burden of proving that revocation of the dispatcher's certification is warranted under § 245.303.

(6) If the railroad determines that revocation of the dispatcher's certification is warranted, the railroad shall impose the proper period of revocation provided for in § 245.305 or § 245.115.

(7) The railroad shall retain the record of the hearing for three years after the date the decision is rendered.

(c) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall satisfy the procedural requirements of this section.

(d) Except as provided for in paragraph (c) of this section, a hearing required under this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be conducted by a presiding officer who can be any proficient person authorized by the railroad other than the investigating officer.

(2) The presiding officer shall convene and preside over the hearing and exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in dispute.

(3) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing; and

(iii) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may assist in achieving a prompt and fair determination of all material issues in dispute.

(4) All relevant and probative evidence shall be received into the record unless the presiding officer determines the evidence to be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(5) Parties may appear at the hearing and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(6) Testimony by witnesses at the hearing shall be recorded verbatim. Witnesses can testify in person, over the phone, or virtually.

(7) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of evidence.

(8) A hearing required under this section may be consolidated with any disciplinary action or other hearing arising from the same facts.

(9) A person may waive their right to a hearing. That waiver shall:

(i) Be in writing;

(ii) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(iii) Be signed by the person making the waiver.

(e) Except as provided for in paragraph (c) of this section, a decision, required by this section, on whether to revoke a dispatcher's certification shall comply with the following requirements:

(1) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision as to whether the railroad is revoking the dispatcher's certification.

(2) The decision shall:

(i) Contain the findings of fact on all material issues as well as an explanation for those findings with citations to all applicable railroad operating rules and practices;

(ii) State whether the railroad official found that the dispatcher's certification should be revoked;

(iii) State the period of revocation under § 245.305 (if the railroad official concludes that the dispatcher's certification should be revoked); and

(iv) Be served on the employee and the employee's representative, if any, with the railroad retaining proof of service for three years after the date the decision is rendered.

(f) The period that a dispatcher's certification is suspended in accordance

with paragraph (b)(1) of this section shall be credited towards any period of revocation that the railroad assesses in accordance with § 245.305.

(g) A railroad shall revoke a dispatcher's certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked the person's dispatcher certification in accordance with the provisions of this section. Such revocation shall end on the same date that the revocation period ends for the railroad that initially revoked the person's certification. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing. No additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) A railroad shall not revoke a dispatcher's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the dispatcher's ability to comply with the railroad operating rule or practice which constitutes a violation under § 245.303.

(i) A railroad may decide not to revoke a dispatcher's certification if sufficient evidence exists to establish that the violation of the railroad operating rule or practice described in § 245.303(e) was of a minimal nature and had no direct or potential effect on rail safety.

(j) If sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available, the railroad shall place the relevant information in the records maintained in compliance with:

(1) Section 245.215 for Class I railroads (including that National Railroad Passenger Corporation), railroads providing commuter service, and Class II railroads; and

(2) Section 245.203 for Class III railroads.

(k) If a railroad makes a good faith determination, after performing a reasonable inquiry, that the course of conduct provided for in paragraph (h) or (i) of this section is warranted, the railroad will not be in violation of paragraph (b)(1) of this section if it decides not to suspend the dispatcher's certification.

Subpart E—Dispute Resolution Procedures

§ 245.401 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had their certification revoked and believes that a railroad incorrectly determined that they failed to meet the certification requirements of this part when making the decision to deny or revoke certification, may petition the Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Certification Review Board (Board). The Board shall be composed of FRA employees.

§ 245.403 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be filed no more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner, except as provided for in paragraph (d) of this section;

(3) Be filed on *https://www.regulations.gov.*

(4) Include the following contact information for the petitioner and petitioner's representative (if petitioner is represented):

(i) Full name;

(ii) Daytime telephone number; and

(iii) Email address;

(5) Include the name of the railroad;

(6) Contain the facts that the petitioner believes constitute the improper action by the railroad and the arguments in support of the petition; and

(7) Include all written documents in the petitioner's possession or reasonably available to the petitioner that document the railroad's decision.

(c) If requested by the Board, the petitioner must provide a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide a written explanation in response to a Board request if written documents, that should be reasonably available to the petitioner, are not supplied.

(d) The Board may extend the petition filing period in its discretion provided that the petitioner provides good cause for the extension and:

(1) The request for an extension is filed before the expiration of the period provided for in paragraph (b)(2) of this section; or

(2) The failure to timely file was the result of excusable neglect.

(e) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 245.411.

§ 245.405 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall be sent to the petitioner (if an email address is provided), petitioner's representative (if any), and the railroad. The acknowledgment shall contain the docket number assigned to the petition and will notify the parties where the petition can be accessed.

(b) Within 60 days from the date of the acknowledgment provided in paragraph (a) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition, and shall supplement the record with any relevant documents in its possession, such as hearing transcripts and exhibits, that were not submitted by the petitioner. Late filings will only be considered to the extent practicable. A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number for the petition;

(2) Provide the railroad's email address;

(3) Serve a copy of the information being submitted to the petitioner and petitioner's representative, if any; and

(4) Be filed on *https://www.regulations.gov.*

(c) The petition will be referred to the Board for a decision after a railroad's response is received or 60 days from the date of the acknowledgment provided in paragraph (a) of this section, whichever is earlier. Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition. If the Board finds that there is insufficient basis for granting or denying the petition, the Board may issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(d) When considering procedural issues, the Board will grant the petition if the petitioner shows:

(1) That a procedural error occurred; and

(2) The procedural error caused substantial harm to the petitioner.

(e) When considering factual issues, the Board will grant the petition if the petitioner shows that the railroad did not provide substantial evidence to support its decision.

(f) When considering legal issues, the Board will determine whether the railroad's legal interpretations are correct based on a *de novo* review.

(g) The Board will only consider whether the denial or revocation of

certification or recertification was improper under this part and will grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision. For example,the Board will not consider whether the railroad properly applied its own more stringent requirements.

(h) The Board's written decision shall be served on the petitioner and/or petitioner's representative (if any), and the railroad.

§ 245.407 Request for a hearing.

(a) If adversely affected by the Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 245.409.

(b) To exercise that right, the adversely affected party shall file a written request for a hearing within 20 days of service of the Board's decision on that party. The request must be filed in the docket on *https://www.regulations.gov* that was used when the case was before the Board.

(c) A written request for a hearing must contain the following:

(1) The name, telephone number, and email address of the requesting party and the requesting party's designated representative (if any);

(2) The name, telephone number, and email address of the respondent;

(3) The docket number for the case while it was before the Board;

(4) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(5) The signature of the requesting party or the requesting party's representative (if any).

(d) Upon receipt of a hearing request complying with paragraph (c) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

(e) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Board's decision will constitute final agency action.

§ 245.409 Hearings.

(a) An administrative hearing for a dispatcher certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator.

(b) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(c) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that they have read the document; that to the best of their knowledge, information, and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed in, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 245.407(e) and paragraph (s)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within 14 days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the

record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn, or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the ''hearing petitioner.'' The party that the Board issued its decision in favor of will be a respondent. At the start of each proceeding, FRA will be a respondent as well. The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence.

(r) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(s) At the close of the record, the presiding officer shall prepare a written decision in the proceeding. The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each, concerning all material issues of fact or law presented on the record;

(2) Shall be served on all parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

§ 245.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter, or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from a Board decision pursuant to § 245.403(e) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

Appendix A to Part 245—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

(1) The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the proposed requirements of § 245.111 of this chapter. This provision requires that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a dispatcher.

(2) To fulfill that obligation, a railroad is required to review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the State agency that issued the candidate's current motor vehicle driver's license. However, a motor vehicle driving record can include multiple documents if the candidate has been issued a motor vehicle driver's license by more than one State agency or a foreign country.

Access to State Motor Vehicle Driving Record Data

(3) The right of railroad workers, their employers, or prospective employers to have access to a State motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many States have mechanisms through which employers and prospective employers, such as railroads, can obtain such data, there are some states where privacy concerns make such access very difficult or impossible. Since individuals are generally entitled to obtain access to their driving record data that will be relied on by a State motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places the responsibility on individuals who want to serve as dispatchers to request that their current state motor vehicle licensing agency (or agencies) furnish such data directly to the railroad that is considering certification (or recertification) of the individual as a dispatcher. Depending on the procedures established by the state motor vehicle licensing agency, the individual may be asked to send the State agency a brief letter requesting such action or to execute a state agency form that accomplishes the same effect. Requests for an individual's motor vehicle driving record normally involve payment of a nominal fee established by the State agency as well. In rare instances, when a certification (or recertification) candidate has been issued multiple licenses, an individual may be required to submit multiple requests.

(4) Once the railroad has obtained the individual's motor vehicle driving record(s), the railroad is required to afford the certification (or recertification) candidate an opportunity to review and comment on the record(s) in writing pursuant to § 245.301. The railroad is also required to provide this review opportunity before the railroad renders a decision based on information in the record(s). The railroad is required to evaluate the information in the certification (or recertification) candidate's motor vehicle driving record(s) pursuant to the provisions of this part.

Appendix B to Part 245—Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 245.117 and 245.118.

(2) For any examination performed to determine whether a person meets the vision acuity requirements in § 245.117, it is recommended that such examination be performed by a licensed optometrist or a technician who reports to a licensed optometrist. It is also recommended that any test conducted pursuant to § 245.117 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(3) For any examination performed to determine whether a person meets the hearing acuity requirements in § 245.118, it is recommended that such examination be performed by a licensed or certified audiologist or a technician who reports to a licensed or certified audiologist. It is also recommended that any test conducted pursuant to § 245.118 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(4) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left-hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right-hand column.

TABLE 1 TO APPENDIX B OF PART 245

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1–15.
AOC—Hardy-Rand-Ritter plates—second edition	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book).
Dvorine—Second edition	3 or more errors on plates 1–15.
Ishihara (14 plate)	2 or more errors on plates 1–11.
Ishihara (16 plate)	2 or more errors on plates 1–8.
Ishihara (24 plate)	3 or more errors on plates 1–15.
Ishihara (38 plate)	4 or more errors on plates 1–21.
Richmond Plates 1983	5 or more errors on plates 1–15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

(5) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that ‘‘yellow signals’’ do not always appear to be the same. It is not acceptable to use ‘‘yarn’’ or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 245.117(c)(3).

(6) An examinee who fails to meet the criteria in the chart may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a dispatcher. The intent of §§ 245.117(d) and 245.118(d) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a dispatcher. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request, but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(7) Dispatchers who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

Issued in Washington, DC.

Amitabha Bose,

Administrator.

[FR Doc. 2023–10772 Filed 5–30–23; 8:45 am]

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Part V

Department of Transportation

Federal Railroad Administration

49 CFR Part 246

Certification of Signal Employees; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 246

[Docket No. FRA–2022–0020, Notice No. 1]

RIN 2130–AC92

Certification of Signal Employees

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes regulations for the certification of signal employees, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008.

DATES: Comments on the proposed rule must be received by July 31, 2023. FRA will consider comments received after that date to the extent practicable.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2022–0020 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, docket number (FRA–2022–0020), and Regulatory Identification Number (RIN) for this rulemaking (2130–AC92). All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, U.S. Department of Transportation, Federal Railroad Administration, telephone: (816) 516–7168, email: *Gabe.Neal@dot.gov;* or Kathryn Gresham, Attorney Adviser, U.S. Department of Transportation, Federal Railroad Administration, telephone: (202) 577–7142, email: *kathryn.gresham@dot.gov.*

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

AAR—Association of American Railroads
ASLRRA—American Short Line and Regional Railroad Association
CE—Categorical Exclusion
CFR—Code of Federal Regulations
DAC—Drug and alcohol counselor
DOT—United States Department of Transportation
EA—Environmental Assessment
EIS—Environmental Impact Statement
FRA—Federal Railroad Administration
IRFA—Initial Regulatory Flexibility Analysis
NEPA—National Environmental Policy Act
NPRM—Notice of Proposed Rulemaking
OMB—United States Office of Management and Budget
PRA—The Paperwork Reduction Act
PTC—Positive Train Control
PV—Present Value
RIN—Regulatory Identification Number
RSAC—Railroad Safety Advisory Committee
RSIA—Rail Safety Improvement Act of 2008
SAP—Substance Abuse Professional
STB—The Surface Transportation Board
U.S.C.—United States Code

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I. Executive Summary

Purpose of the Regulatory Action

FRA proposes to require railroads to develop programs for the certification of signal employees and to submit those written certification programs to FRA for approval prior to implementation. Signal employees are responsible for the installation, testing, troubleshooting, repair, and maintenance of railroad signal systems which, for purposes of this proposed rule, include highway-rail and pathway grade crossing warning systems, unusual contingency detection devices, broken rail detection systems, power-assisted switches, and switch point indicators.

Under this proposed rule, railroads would be required to verify and document that each signal employee [1] has the requisite knowledge, skills, safety record, and abilities to safely perform all of the safety-related signal employee duties mandated by Federal laws and regulations, prior to certification. In addition, railroads would be required to have formal processes for revoking certification (either temporarily or permanently) for signal employees who violate specified minimum requirements.

FRA is proposing this regulation in response to the Rail Safety Improvement Act of 2008 (RSIA), which required the Secretary of Transportation (Secretary) to submit a report to Congress addressing whether certification of ''certain crafts or classes'' of railroad employees or contractors, including signal employees, was necessary to ''reduce the number and rate of accidents and incidents or to improve railroad safety.'' If the Secretary determined it was necessary to require the certification of certain crafts or classes to improve railroad safety, section 402 of the RSIA authorized the Secretary to prescribe such regulations.

The Secretary submitted a report to Congress on November 4, 2015,[2] stating that, based on FRA's preliminary research, signal employees were one of the most viable candidate railroad crafts for certification, particularly with the introduction of Positive Train Control (PTC) technology. Given the safety critical role of signal employees in facilitating safe railroad operations, FRA determined that railroad safety is expected to be improved if signal employees were required to satisfy certain standards and be certified by each railroad whose signal systems they install, troubleshoot, repair, test, or maintain.

Summary of Major Provisions

This proposed rule would require railroads to develop written programs for certifying individuals who work as signal employees on their territories and to submit those written certification programs to FRA for approval prior to implementation. FRA would issue a letter to the railroad when it approves a certification program that explains the basis for approval and a program would not be considered approved until the approval letter is issued.

FRA is proposing to require Class I railroads (including the National Railroad Passenger Corporation), and railroads providing commuter service, to submit their written certification programs to FRA no later than eight (8) months after the final rule effective date. Class II and Class III railroads would be

[1] Although ''signal employees'' are also referred to as ''signalmen,'' those terms are synonymous.

[2] A copy of this November 4, 2015 Report to Congress has been posted in the rulemaking docket at: *https://www.regulations.gov/document/FRA-2022-0020-0001.*

required to submit their written certification plans sixteen (16) months after the final rule effective date. New railroads that begin operation after the final rule effective date would be required to submit their written certification programs to FRA and obtain FRA approval before installing their signal systems and commencing operations. In addition, railroads seeking to materially modify their FRA-approved certification programs would be required to obtain FRA approval prior to modifying their programs.

Railroads would be required to evaluate certification candidates in multiple areas, including prior safety conduct as a motor vehicle operator, prior safety conduct with other railroads, substance abuse disorders and alcohol/drug rules compliance, and vision and hearing acuity.

The proposed rule also contains minimum requirements for the training provided to candidates for signal employee certification. These proposed requirements are intended to ensure signal employees receive sufficient training before they are certified to work on signal systems. These proposed requirements are also intended to ensure that certified signal employees periodically receive recurring training on railroad signal system standards, test procedures, operating rules and procedures, and orders governing the installation, operation, testing, troubleshooting, repair, and maintenance of railroad signal systems, as well as comprehensive training on new signal systems and technology before they are introduced on the railroads where they work.

With the exception of individuals designated as certified signal employees prior to FRA approval of the railroad's signal employee certification program, the proposed rule would prohibit railroads from certifying signal employees for intervals longer than three (3) years. This three-year limitation, which would be consistent with the 36-month maximum period for certifying locomotive engineers in 49 CFR 240.217(c) and the 36-month maximum period for certifying conductors in 49 CFR 240.201(c), would allow for periodic re-evaluation of certified signal employees to verify their continued compliance with FRA's minimum safety requirements.

Subpart D of this proposed rule addresses the process and criteria for denying and revoking certification. Proposed § 246.301 describes the process a railroad would be required to undergo before it denies an individual certification or recertification. This process would include providing the certification candidate with the information that forms the basis for the denial decision and giving the candidate an opportunity to rebut such evidence. When a railroad denies an individual certification or recertification, it must issue its decision in writing and the decision must comply with certain requirements provided in the proposed rule.

A railroad could only revoke a signal employee's certification if one of eleven events occurs. Generally, for the first revocable event that is not related to a signal employee's use of drugs or alcohol, the individual's certification would be revoked for 30 days. If an individual accumulates more of these violations in a given time period, the revocation period (period of ineligibility) would become increasingly longer.

If a railroad acquires reliable information that a certified signal employee has violated an operating rule or practice requiring decertification under the proposed rule, it must suspend the signal employee's certification immediately while it determines whether certification revocation is warranted. In such circumstances, signal employees would be entitled to a hearing. Similar to a railroad's decision to deny an individual certification, a railroad's decision to revoke a signal employee's certification would be required to comply with certain requirements. Finally, if an intervening cause prevented or materially impaired a signal employee's ability to comply with a railroad operating rule or practice, the railroad would not revoke the signal employee's certification.

Subpart E of this proposed rule discusses the dispute resolution process for individuals who wish to challenge a railroad's decision to deny certification, deny recertification, or revoke certification. This dispute resolution process mirrors the process used for locomotive engineers and conductors under 49 CFR parts 240 and 242, respectively.

Finally, the proposed rule contains two appendices. Appendix A discusses the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B provides guidance on the procedures railroads should employ in administering the vision and hearing requirements under §§ 246.117 and 246.118.

Costs and Benefits

FRA analyzed the economic impact of this proposed rule. FRA estimated the costs estimated to be incurred by railroads and the Government. FRA also estimated the benefits of fewer signal employee-caused accidents.

FRA is proposing regulations establishing a formal certification process for railroad signal employees. As part of that process, railroads would be required to develop a program meeting specific requirements for training current and prospective signal employees, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a comprehensive record, including of safety compliance infractions, that other railroads can review when considering individuals for certification.

This proposed regulation would ensure that signal employees are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

FRA estimates the 10-year costs of the proposed rule to be $8.3 million, discounted at 7 percent. The estimated annualized costs would be $1.2 million discounted at 7 percent. The following table shows the total costs of this proposed rule, over the 10-year analysis period.

TOTAL 10-YEAR DISCOUNTED COSTS

[2020 dollars] [3]

Category	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Development of Certification Program	1,140,385	1,168,920	162,365	137,033
Certification Eligibility Requirements	87,507	100,380	12,459	11,768
Recertification Eligibility Requirements	203,790	259,653	29,015	30,439

TOTAL 10-YEAR DISCOUNTED COSTS—Continued

[2020 dollars][3]

Category	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Training	2,079,835	2,379,911	296,122	278,998
Knowledge Testing	746,865	898,884	106,337	105,377
Vision and Hearing	1,097,523	1,320,891	156,263	154,849
Monitoring Operational Performance	832,102	994,414	118,473	116,576
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	103,175	124,175	14,690	14,557
Petitions and Hearings	42,451	50,731	6,044	5,947
Government Administrative Cost	1,653,360	1,914,063	235,401	224,387
Total	8,277,337	9,566,001	1,178,507	1,121,427

This rule would reduce the likelihood of an accident occurring due to signal employee error. FRA has analyzed accidents over the past 10 years to categorize those where signal employee training and certification would have impacted the accident. FRA then estimated benefits based on that analysis.

The following table shows the estimated 10-year quantifiable benefits of the proposed rule. The total 10-year estimated benefits would be $2.9 million (PV, 7%) and annualized benefits would be $0.4 million (PV, 7%).

TOTAL 10-YEAR DISCOUNTED BENEFITS

[2020 dollars]

Category	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Grade Crossing Accidents	1,766,028	2,064,676	251,443	242,043
Train Accidents/Incidents	989,123	1,156,391	140,829	135,564
Business Benefits from Fewer Activation Failures	159,526	186,503	22,713	21,864
Total	2,914,678	3,407,570	414,985	399,471

This proposed rule would also provide unquantifiable benefits. FRA has quantified the monetary impact from accidents which is reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (*e.g.,* environmental impact). That impact may account for additional benefits not quantified in this analysis. If these costs were realized, accidents affected by this proposed rulemaking could have much greater economic impact than estimated quantitative benefit estimates.

There is also a chance of a high impact event due to signal employee error. This could involve fatalities, injuries, and environmental damage, as well as impact railroads, communities, and the public. FRA has not estimated the likelihood of such an accident, but this proposed rule is expected to reduce the risk of an accident of that magnitude.

II. Legal Authority

Pursuant to the Rail Safety Improvement Act of 2008, Public Law 110–432, sec. 402, 122 Stat. 4884 (Oct. 16, 2008) (hereinafter ''RSIA''), the Secretary of Transportation (Secretary) was required to submit a report to Congress addressing whether certification of certain crafts or classes of employees, including signal repair and maintenance employees, was necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.[4] If the Secretary determined it was necessary to require the certification of certain crafts or classes of employees to reduce the number and rate of accidents and incidents or to improve railroad safety, section 402 of the RSIA stated the Secretary may prescribe such regulations. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89. In response to the RSIA, the Secretary submitted a report to Congress on November 4, 2015, stating that, based on FRA's preliminary research, dispatchers and signal employees were potentially the most viable candidate railroad crafts for certification. Based on the analysis in Section III below, the Federal Railroad Administrator has determined that it is necessary to require the certification of signal employees to improve railroad safety.

III. Background

1. Roles and Responsibilities of Signal Employees

Railroad signal employees play an integral role in ensuring the safety of railroad operations, as well as the safety of highway motorists. They are responsible for the installation, testing, troubleshooting, repair, and maintenance of signal systems, as defined in proposed 49 CFR 246.7, which railroads utilize to direct train movements. Signal employees must also use specialized test and maintenance equipment to complete safety critical

[3] Numbers in this table and subsequent tables may not sum due to rounding.

[4] *See also* 49 U.S.C. 20103 (providing FRA's general authority to ''prescribe regulations and issue orders for every area of railroad safety'').

tasks on mechanical, electrical, and electronic signal equipment.

The work performed by signal employees can generally be divided into two categories: construction and maintenance. On larger railroads, some signal employees work in groups (often referred to as ''gangs'') under the direct supervision and oversight of an experienced signal employee to construct, install, and upgrade signal systems and signal system subsystems and components. Some signal employees also work in ''gangs'' under the direct supervision and oversight of an experienced signal employee to make repairs to the signal system, while other signal employees (often referred to as ''signal maintainers'') are tasked with inspecting and testing signal systems and performing minor and emergency repairs as needed.

The implementation of complex PTC system technology requires increasingly sophisticated work by signal employees. PTC systems provide another layer of safety to existing signal systems, many of which have been place for many decades. In addition, PTC systems are interoperable with each other, as well as with existing signal systems. Therefore, signal employees need to understand the relationship between signal and PTC systems and the communication medium and how these systems operate, function, and react to a myriad of circumstances. Signal systems and PTC systems are also continually upgraded, so the development and implementation of these systems need to be properly understood and monitored by both FRA and railroad signal employees.

2. FRA History of Certification

On January 4, 1987, an Amtrak train collided with a Conrail train in Chase, Maryland, resulting in 16 deaths and 174 injuries. At the time, it was the deadliest train accident in Amtrak's history. The subsequent investigation by the National Transportation Safety Board concluded that the probable cause of the accident was the impairment of the Conrail engineer who was under the influence of marijuana at the time of the collision.[5]

Following this accident, Congress passed the Rail Safety Improvement Act of 1988, Public Law 100–342, 4, 102 Stat. 624, 625 (1988), which instructed the Secretary of Transportation (Secretary) to ''issue such rules, regulations, orders, and standards as may be necessary to establish a program requiring the licensing or certification of any operator of a locomotive, including any locomotive engineer.'' On June 19, 1991, FRA published a final rule establishing a certification system for locomotive engineers and requiring railroads to ensure that they only certify individuals who met minimum qualification standards.[6] In order to minimize governmental intervention, FRA opted for a certification system where the railroads issue the certificates as opposed to a government-run licensing system. This final rule, published in 49 CFR part 240 (part 240), created certification requirements for engineers that addressed various areas including vision and hearing acuity; training, knowledge, and performance skills; and prior safety conduct.

Seventeen years later, Congress passed the RSIA, which mandated the creation of a certification system for conductors. On November 9, 2011, FRA published a final rule requiring railroads to have certification programs for conductors and to ensure that all certified conductors satisfy minimum Federal safety standards.[7] The conductor certification rule, published in 49 CFR part 242 (part 242), was largely modeled after part 240 with some deviations based on the different job classifications. Part 242 also included some organizational improvements which made the regulation more streamlined than part 240.

3. Statutory Background for Signal Employee Certification

In addition to requiring certification for conductors, the RSIA required the Secretary to submit a report to Congress addressing whether certain other railroad crafts or classes of employees would benefit from certification. Specifically, section 402(b) of the RSIA requires that the Secretary issue a report to Congress ''about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.'' As part of that report, section 402(c) specifically requires the Secretary to consider ''signal repair and maintenance employees'' as one of the railroad crafts for certification.

After identifying a railroad craft or class for which certification is necessary, pursuant to the report to Congress discussed above, section 402(d) authorizes the Secretary to ''prescribe regulations requiring the certification of certain crafts or classes of employees that the Secretary determines . . . are necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.''

4. Report to Congress

On November 4, 2015, the Secretary submitted the report to Congress required under the RSIA. The report stated that, based on FRA's preliminary research, dispatchers and signal repair employees were the most viable candidates for certification, particularly with the introduction of Positive Train Control (PTC) technology. In reaching this determination with respect to signal employees, the Secretary cited a variety of factors.

The report noted that signal employees perform safety-sensitive work as shown by signal employees being covered under the Hours of Service laws. Signal employees are also subject to regular and pre-employment random drug and alcohol testing. In 2012 and 2013, signal employees had a positive drug testing rate that was considerably higher than that of their train and engine service counterparts. Annual drug and alcohol testing data submitted to FRA in 2012 and 2013 showed a 0.75-percent random positive drug rate for signal employees, as compared to a 0.30-percent random positive drug rate for train and engine service employees.[8]

The report also noted that the greatest proportion of contractors covered under the Hours of Service laws are signal employees, who tend to switch employers more frequently than other crafts of employees. In addition, the report noted that frequent job-hopping by signal employees makes it even more important to track their violations and any disqualifications that may result. However, 49 CFR parts 240 and 242 require a five-year alcohol and drug background check, as well as disqualification of employees for specified alcohol and drug test violations and for refusing such testing. If such requirements are included in a signal employee certification program, they could help prevent signal employees with active substance abuse disorders from ''job hopping'' from one employer to another and reduce the safety risk of having individuals with

[5] Railroad Accident Report: Rear-end Collision of Amtrak Passenger Train 94, the Colonial and Consolidated Rail Corporation Freight Train ENS–121, on the Northeast Corridor, Chase, Maryland, January 4, 1987 (144 Nat'l Transp. Safety Bd. 1988).

[6] 56 FR. 28227 (June 19, 1991).

[7] 76 FR 69801 (Nov. 9, 2011).

[8] Testing results submitted to FRA in 2020 and 2021 showed a 0.81-percent random violation (drug and alcohol positives and refusals) rate and a 0.79-percent pre-employment violation rate for signal employees, as compared to a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.

untreated substance abuse disorders working as signal employees.

Another important factor in the report was the nature of the work signal employees perform on wayside signal and train control systems, which are safety-critical for freight and passenger rail operations. The report noted that, in the coming decade, the rail industry will likely lose many experienced signal employees to retirement, while growth in freight, commuter, and intercity passenger rail will require that more signal employees are hired and trained.

The report also summarized the challenges posed by PTC system implementation, while noting the ''increasingly sophisticated work'' involved in the implementation of complex PTC system technology by signal employees.[9] In particular, the report noted that ''signal employees will be required to differentiate between a vital and non-vital PTC system [10] and to address the technicalities of using standalone or overlay PTC systems.'' [11] This combination of factors led to the report's conclusion that signal employees are a potentially viable candidate craft for certification.

5. RSAC Working Group

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task.

On April 21, 2017, a task statement regarding certification of signal employees was presented to the RSAC by email but no vote was taken. On April 24, 2019, the RSAC accepted a task (No. 19–03) entitled, ''Certification of Railroad Signal Employees.'' [12] The purpose of the task was ''[t]o consider whether rail safety would be enhanced by developing guidance, voluntary standards, and/or draft regulatory language for the certification of railroad signal installation, repair, and maintenance workers.'' The task called for the RSAC Signal Employee Working Group (Working Group) to perform the following actions:

—Review critical tasks performed by railroad signalmen for safe train operations, particularly with the introduction of Positive Train Control (PTC) technology;
—Review training duration, content, and methodology for new hires and continuing education.
—Review background checks designed to prevent railroad signalmen with active substance abuse disorders from ''job-hopping'' from one employer to another.

The revised task statement also asked the Working Group to address the following issues, if appropriate:

—What requirements for training and experience are appropriate?
—What classifications of signalmen should be recognized, if any?
—To what extent do existing requirements and procedures for the certification of locomotive engineers and conductors provide a model for signalmen certification?
—What types of unsafe conduct should affect railroad signalmen's certification status?
—Do the existing locomotive engineer and conductor certifications provide an adequate model for handling appeals from decertification decisions of the railroads?

The Working Group, which included representatives from the Association of American Railroads (AAR), American Public Transportation Association (APTA), American Short Line and Regional Railroad Association (ASLRRA), Brotherhood of Railroad Signalmen (BRS), SMART Transportation, Commuter Rail Coalition, and National Railroad Construction & Maintenance Association, held its first and only meeting on September 5, 2019 in Washington, DC At this meeting, the Working Group reviewed the task statement from the RSAC, discussed some of the safety-critical tasks performed by signal employees, and debated whether certification of signal employees would be beneficial to railroad safety. At the end of the meeting, action items were assigned and the next meeting was tentatively scheduled for January 2020.

However, on December 16, 2019, the presidents of the American Train Dispatchers Association, BRS, and the International Brotherhood of Electrical Workers (collectively the ''Unions'') sent a letter to the FRA Administrator requesting that the RSAC task be withdrawn from consideration. The letter stated the Unions were involved in numerous activities and were not able to give the task proper attention. AAR and ASLRRA advised the unions that they were not opposed to this request. In response to this letter, FRA withdrew the task from the RSAC and the Working Group became inactive.

6. Public Outreach

In 2021, FRA revisited the issue of establishing certification requirements for signal employees. The agency assembled subject matter experts from FRA, the International Brotherhood of Electrical Workers (IBEW) and the Brotherhood of Railroad Signalmen to exchange facts or information regarding the tasks performed by signal employees. Those parties met virtually several times between May 5, 2021 and June 30, 2021.

As part of FRA's outreach, a list of tasks performed by signal employees was developed. These tasks generally involved: vital equipment design validation, installation, calibration, testing, maintenance, and repair (interlockings, grade crossings, wayside signal systems, PTC, etc.). FRA reviewed each task to determine whether correctly performing the task was critical to railroad safety; what were the potential consequences if errors were made while performing the task; and whether there were any recent examples of issues or concerns with respect to the task. After performing this analysis, FRA concluded that the vast majority of tasks performed by signal employees (80–90% of the listed tasks) were critical to railroad safety with potentially catastrophic consequences, such as accidents, injuries, and/or deaths, if the tasks were not performed properly.

During FRA's outreach, the benefits of certification based on the experience of stakeholders with engineer and conductor certification under 49 CFR parts 240 and 242 were also discussed. Some of the main benefits of

[9] *See* 2015 DOT Report to Congress on Certification of Railroad Crafts at 3.

[10] PTC systems vary widely in complexity and sophistication based on the level of automation and functionality they implement, the system architecture used, the wayside system upon which they are based (*i.e.,* non-signaled, block signal, cab signal, etc.), and the degree of train control they are capable of assuming. Vital systems are reliable and built upon failsafe principles, while non-vital systems are reliable but not guaranteed to provide failsafe operation.

[11] *See* 2015 DOT Report to Congress on Certification of Railroad Crafts at 3. An overlay system relies upon and supplements an existing wayside signal system or redundant method of operation. A standalone system replaces the existing method of operation.

[12] At the same meeting, the RSAC also accepted a task (No. 19–02) titled ''Certification of Train Dispatchers.'' A separate RSAC Working Group was formed to address this task and FRA plans to issue a related proposed rule that would establish certification requirements for dispatchers.

certification that were identified include:

—Creating a minimum standard for training to ensure that the training encompasses all skills and proficiencies necessary to properly perform all safety-related signal employee functions;
—Establishing a record of safety compliance that will follow a signal employee if they wish to become certified by another railroad and that can be used to review a signal employee's performance and potential training needs;
—Requiring certain safety checks, such as identifying active substance abuse disorders, that can minimize the risks posed by job hopping; and
—Establishing a system for individuals to dispute a railroad's decision to deny or revoke certification with the aim of creating a fair and consistent process for all parties.

Based on these meetings, FRA concluded that requiring certification for signal employees would be an important tool to ensure signal employees performing safety-sensitive tasks are adequately trained and qualified and have a documented record of performance that is accessible to prospective employers.

Following this initial outreach, FRA held a follow-up conversation with BRS and IBEW, on March 3, 2022, and individuals from the BRS and IBEW informed FRA of elements that they believe would be beneficial in a signal employee certification program. During this conversation, which was held in videoconference format, FRA asked the attendees to provide individualized feedback on how similar or different a signal employee certification rule should be to FRA's locomotive engineer and conductor certification rules found in 49 CFR parts 240 and 242.

FRA heard that the agency needs to ensure that comprehensive training is provided to signal employees as the current training is inadequate. FRA also heard that railroads are not providing enough training on new equipment and new technology for signal employees. It was also noted that, in some cases, signal employees are being required to use new equipment and new technology without having received any prior training on the equipment or technology.

On March 7, 2022, FRA had a conversation with the railroad industry, including Norfolk Southern Corporation (NS), ASLRRA, and AAR. During this conversation, which was conducted in a videoconference format, FRA also asked for individualized feedback on how FRA's locomotive engineer and conductor certification regulations in 49 CFR parts 240 and 242 could be improved upon with respect to signal employee certification. Specifically, FRA asked for feedback on any regulatory provisions in 49 CFR parts 240 and 242 that, in their experience, may have been difficult to implement, as well as whether FRA should explore any changes to these regulatory provisions.

AAR expressed opposition to FRA's proposal to issue regulations requiring certification of signal employees arguing that there was not a safety benefit to certification. In addition, NS questioned the need for certification regulations in the absence of any identified gaps in coverage by existing railroad training programs.

ASLRRA expressed concern that FRA's proposal to issue regulations requiring certification of dispatchers and signal employees would result in a big paperwork burden with little benefit. In addition, ASLRRA asserted that most shortline railroads do not have signal systems. With respect to grade crossings, ASLRRA asserted that most shortline railroads rely on contractors to maintain their grade crossing warning systems.

After this conversation, FRA provided a short list of written questions to AAR and ASLRRA. While AAR did not provide additional feedback in response to FRA's list of questions, ASLRRA responded to FRA's list of written questions by email on April 13, 2022, a copy of which has been placed in the docket.[13]

On March 8, 2022, FRA staff had a follow-up conversation with BRS and IBEW to receive information on the types of errors and grade crossing and signal violations that should result in a railroad revoking a signal employee's certification. During this conversation, which was conducted in a videoconference format, FRA heard that it might be appropriate to revoke a signal employee's certification in response to willful violations.

7. Contractors

FRA considered whether railroad contractors (and subcontractors) should be authorized to certify their employees. FRA did not, however, include that option in this proposed rule. Instead, consistent with FRA's engineer and conductor certification regulations, this proposed rule requires railroads to develop and submit certification programs to FRA for approval and then implement their FRA-approved certification programs. FRA is proposing to adopt this approach because railroads are ultimately held responsible for the actions (or failure to act) of their employees, contractors, and subcontractors when engaged in railroad operations.

FRA acknowledges that signal employee tasks are being subcontracted out by railroads to companies that specialize in this work. However, railroads are generally most knowledgeable about the signal systems that have been deployed on their territories. Therefore, railroads are best suited to develop certification programs that are needed to ensure all signal employees responsible for installing, troubleshooting, testing, repair, or maintenance of railroad signal systems, as defined in § 246.7, have been properly trained and certified on: (a) all applicable Federal rail safety laws, regulations, and orders governing the installation, testing, repair, and maintenance of these systems; and (b) all railroad rules and procedures promulgated to implement those Federal rail safety laws, regulations, and orders. In addition, by keeping certification programs in-house, railroads can implement quality control measures to ensure that their FRA-approved certification programs are being implemented properly.

Nonetheless, FRA is soliciting comment on the approach adopted in this proposed rule, which would require railroads to develop and implement FRA-approved signal employee certification programs. To ease any potential burden, especially on Class III railroads, the proposed rule would allow all railroads to choose between conducting the training or using a training program conducted by a third party, which would be adopted and ratified by the railroad. In addition, contractors that employ signal employees could help railroads comply with the requirements in this proposed rule by providing information about their signal employees' compliance with some of the proposed regulatory requirements. For example, contractors could provide information about their signal employees' compliance with the vision and hearing acuity requirements in the proposed rule. Under this proposed rule, however, railroads would ultimately be responsible for ensuring that certified signal employees are installing, testing, maintaining, and repairing their signal systems.

[13] A record of public contact summarizing this meeting has been posted in the rulemaking docket at: *https://www.regulations.gov/document/FRA-2022-0020-0003.*

8. Interaction With Other FRA Regulations

While developing this proposed rule, FRA has been mindful of other regulations that may touch upon topics covered in this proposed rule, including FRA's training, qualification, and oversight regulations in 49 CFR part 243 (part 243); railroad safety risk reduction programs (SSP/RRP) in 49 CFR parts 270 and 271 (parts 270 and 271); and fatigue risk management programs (FRMP) in parts 270 and 271. However, FRA finds that this proposed rule would complement, rather than duplicate, those regulations.

Signal employees are currently included in part 243's requirements for training, qualification, and oversight for safety-related railroad employees. However, part 243 does not require railroads to have formal processes in place for promptly removing signal employees from service if they violate one or more basic regulatory standards that could have a significant negative impact on the safety of rail operations. FRA's proposed signal employee certification requirements have been drafted to help address this void, as well as prevent signal employees who have been fired for committing one or more of the revocable events discussed in the proposed rule from ''job hopping'' and quickly resuming safety-sensitive service at a different railroad that is unaware of the signal employee's prior violation(s) of FRA's rail safety regulations.

As codified in parts 270 and 271, FRA requires Class I railroads, railroads with inadequate safety performance, and passenger rail operations to implement railroad safety risk reduction programs. A railroad safety risk reduction program is a comprehensive, system-oriented approach to safety that determines an operation's level of risk by identifying and analyzing identified hazards and developing strategies to mitigate risks associated with those hazards. In this background, FRA is using the term ''railroad safety risk reduction programs'' to include both a ''system safety program'' (SSP) that is required for certain passenger rail operations [14] and a ''risk reduction program'' (RRP) that is required for a limited number of other rail operations.[15] Although a railroad safety risk reduction program might address a railroad's safety hazards and risks associated with its signal employees, the framework established by these programs neither directly addresses the risks associated with signal systems nor establishes an industry-wide approach.

First, not every railroad is required to have a railroad safety risk reduction program. Indeed, FRA estimates that fewer than 100 railroads (out of approximately 750 railroads under FRA's jurisdiction) will be required to develop a railroad safety risk reduction program over the next 10 years.

Second, even if a railroad is required to have a railroad safety risk reduction program through which it identifies the risks associated with installing, testing, maintaining, and repairing signal systems, the railroad may decide not to implement mitigations to eliminate or reduce those specific risks. Parts 270 and 271 permit railroads to prioritize risks.[16] Whether a railroad is required to have a program that mitigates risks associated with signal systems will depend on how the railroad prioritizes risks for mitigation and how effectively that mitigation would promote continuous safety improvement compared to mitigation of other identified hazards and risks. Thus, even if signal systems are identified as a risk, a railroad may not implement mitigations to eliminate or reduce that risk.

Accordingly, this proposed rule may complement the SSP/RRP requirements but does not duplicate those requirements. Without this proposed rule, railroads may not be required to implement mitigations to address identified safety risks associated with signal systems across the entire industry.

With respect to FRMPs,[17] an FRMP is a comprehensive, system-oriented approach to safety in which a railroad determines its fatigue risk by identifying and analyzing applicable hazards and developing plans to mitigate, if not eliminate, those risks. Like the SSP/RRP rules, the FRMP rule is part of FRA's continual efforts to improve rail safety and satisfies the statutory mandate of Section 103 of the RSIA.[18]

Like the SSP/RRP requirements, there is no guarantee that any railroad covered by the regulation will use an FRMP to address signal issues. As with the SSP/RRP rules, a covered railroad must identify fatigue hazards, assess the risks associated with those fatigue hazards, and prioritize those risks for mitigation purposes. It is possible that other fatigue risks, not associated with signal systems, might rank higher, in which case the risk associated with signal systems might not be promptly mitigated. Further, because the FRMP requirements would apply only to those railroads required to comply with the SSP/RRP requirements, an FRMP would not be required of every railroad. Thus, like the SSP/RRP rules, this proposed rule is complementary to the FRMP final rule and is not duplicative.

IV. Section-by-Section Analysis

Subpart A—General

Subpart A of the proposed rule contains general provisions, including a formal statement of the proposed rule's purpose and scope. The subpart also provides that this proposed rule does not constrain the ability of a railroad to prescribe additional or more stringent requirements for its signal employees that are not inconsistent with this proposed rule.

Section 246.1 Purpose and Scope

This proposed section, derived from 49 CFR 240.1 and 242.1, indicates that the purpose of the proposed rule is to ensure that only those persons who meet minimum Federal safety standards serve as certified signal employees, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

Even though a person may have a job title other than signal employee, the requirements of this proposed rule would apply to that person if they meet the definition of ''signal employee'' without regard to the class or craft of the employee or the manner in which the employee is compensated, if at all. The definition of ''signal employee,'' and an explanation of who is covered by the definition, are discussed in more detail in the section-by-section analysis for § 246.7, below.

Section 246.3 Application and Responsibility for Compliance

The extent of FRA's jurisdiction, and the agency's exercise of that jurisdiction, is well-established. *See* 49 CFR part 209, app. A. This proposed application and responsibility for compliance section is consistent with FRA's *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws* in appendix A to 49 CFR part 209 (Policy Statement).

This proposed section, derived from 49 CFR 240.3 and 242.3, provides that the proposed rule would apply to all railroads with four exceptions.

[14] 49 CFR 270.3 (requiring the application of the system safety program rule to certain passenger rail operations).

[15] 49 CFR 271.3 (requiring the application of the risk reduction program rule to certain rail operations).

[16] *See e.g.,* 49 CFR 270.5 (definition of ''risk-based hazard management'') and 271.103(b)(3).

[17] On June 13, 2022, FRA published a final rule adding a FRMP to the railroad safety risk reduction program requirements in parts 270 and 271. 85 FR 83484.

[18] Codified at 49 U.S.C. 20156.

Paragraph (a)(1) of this section notes that this proposed rule would not apply to railroads that do not have a signal system, as defined in § 246.7. In paragraph (a)(2), FRA proposes to exempt operations that occur within the confines of industrial installations commonly referred to as ''plant railroads'' and typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves. Further explanation of what is meant by the term ''plant railroad'' is provided in the section-by-section analysis for § 246.7.

In paragraph (a)(3), FRA is also proposing to exclude ''tourist, scenic, historic, and excursion operations conducted only on track used exclusively for that purpose . . . and only on track inside an installation that is insular.'' In other words, FRA is proposing to exclude tourist, scenic, historic, or excursion operations conducted only on track where there is no freight, intercity passenger, or commuter passenger railroad operations on the track. In addition, FRA is proposing to consider insularity when determining whether the requirements of this proposed rule apply to a tourist, scenic, historic, or excursion operation. As explained in the Policy Statement, FRA considers a railroad to be ''insular'' if its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of any member of the public (except a business guest, a licensee of the tourist operation or an affiliated entity, or a trespasser) would be affected by the operation. A railroad is not considered insular if one or more of the following exists on its line: (a) A public highway-rail grade crossing that is in use; (b) an at-grade rail crossing that is in use; (c) a bridge over a public road or waters used for commercial navigation; or (d) a common corridor with a railroad (*i.e.,* its operations are within 30 feet of those of any railroad). In addition, when determining insularity for purposes of this proposed rule, FRA would consider whether a public pathway grade crossing is located on the railroad line. FRA is proposing to add this criterion to the determination of insularity for purposes of this proposed rule, in recognition of the potential safety risks associated with the use of public pathway grade crossings by members of the general public.

FRA believes that applying the proposed regulatory requirements in this part to signal employees who work on non-insular passenger rail operations off the general system is warranted by the potential risk to passengers associated with accidents involving heavy motor vehicles. FRA acknowledges that a passenger railroad off the general system may be considered non-insular, yet have only private grade crossings on its line of railroad. Due to the non-insular status of the railroad, signal employees who install, maintain, test, or repair train-activated warning devices at those private grade crossings or who install, maintain, test, or repair signal systems on its line would be subject to this rule.

The final proposed exclusion in § 246.3(a)(4) covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. It should, however, be noted that FRA exercises jurisdiction over some rapid transit type operations, given their links to the general railroad system of transportation, such as rapid transit operations conducted on track used for freight, intercity passenger, or commuter passenger railroad operations, during a block of time during which a general system railroad is not operating (temporal separation). Thus, this proposed rule would apply to persons who perform work on signal systems for those rapid transit type operations.

Paragraph (b) is intended to clarify that any person, as defined in § 246.7 (including a railroad employee or employee of a railroad contractor) who performs a function required by this part will be held responsible for compliance.

Section 246.5 Effect and Construction

This proposed section is derived from 49 CFR 240.5 and 242.5. Paragraph (a) addresses the relationship of this proposed rule to preexisting legal relationships. Paragraph (b) states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this proposed rule.

Paragraph (c) of this section is intended to note that, as a general matter, FRA does not intend to create or prohibit the right to ''flowback'' or take a position on whether ''flowback'' is desirable. The term ''flowback'' has been used in the industry to describe a situation where an employee leaves their current position to return to a previously held position or craft. The reasons for reverting back to the previous craft may derive from personal choice or a less voluntary nature (such as downsizing). Many collective bargaining agreements address the issue of flowback. However, paragraph (c) must be read in conjunction with § 246.213, which would limit flowback in certain situations (*i.e.,* when a certificate is revoked due to an alcohol or drug violation).

Paragraph (d) of this proposed section addresses employee rights. The proposed rule would explicitly preserve any remedy already available to the person and would not create any new entitlements.

Section 246.7 Definitions

This section defines a number of terms that have specific meaning in this proposed part. Some of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter.

Contractor, as defined in this proposed part, would include prime contractors, as well as subcontractors. This definition, which mirrors the definition of ''contractor'' in 49 CFR part 243, has been included in this section to help explain FRA's intent that the requirements of this part which apply to railroad contractors are also intended to apply to railroad subcontractors as well.

Disable, as defined in this proposed part, would mean to render a device [or system] incapable of proper and effective action or to materially impair the functioning of that device. In the interest of consistency, this proposed definition is very similar to the definition of ''disable'' provided in § 218.53 of FRA's railroad operating practices regulations. However, for purposes of this proposed part, the term ''disable'' would include situations in which a device or system is lawfully rendered incapable of proper and effective action.

Consistent with parts 240 and 242, FRA proposes to define ''drug'' as any substance (other than alcohol) that has known mind- or function-altering effects on an individual, specifically including any psychoactive substance and including, but not limited to, controlled substances. This term is intended to refer to substances that have a significant potential for abuse and/or dependence. Normal ingestion of caffeine in beverages and use of nicotine from tobacco products, even though involving some degree of habituation or dependence, are not intended to be included within the definition.

In this proposed part, the terms ''ineligible'' and ''ineligibility'' would be catch-all terms that not only encompass revocation and denial of certification, but also cover other situations in which a signal employee would be legally disqualified from serving as a signal employee. For example, a certified signal employee

may voluntarily refer him or herself for substance abuse counseling or treatment under 242.115(c). If the signal employee then refuses to complete a course of action recommended under the provisions of 49 CFR 219.1003, that would not be an operating rule or procedure, or type of alcohol or drug violation that would require revocation (nor would it require denial of certification). Rather the signal employee would simply remain ''ineligible'' until a railroad determined that the person no longer had a substance abuse disorder, or the person re-entered a substance abuse program and it had been determined under the provisions of 49 CFR 219.1003 that the person could safely return to duty under certain conditions.

In this proposed part, *mentor* would be defined as a certified signal employee who has at least one year of experience as a certified signal employee. FRA is proposing to define the term, ''mentor,'' to help clarify that a mentor provides direct supervision and oversight over the work of one or more signal employees.

In this proposed part, *person* would take on the same meaning as it does in FRA's other safety rules. The proposed definition is intended to clarify that this term does not apply merely to individual persons. Instead, the term would mean ''an entity of any type covered under 1 U.S.C. 1'' and the proposed definition goes into detail regarding the types of people and entities that are covered.

FRA proposes a definition of *plant railroad* to aid in the understanding of the application of this part pursuant to section 246.3(a)(1). The definition coincides with FRA's longstanding explanation of how the agency will not exercise jurisdiction over a plant railroad that does not operate on the general system of transportation and does not move cars for other entities. *See* 49 CFR part 209, app. A.

Although the RSIA required FRA to issue a report to Congress on whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees, including ''signal repair and maintenance employees,'' is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety, the RSIA did not define the term, ''signal repair and maintenance employees.'' In the absence of such a definition in the RSIA, FRA proposes to use the streamlined term, ''signal employee.'' FRA also proposes to define this streamlined term, ''signal employee,'' as a person who is engaged in installing, troubleshooting, testing, repair, or maintenance of railroad signal systems, highway-rail and pathway grade crossing warning systems, unusual contingency detection devices, power-assisted switches, broken rail detection systems, and switch-point indicators, as well as other safety-related devices, appliances, and systems installed on the railroad in signaled or non-signaled territory. This proposed definition is generally consistent with the definition of ''signal employee'' in the hours of service law but includes the terms ''troubleshooting'' and ''testing'' which are not found in the statutory definition.[19]

Consistent with parts 240 and 242, the term ''substance abuse disorder'' is defined as a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation.

This proposed definition would include drug and alcohol users who engage in abuse patterns which result in ongoing safety risks and violations. A substance abuse disorder is ''active'' within the meaning of this proposed rule if the person (1) is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a Substance Abuse Professional (SAP) or Drug and Alcohol Counselor (DAC).

Section 246.9 Waivers

This proposed section, derived from 49 CFR 240.9 and 242.9, provides the proposed requirements for a person seeking a waiver of any section of this proposed rule.

Section 246.11 Penalties and Consequences for Noncompliance

This proposed section, derived from 49 CFR 240.11 and 242.11, explains that FRA may impose civil penalties on any person, including a railroad or a contractor providing goods or services to a railroad, that violates any requirement of this proposed rule. Any person who violates a requirement of this proposed rule may be subject to civil penalties between the minimum and maximum amounts authorized by statute and adjusted for inflation per violation. Individuals may be subject to penalties for willful violations only. Where a pattern of repeated violations, or a grossly negligent violation creates an imminent hazard of death or injury, or causes death or injury, an aggravated maximum penalty may be assessed.[20] Finally, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these proposed regulations.

Consistent with FRA's final rule regarding the removal of civil penalty schedules from the CFR (84 FR 23730 (May 23, 2019)), FRA will not publish a civil penalty schedule for this rule in the CFR, but plans to publish a civil penalty schedule on its website. Penalty schedules are statements of agency policy, thus notice and comment are not required prior to their issuance, nor are they required to be published in the CFR. See 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to suggest the types of actions or omissions under each regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalty amounts may be appropriate, based upon the relative seriousness of each type of violation.

Subpart B—Program and Eligibility Requirements

Section 246.101 Certification Program Required

This proposed section, derived from 49 CFR 240.101 and 242.101, would require railroads to have written certification programs comprised of multiple elements, each of which comports with specific regulatory provisions in the proposed rule related to that element. In addition to these required elements, paragraph (b)(1) would require railroads who elect to classify their certified signal employees into multiple occupational categories (and, in some cases, subcategories) to explain and discuss each category or subcategory of certified signal employees.

Paragraph (c) would require railroads to maintain version control for their certification programs. Therefore, railroads would be required to maintain an up-to-date, detailed list or index

[19] 49 U.S.C. 21101(4). The hours of service law defines ''signal employee'' as ''an individual who is engaged in installing, repairing, or maintaining signal systems.'' 49 U.S.C. 21101(4). While FRA believes ''troubleshooting'' and ''testing'' would fall under the terms ''installing, repairing, or maintaining'' in the hours of service law definition, FRA wanted to make explicit in this rule that ''troubleshooting'' and ''testing'' are included in the definition of ''signal employee.'' The addition of ''troubleshooting'' and ''testing'' in the proposed definition in this rule is not intended to capture a broader group of employees than provided in the hours of service law.

[20] Please visit FRA's website for the current aggravated maximum penalty amount at *https://railroads.dot.gov/.*

tracking every change made to their certification programs. FRA would encourage railroads to maintain a redlined version of their certification programs to reflect changes that have been made over the years in context.

Section 246.103 FRA Review of Certification Programs

This proposed section, derived from 49 CFR 240.103 and 242.103, describes the process for the submission and review of signal employee certification programs. Paragraph (a) of this section applies to railroads that have a signal system, as defined in § 246.7, in operation prior to the effective date of the final rule and provides the deadlines for when these railroads would be required to submit their certification programs to FRA. (Paragraph (a) would not, however, apply to railroads that are exempted by § 246.3(a)). The submission schedule in paragraph (a) would require Class I railroads and commuter service railroads to submit their programs earlier than Class II railroads, Class III railroads, and railroads not otherwise classified. The separate deadlines would help space out the initial influx of programs FRA will receive after the final rule goes into effect, to allow FRA to issue approval and disapproval decisions in a more timely manner. FRA also presumes that, in general, Class I railroads and commuter service railroads will have more resources to devote to creating these programs and will be better positioned to create and draft them more quickly.

Paragraph (b) of this section would only apply to railroads that commence operations after the effective date of the final rule. Prior to installing, implementing, or operating any signal system as defined in § 246.7, these railroads would be required to submit their signal employee certification program to FRA and obtain FRA approval.

Paragraph (c) of this section provides that railroads would submit their programs and their requests for approval (which are described in greater detail in § 246.106(a)) by uploading them to FRA's secure document submission site. This will allow for more efficient processing and will significantly reduce the risk of a program submission getting lost. FRA will need basic information from each railroad before setting up the user's account. In order to provide secure access, information regarding the points of contact will be required. It is anticipated that FRA will be able to approve or disapprove all or part of a program and generate automated notifications by email to a railroad's points of contact.

FRA does not intend to develop a secure document submission site that would allow confidential materials to be identified and not shared with the general public. This is because FRA does not expect the information in a program to be confidential or proprietary, particularly since each railroad would be required to share the program submission, resubmission, or material modification with the president of each labor organization that represents the railroad's certified signal employees and the program will be available on FRA's website. *See* § 246.103(d) and (j). Accordingly, FRA does not at this time believe it is necessary to develop a document submission system to address confidential materials.

When a railroad submits its certification program to FRA, paragraph (d) of this section would require the railroad to also submit a copy of the program and the request for approval to the president of each labor organization that represents the railroad's signal employees and to all of the railroad's signal employees who would be subject to this part. The railroad's submission to FRA must include a statement affirming that it has provided a copy of the program and the request for approval to the president of each labor organization that represents its signal employees and to all of the railroad's signal employees who would be subject to this part. In addition, the railroad would be required to include a list of the names and email addresses of each labor organization president who received a copy of the program.

Paragraph (e) of this section explains who would be allowed to comment on these programs. For signal employees who are members of a labor union, any comments must be submitted by a designated representative. Signal employees who are not members of a labor union would, however, be permitted to personally submit comments on their railroad's certification program. FRA anticipates that comments submitted through this process will assist the agency in determining whether a program conforms to the requirements set forth in this rule, and thus, FRA will not make a decision on a program until after the 45-day comment period in paragraph (e)(1) has passed.

Paragraph (f) of this section states FRA's aspirational goal to decide on whether to approve a program within 90 days of the date that the program is submitted. However, this would only be a goal and not a deadline for the agency. Paragraph (f)(3) explains that if FRA is unable to issue a decision on the program within 90 days, the program will not be considered approved on the 91st day. A certification program will not be approved until FRA issues a letter notifying the railroad that its program has been approved. While FRA will make every effort to issue approval and disapproval letters within 90 days, FRA recognizes that this will not always be possible. It may be especially difficult for FRA to meet this goal during the initial implementation of the final rule issued in this rulemaking when FRA expects to receive many certification programs within a relatively short period of time.

Paragraph (g) of this section addresses the process for railroads who wish to materially modify their previously approved programs. If a railroad wishes to materially modify its certification program, it must submit two documents to FRA: (1) a description of how it intends to modify its current program (this constitutes the request for approval required under § 246.106(a)); and (2) a copy of the modified program. Paragraph (g)(1) defines a ''material modification'' as a modification that ''would affect the program's conformance with this part.'' This definition is taken from 49 CFR 240.103(h)(1) and 242.103(i)(1) and is intentionally broad to cover many different types of program modifications. FRA recognizes that there may be some desire among some interested parties to have a more specific definition of ''material modification'' in the regulation. Thus, FRA welcomes any comments on suggested changes to the proposed definition of ''material modification.''

Paragraph (g)(3) explains that the process for submission and review of material modifications mirrors the process for submission and review of initial certification programs. Railroads would be required to submit their material modifications to FRA in conformance with paragraph (c) of this section and would be required to send a copy of the material modification description and the modified program to all required parties referenced in paragraph (d) of this section. Certain interested parties would be allowed to comment on the modification in conformance with paragraph (e) of this section, and FRA would issue a letter either approving or disapproving the material modification in conformance with paragraph (f) of this section. If FRA approves the material modification, the railroad could begin implementing the modification and the modified program would replace the original program. If

FRA disapproves the material modification, the railroad would not be allowed to implement the modification and the original program must remain in effect. If a railroad's material modification submission contains multiple modifications, FRA reserves the right to approve some modifications while disapproving other modifications. In such an instance, the railroad could only begin implementing those modifications that FRA has approved.

Paragraph (h) of this section describes the process to resubmit a program or material modification that was previously disapproved by FRA. Paragraph (h)(2) notes that the process for submission and review of resubmitted programs and material modifications mirrors the process for submission and review of initial certification programs. Railroads would resubmit their initial programs or material modifications to FRA in conformance with paragraph (c) of this section and would send a copy of the resubmitted program or material modification to all required parties referenced in paragraph (d) of this section. Certain interested parties would be allowed to comment on the resubmitted program or material modification in conformance with paragraph (e) of this section and FRA would issue a letter either approving or disapproving the resubmitted program or material modification in conformance with paragraph (f) of this section.

Railroads would, however, remain responsible for maintaining their signal systems, as defined in § 246.7, in compliance with Federal regulations even if rail operations cease or have not yet been initiated.

Paragraph (h)(3) provides the deadlines, if any, for when a railroad must resubmit its certification program or material modification to FRA. For railroads that have installed or implemented a signal system, as defined in § 246.7, prior to the effective date of the final rule (legacy railroads), if their initial certification program is disapproved by FRA, the railroad would be required to resubmit its program within 30 days of the date FRA notified the railroad that its program was deficient. If a legacy railroad fails to resubmit its program within 30 days and continues operations, FRA may use its enforcement discretion to determine whether enforcement action against the railroad is warranted.

FRA believes a 30-day deadline is needed for legacy railroads because § 246.105(a) allows legacy railroads to continue operations while they await FRA approval of their programs. Thus, without a deadline, legacy railroads could purposely delay coming into compliance with the final rule issued in this rulemaking by taking months or even years to resubmit their programs. In contrast, railroads that begin operations after the effective date of the final rule cannot begin operations until FRA approves their program. Likewise, no railroad (legacy or non-legacy) can implement a material modification to its program until FRA has approved the modification. In these scenarios, a deadline is unnecessary because the railroad has every incentive to resubmit its programs or material modifications in a timely manner. However, while there is no FRA-imposed deadline in these scenarios, FRA still recommends that railroads provide their resubmissions within 30 days of being notified of deficiencies.

Paragraph (i) of this section acknowledges that FRA reserves the right to revisit its prior approval of a certification program. In certain circumstances, including an audit of a certification program, FRA may discover that it made an error when it previously approved a program. This paragraph allows FRA to rescind a wrongful prior approval while also providing the railroads with certain rights. Paragraph (i)(3) notes that the process for submission and review of programs whose prior approval has been rescinded mirrors the process for submission and review of initial certification programs and resubmission of initially disapproved programs. Railroads would resubmit their programs to FRA in conformance with paragraph (c) of this section and they would send a copy of the resubmitted program to all required parties referenced in paragraph (d) of this section. Certain interested parties would be allowed to comment on the resubmitted program in conformance with paragraph (e) of this section, and FRA would issue a letter either approving or disapproving the resubmitted program in conformance with paragraph (f) of this section.

Paragraphs (i)(6) and (i)(7) allow for a grace period where a rescinded program may remain in effect for a certain period of time. However, once FRA approves a resubmitted program, the resubmitted program must replace the rescinded program. In addition, a rescinded program can no longer remain in effect if FRA has twice disapproved the railroad's resubmitted program. This latter scenario is best explained through an example: On February 10th, FRA notifies ABC Railroad (ABC) that FRA is rescinding its prior approval of the railroad's signal employee certification program. On March 10th, ABC resubmits its program to FRA. On June 10th, FRA disapproves ABC's resubmitted program. On July 10th, ABC sends FRA its second resubmitted program. On October 10th, FRA issues a letter once again disapproving ABC's program. In this example, ABC's rescinded program could remain in effect between February 10th and October 10th. However, after October 10th, the rescinded program could no longer be in effect. If ABC continued to operate its signal system after October 10th, when it did not have an FRA-approved certification program, FRA could find that the railroad failed to implement a program. In such cases, FRA would determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising its enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to address the deficiencies in its resubmissions.

Finally, paragraph (j) of this section notes that the following documents would be made available on FRA's website (*railroads.dot.gov*): (1) certification programs and material modifications submitted by the railroads; (2) any comments to the submissions from the railroads; and (3) the letters from FRA approving or disapproving a program or a material modification. While parts 240 and 242 do not currently require the posting of these documents on FRA's website, the current practice with respect to locomotive engineer and conductor certification programs has been for FRA to post comments on a railroad's submission, as well as FRA approval and disapproval letters, on its website. Paragraph (j) of this section in this proposed rule is intended to make the proposed review and approval process for railroad signal employee certification programs as transparent as possible.

Section 246.105 Implementation Schedule for Certification Programs

This section, derived from 49 CFR 240.201 and 242.105, contains the timetable for implementing this proposed rule. Paragraph (a) of this section acknowledges railroads that have installed or implemented a signal system, as defined in § 246.7, prior to the effective date of the final rule may continue their rail operations while they await FRA's approval of their certification programs. However, if FRA disapproves a legacy railroad's certification program twice (the initial

submission and the first resubmission), the railroad will no longer be in compliance with the rule if it continues to operate its signal system without an FRA-approved program. In such a scenario, FRA could find that the railroad has failed to implement a program and would determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising this enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to comply with the requirements of the rule through its submitted program. Paragraph (b) provides that any non-legacy railroad (a railroad that did not have any signal system, as defined in § 246.7, installed or implemented prior to the effective date of the final rule) may not install or implement a signal system until FRA has approved its signal employee certification program.

Paragraph (c) of this section would require railroads to designate as certified signal employees, in writing, all persons authorized by the railroad to perform the duties of each category or subcategory of certified signal employee identified by the railroad pursuant to § 246.107 as of the effective date of the final rule. Similarly, paragraph (d) of this section would require railroads to designate as certified signal employees, in writing, all such persons authorized by the railroad to perform the duties of certified signal employees pursuant to § 246.107 between the effective date of the final rule and the date FRA approves the railroad's certification program. Railroads would also be required to issue a certificate to each person they designate. This designation system is modeled after the system used when parts 240 and 242 first went into effect. This system allows ''legacy signal employees'' to obtain certificates so that when their railroad's program is approved, they will be considered ''previously certified signal employees'' when the time comes for them to be recertified through the railroad's signal employee certification program. Therefore, the recertifying railroad will not have to provide legacy certified signal employees with the kind of basic training that would be given to individuals with little to no signal experience. In other words, a person with 20 years of experience as a signal employee most likely does not need to take a ''Signal 101'' course that provides a basic overview of signal systems and related technology. Instead, this person would be better served by undergoing continuing education training as described in §§ 246.107(b)(2) and 246.119(j).

Paragraph (e) of this section states that after the final rule has been in effect for eight months, no person would be permitted to serve as a certified signal employee unless that person has been certified. Paragraph (f) of this section requires each railroad to make formal determinations concerning those individuals it has designated as certified signal employees within three years after FRA's approval of the railroad's certification program. Pursuant to this paragraph, a designated signal employee may serve as a certified signal employee for up to three years from the date of FRA's approval of the program. At the end of three years, however, the designated signal employee can no longer serve as a certified signal employee unless they successfully complete the tests and evaluations provided in subpart B of this rule (*i.e.,* the full certification process).

Thus, individuals who are designated as certified signal employees under paragraphs (c) and (d) of this section could be certified for more than three years before they have to complete the railroad's full certification process. For example, if a person is designated as a certified signal employee on September 1, 2024, and FRA approves the railroad's certification program on September 1, 2025, the signal employee would not have to go through the full certification process and get recertified until September 1, 2028 (four years from the date the individual was designated by the railroad as a certified signal employee). Railroads should note that they may not test and evaluate a designated signal employee or signal employee certification candidate under subpart B of this rule until they have a certification program approved by FRA pursuant to § 246.103.

In order to test and evaluate all of its designated signal employees by the end of the three-year period, a large railroad would likely have to begin that process well in advance of the end of the three-year period. For example, paragraph (f), which is derived from the designation provisions in parts 240 and 242, would permit a railroad to test and evaluate one-third of its designated signal employees within one year of the approval date of the railroad's certification program; another one-third within two years of the program's approval date; and the final one-third within three years of the program's approval date.

To address the issue of designated signal employees who would be eligible to retire within three years of the date FRA approves their railroad's certification program, FRA is proposing paragraphs (f)(1) through (3) in this section since it would not be an efficient use of railroad resources to conduct the full certification process for a designated signal employee who is going to retire before the end of their designation period. Paragraph (f)(1) provides that a designated signal employee, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date FRA approves the railroad's certification program, may request in writing that the railroad not perform the full certification progress on that designated signal employee until three years from the date FRA approves the railroad's program.

Paragraph (f)(2) would allow the railroad to honor the designated signal employee's request. Thus, paragraphs (f)(1) and (2) allow designated signal employees to serve as signal employees for the full designation period and then retire before being subjected to the full certification process. While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the designation period expires, and thus, in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of designated signal employees properly request that the railroad wait to recertify them at the end of the designation period, but then do not retire by the end of the designation period, the railroad might not be able to recertify everyone in time and would risk violating this rule. In recognition of that risk and the need to give railroads some flexibility to comply with the rule, paragraph (f)(2) also provides that a railroad granting any request to delay performance of the full certification process must grant the request of all eligible persons ''to every extent possible.''

In addition, paragraph (f)(3) provides that a designated signal employee who is also subject to recertification under part 240 or 242 may not make a request under paragraph (f)(1) of this section. This provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified signal employee and a certified locomotive engineer or conductor. Thus, it would not be appropriate, in that instance, for a designated signal employee who is already subject to recertification under part 240 or 242 to

make a request to delay the full signal employee certification process.

Paragraph (g) of this section provides that after FRA approves a railroad's certification program, the railroad cannot certify or recertify a person as a signal employee unless that person has been tested and evaluated in accordance with the procedures provided in subpart B of this rule. In other words, after FRA approves a railroad's program, that railroad can no longer designate persons as certified signal employees under paragraph (c) or (d) of this section.

Section 246.106 Requirements for Certification Programs

This proposed section, derived from Appendix B to part 240 and Appendix B to part 242, provides both the proposed organizational requirements and a narrative description of the submission required under §§ 246.101 and 246.103. FRA is not proposing to require railroad submissions to be made on a specific form. Instead, FRA proposes to prescribe only minimal constraints on the organization and manner of presenting information.

Paragraph (a) of this section addresses what must be included in a railroad's submission to FRA. Specifically, the railroad must include two documents in its submission: (1) a request for approval; and (2) the certification program. If a railroad is submitting its initial certification program, the request for approval can be a brief document that simply states the railroad is submitting its initial signal employee certification program to FRA for approval. However, if a railroad is making a material modification or modifications to a signal employee certification program that has previously been approved by FRA, the request for approval must describe how the railroad intends to modify its program. In addition, the railroad must provide a copy of the modified certification program that identifies all of the proposed changes from the last FRA-approved version of the program, as required by section 246.103(g).

Paragraph (b) of this section would require that signal employee certification programs be divided into six sections, each dealing with a different subject matter, and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program. Paragraph (b)(1) would require railroads to include basic contact information in Section One of their certification programs and to address whether the railroad elects to accept responsibility for training persons not previously certified as signal employees. However, for railroads that elect to classify their certified signal employees into more than one occupational category or subcategory by class, task, location, or other suitable terminology, paragraph (b)(1) would require the railroad to provide detailed information about each occupational category (and subcategory, if applicable) of certified signal service in Section One of its certification program.

Paragraph (b)(2) would require railroads to address in Section Two of their certification programs how they will provide continuing education for certified signal employees. A matter of particular concern to FRA is how each railroad will ensure that certified signal employees receive sufficient training on new signal systems and related technology that are deployed on the railroad's territory. While a railroad would have the latitude to select the specific subject matters to be covered, the duration of continuing education sessions, the methods of presenting the information, and the frequency with which continuing education will be provided, the railroad must describe in this section how it will use that latitude to ensure that its certified signal employees receive up-to-date and comprehensive training on new signal systems and related technology so as to comply with the training standards set forth in § 246.119(j).

However, time and circumstances can diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances can also alter the value of previously obtained knowledge and the application of that knowledge. Therefore, certified signal employees also need to have their fundamental knowledge of applicable Federal laws and regulations, as well as railroad signal system safety rules and practices, refreshed periodically. Therefore, the railroad must also describe in Section Two how it will ensure that its certified signal employees remain knowledgeable concerning the safe discharge of their responsibilities, in accordance with the standard set forth in § 246.119(j).

Section Three of the certification program must address requirements for the testing and evaluation of previously certified signal employees. Paragraph (b)(3)(i) would require railroads to address how their certification programs will comply with the standards found in § 246.121. Section 246.121 would require railroads, when seeking a demonstration of the signal employee's knowledge, to employ a written or electronic test containing objective questions that address the following subject matters: (i) compliance with all applicable Federal railroad safety laws, regulations, and orders governing signal systems and related technology; (ii) compliance with all applicable railroad safety and operating rules; and (iii) compliance with all applicable railroad standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems and related technology. In addition, the test must also include a practical demonstration component. Paragraph (b)(3)(ii) would also require railroads, in their certification programs, to explain their procedures for testing vision and hearing acuity and for ensuring that their medical examiners have sufficient knowledge to make determinations on whether candidates for signal employee certification or recertification can safely work as certified signal employees.

Section Four of the certification program would address the requirements for training, testing, and evaluating persons not previously certified as signal employees. Railroads that elect, in Section One of the certification programs, to not take responsibility for training persons not previously certified as signal employees can skip this section. Paragraph (b)(4) would require railroads that elect to provide training to persons who have not been previously certified as signal employees to provide details in Section Four for how they will train, test, and evaluate these individuals to ensure they acquire and demonstrate sufficient knowledge and skills to safely perform the job of a certified signal employee. Paragraph (b)(4)(i) would also require railroads to discuss in Section Four its procedures for mentoring candidates for signal employee certification, in accordance with § 246.124.

Paragraph (b)(4)(ii) would require railroads to include the same level of detail in Section Four of their certification programs as that provided in Sections Two and Three of their programs. Therefore, railroads would be required to address both the training requirements found in § 246.119 and the knowledge testing requirements in § 246.121.

If a railroad intends to rely on another entity to provide training to persons not previously certified as signal employees, paragraph (b)(4)(iii) would require the railroad to explain in Section Four how the railroad will ensure that the training provided by another entity adheres to the railroad's certification program. Specifically, the railroad would be required to explain how persons not previously certified as signal employees will be given the required training on

the railroad's signal systems and related technology.

Paragraph (b)(5) would require railroads to discuss in Section Five of their certification programs how the railroad will monitor the operational performance of its certified signal employees in accordance with § 246.123. In particular, the railroad must discuss the processes and procedures it will use for ensuring that such monitoring and testing is performed. This includes a description of the scoring system the railroad will employ during monitoring observations and unannounced tests.

Finally, paragraph (b)(6) would require railroads to address in Section Six of their certification programs how the railroad will perform routine administration of the program. This section must include summaries of how the program will comply with the various provisions listed in paragraph (b)(6) that contain procedural requirements for railroad certification programs.

Section 246.107 Signal Service Classifications

This proposed section would permit, but not require, railroads to issue certificates for one or more occupational categories or subcategories of certified signal employee service. While some railroads with only one type of signal employee service might not have any interest in certifying multiple types of signal employee service, larger railroads that have already established multiple categories of signal employee service (such as signal maintainers, signal inspectors, locomotive signal/electrical technicians, etc.) on their territories may find it beneficial to issue certificates for multiple types of signal employee service. Therefore, by allowing railroads to classify their certified signal employees into multiple occupational categories or subcategories, FRA would give railroads the flexibility to shape the structure of their certification programs to highlight the specific tasks and responsibilities for each category and subcategory of certified signal employee working on their territories.

A railroad that classifies its certified signal employees into separate categories, such as signal maintainers, signal inspectors, and locomotive signal/electrical technicians, would be permitted to issue specific certificates for each category of signal employee service. This proposed section would also allow railroads to certify signal employees for signal system work on specific railroad divisions or subdivisions, as opposed to issuing one universal signal employee certificate that would certify the signal employee to perform signal system work anywhere on the certifying railroad's territory. As further explained in the Section-by-Section Analysis of § 246.106(b), railroads that choose to classify their certified signal employees into multiple occupational categories and subcategories would be required by § 246.106(b)(1)(iv) to provide detailed information about each occupational category (and subcategory, if applicable) of its certified signal employees.

Paragraph (b) of this section would require certified signal employees to immediately notify the railroad (or their employer, if they are not employed by a railroad) if they are called to work on a signal system or signal-related technology on which they have not been certified. When notified that a certified signal employee has been called to work on a signal system or signal-related technology on which the employee has not been certified, paragraph (c) would prohibit the railroad from requiring the certified signal employee to work on the signal system or signal-related technology unless the certified signal employee is allowed to work under the direct oversight and supervision of a mentor in accordance with § 246.124.

Section 246.109 Determinations Required for Certification and Recertification

This proposed section lists the determinations that would be required for evaluating a candidate's eligibility to be certified or recertified. The reference to § 246.303 in paragraph (a)(2) of this section is to ensure railroads determine whether a candidate is eligible to hold a certification by reviewing any prior revocations addressed in subpart D of this rule.

Despite the reference in paragraph (a)(1) of this section to provisions in §§ 246.111 and 246.113 requiring a review of safety conduct information from the preceding five years, § 246.113(g)(1) would not permit a railroad to consider information concerning safety conduct that occurred prior to the effective date of the final rule issued in this rulemaking. Even though this provision would result in a railroad's evaluation of less than five years' worth of information for some signal employees early on in the rule's effective period, it is included in part 246 for the same reason similar provisions were included in parts 240 and 242—namely, that all signal employees should be permitted to start with a ''clean slate'' for certification purposes as a matter of basic fairness. See 56 FR 28228, 28242 (June 19, 1991).

Paragraph (b) of this section would provide flexibility to railroads and signal employees or signal employee candidates in obtaining the information required by §§ 246.111 and 246.113. For example, in some states, railroads may be able to obtain motor vehicle operator data for signal employees and signal employee candidates through background checks.

Section 246.111 Prior Safety Conduct as Motor Vehicle Operator

This proposed section, derived from 49 CFR 240.111, 240.115, and 242.111, would provide the requirements and procedures that a railroad would be required to follow when evaluating a certified signal employee or certification candidate's prior safety conduct as a motor vehicle operator. FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a signal employee would be required to request in writing that the chief of each driver licensing agency that issued them a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this proposed rule would not require individuals to also request motor vehicle operator information from the National Driver Registry (NDR). Based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR part 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified signal employees.

Paragraphs (b) and (c) of this section would require a railroad to certify or recertify a person for 60 days if the person: (1) requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5). If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (b) and (c) but is unable to obtain and evaluate the required information during those 60 days, the person would be ineligible to perform as a certified signal employee until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would be required to certify or recertify a person if the person

otherwise meets the eligibility requirements of § 246.109(a)(1) through (5).

Paragraph (k) of this section would require certified signal employees or persons seeking certification as signal employees to notify their employer (if employed by a railroad or contractor to a railroad), all prospective certifying railroads (if applicable), and all railroads with whom the person holds a signal employee certificate of motor vehicle incidents described in paragraph (m) of this section within 48 hours of the conviction or completed State action to cancel, revoke, suspend, or deny their motor vehicle driver's license for such incidents. Paragraph (k) would also prohibit railroads from having a more restrictive company rule requiring certified signal employees or persons seeking signal employee certification to report a conviction or completed State action to cancel, revoke, or deny a motor vehicle driver's license in less than 48 hours.

The reasoning behind proposed paragraph (k) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person ineligible for certification until that person has received due process from the State agency taking the action against the motor vehicle license. Further, by not requiring reporting until 48 hours after the completed State action, the proposed rule would have the practical effect of ensuring that a required referral to a drug and alcohol counselor (DAC) under paragraph (n) of this section would not occur prematurely. However, proposed paragraph (k) would not prevent an eligible person from choosing to voluntarily self-refer. Nor would it prevent the railroad from referring the person for an evaluation under an internal railroad policy if other information exists that identifies the person as possibly having a substance abuse disorder.

Paragraph (n) of this section would provide that if a motor vehicle incident described in paragraph (m) is identified, the railroad would be required to provide the data to its DAC along with ''any information concerning the person's railroad service record.'' Furthermore, the person would have to be referred for evaluation to determine whether the person has an active substance abuse disorder. If the person has an active substance abuse disorder, the person would not be eligible for certification. However, even if it is determined that the person is not currently affected by an active substance abuse disorder, the railroad would be required, if recommended by a DAC, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs or both. The intent of this proposed provision is to use motor vehicle records to identify signal employees or candidates for signal employee certification who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service. Any testing performed as a result of a DAC's recommendation under paragraph (n) would be done under company authority, not Federal. However, the testing would be required to comply with the ''technical standards'' of part 219, subpart H, and part 40.

Paragraph (n)(5) is intended to clarify that failure to cooperate in the DAC evaluation discussed in paragraphs (n)(2) of this section would result in the person being ineligible to perform as a certified signal employee until such time as the person cooperates in the evaluation.

Section 246.113 Prior Safety Conduct With Other Railroads

This proposed section, which is derived from 49 CFR 240.113, 240.205, and 242.113, would establish a process for certification candidates to request information about their prior safety conduct when employed or certified by another railroad. Except as otherwise provided by the retroactive time limit contained in paragraph (g) of this section, this section would require railroads to review records provided by railroads that previously employed or certified the certification candidate regarding the candidate's prior compliance with §§ 246.115 and 246.303 within the previous five years, as well as the candidate's motor vehicle driving record within the previous three years.

Paragraph (b) of this section contains an exception that if a certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request pursuant to paragraph (c) of this section. Such candidates, however, must notify the railroad where they are seeking certification of this fact. This exception should help minimize any burden arising from these proposed requirements.

For certification candidates who do not qualify for the exception provided in paragraph (b), paragraph (c) would require the certification candidate to submit a written request to each railroad that employed or certified the candidate within the previous five years. As indicated earlier, the written request would direct the previous railroad employer or certifying railroad to provide information about the certification candidate's prior compliance with §§ 246.115 and 246.303 within the previous five years, as well as the candidate's motor vehicle driving record within the previous three years from the date of the written request.

In addition, railroads would be required by paragraph (e) to comply with written requests for records of prior safety conduct submitted by former employees or certified signal employees pursuant to this section within 30 days after receipt of such requests. Railroads that are unable to provide information about prior safety conduct within 30 days would be required by paragraph (f) to either: (1) provide a written explanation of why the railroad cannot provide the information within the requested time frame, along with an estimate of how much time will be needed to supply the requested information; or (2) provide an adequate explanation for why the railroad cannot provide the information requested.

In the event a railroad seeking to certify or recertify a certification candidate receives a written statement from another railroad pursuant to paragraph (f) of this section, which explains that the railroad cannot provide the information requested, the railroad seeking to certify or recertify the certification candidate would be deemed to have complied with the eligibility determination required by paragraph (a) of this section, provided the railroad retains a copy of the other railroad's written statement in its records.

Similarly, in the event a railroad seeking to certify or recertify a certification candidate does not receive a written response from other railroads, the railroad would be deemed to have complied with the eligibility determination required by paragraph (a) of this section provided the railroad retains a copy of its written request for this information in its records.

Section 246.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance

This proposed section, which is derived from 49 CFR 240.119, 240.205, and 242.115, addresses: (1) active substance abuse disorders; and (2) specific alcohol/drug regulatory violations. As noted earlier, annual drug and alcohol testing data submitted to FRA revealed that signal employees had

a random violation rate (drug and alcohol positives and refusals) and a pre-employment violation rate that was considerably higher than their train and engine service counterparts.

Therefore, this section and § 246.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not preclude the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance and other indicators may, to the extent not immediately explicable, indicate the need for an evaluation under internal policies of the railroad.

The purpose of identifying conditions is not to require (and does not require) a railroad to order an evaluation any time a listed condition is exhibited. Rather, FRA is simply providing guidance here as to conditions that may, given the context, call for an evaluation under internal policies of the railroad. Moreover, FRA remains vigilant of harassment and intimidation and will take appropriate action if such conduct is discovered.

Paragraph (a) of this section would require railroads to determine that a person initially certifying, or a signal employee recertifying, meets the eligibility requirements of this section. In addition, each railroad would be required by § 246.203 to retain the documents used to make that determination.

Paragraph (c) of this section would prohibit a person with an active substance abuse disorder from being certified as a signal employee. This means appropriate action must be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (c) would also provide a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (d) would address conduct constituting a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. Section 219.101(a)(1) prohibits regulated employees from using or possessing alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad. Section 219.101(a)(2) prohibits regulated employees from reporting for regulated service, or going on or remaining on duty in regulated service, while under the influence of (or impaired by) alcohol or while having a breath or blood alcohol concentration of 0.04 or more. A regulated employee is also prohibited from using alcohol either within four hours of reporting for regulated service or after receiving notice to report for regulated service, whichever is less. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a regulated employee, at any time, whether on or off duty, except for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established, based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after an SAP evaluation, any needed treatment and/or education, and a negative return-to-duty test, and is subject to follow-up testing (as required by § 219.104). These requirements constitute an absolute minimum standard for action when a signal employee is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has had prior violations.

This proposed rule would require railroads to consider conduct that occurred within the period of five consecutive years prior to the review. This is the same period provided in this proposed rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in parts 240 and 242. Use of a 5-year cycle reflects railroad industry experience indicating that conduct committed as much as 5 years before may tend to predict future alcohol or drug abuse behavior. For example, in analyzing data submitted to FRA between 2017 and 2021, FRA found that railroad employees returning to duty from previous drug or alcohol violations were approximately five times more likely to test positive than other railroad employees. Of course, railroads would retain the flexibility to consider prior conduct (including conduct more than 5 years prior) in determining whom they will hire as signal employees.

Conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a signal employee in order to be considered. For instance, an employee who violated § 219.101 while working as a conductor and then sought signal employee certification six months later (under the provision described below) would not be eligible for certification. The same is true under part 240—an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The responsibility of the railroad would therefore not be limited to periodic recertification. This proposed rule would require a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The proposed rule would require a determination of ineligibility for a period of 9 months for an initial violation of § 219.101. This would parallel the 9-month ineligibility period in §§ 240.119(c)(4)(iii) and 242.115(e)(4)(iii).

Specifying a period of ineligibility serves the interest of deterrence while giving further encouragement to deal with the problem before it is detected by management. In order to preserve and encourage referrals, the nine-month period could only be waived in the case of a qualifying referral (*see* § 219.1001). FRA believes that this distinction in treatment, which is also found in part 242, is warranted as a strong inducement to participation because referral programs help identify troubled employees before those employees get into accidents and incidents.

In the case of a second violation of § 219.101, the signal employee would be ineligible for a period of five years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely that any individual so situated may also be permanently dismissed from employment. However, it would be important that the employing railroad follow through and revoke the certificate under this proposed rule, so the signal employee could not go to work for another railroad (or railroad contractor) within the five-year period using the unexpired certificate issued by the first railroad as the basis for certification. These proposed sanctions

mirror the sanctions in §§ 240.119 and 242.115.

Under this proposed rule, one violation of § 219.102 within the 5-year window would require only temporary suspension and the minimum response described in § 246.115(e) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach taken in parts 240 and 242 and reflects FRA's intent to not undercut the therapeutic approach to drug abuse employed by many railroads. This approach permits first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances, and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the employee to a mandatory two-year period of ineligibility. A third violation within five years would lead to a five-year period of ineligibility.

This proposed rule also addresses violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for three years; and the same would be true for the reverse sequence. This mirrors the ineligibility period for locomotive engineers and conductors who have one § 219.101 violation and one § 219.102 violation. *See* 49 CFR 240.119(e)(4)(ii) and 242.115(e)(4)(ii).

Refusals to participate in chemical tests would be treated as if the test were positive. A refusal to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative would be treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal to provide a breath sample for alcohol testing, or a blood specimen for mandatory post-accident toxicological testing; or (2) § 219.102, in the case of a refusal to provide a body fluid specimen for drug testing.

Interested parties should, however, note that 49 CFR part 40, subpart I, discusses medical conditions under which an individual's failure to provide a sufficient sample would not be deemed a refusal. In addition, subpart G of FRA's alcohol and drug regulations excuses employees from compliance with the requirement to participate in random drug and alcohol testing if the employee can substantiate a medical emergency involving the employee or an immediate family member. *See* 49 CFR 219.617.

If an employee covered by 49 CFR part 219 refuses to provide a breath or body fluid specimen or specimens when required to by a railroad pursuant to a mandatory provision of 49 CFR part 219, then the railroad (apart from any action it takes under part 246) would be required to remove that employee from regulated service and disqualify the employee from working in regulated service for nine months. *See* 49 CFR 219.104 and 219.107; *see also,* 49 CFR part 219, subpart H, and 49 CFR 40.191 and 40.261. The employee would also be prohibited by § 246.213(c) from working as a certified signal employee for any other railroad during this 9-month period.

Paragraph (e) prescribes the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of FRA's alcohol/drug regulations. These conditions are derived from the conditions in §§ 240.119(d) and 242.115(f) and closely parallel the return-to-duty provisions of the alcohol/drug rule. The proposed regulation would not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, the railroad that intends to withdraw its conditional certification would be required to afford the signal employee the hearing procedures provided by § 246.307 if the signal employee does not waive their right to the hearing.

Paragraph (f) would ensure that a signal employee, like any other covered employee, can self-refer for treatment under the alcohol/drug rule (49 CFR 219.1003) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice from the DAC of any substance abuse disorder identified as a result of a voluntary self-referral under 49 CFR 219.1003. However, paragraph (f) would also require that the railroad policy provide that confidentiality is waived if the signal employee at any time refuses to cooperate in a recommended course of counseling or treatment, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this proposed provision is that the certification status of a signal employee who seeks help and cooperates in treatment would not be affected, unless the signal employee fails to follow through.

Section 246.117 Vision Acuity

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for vision acuity testing that a railroad would have to incorporate in its signal employee certification program. This section differs from its analogous sections in 49 CFR parts 240 and 242 in that 40 CFR parts 240 and 242 address the requirements of vision and hearing acuity in the same section. However, FRA determined that for this proposed rule, it could more clearly present these requirements if they are in two separate sections: one section for vision acuity (§ 246.117) and one section for hearing acuity (§ 246.118).

Paragraph (c) of this section contains the general vision standards that a person would be required to satisfy in order to be certified as a signal employee unless they are determined to have sufficient vision acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the vision acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. FRA is proposing that certified signal employees should have to satisfy certain vision standards, with the ability to distinguish between colors being particularly important. However, FRA requests comments on whether vision acuity standards for certified signal employees are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section permits a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a certified signal employee, the railroad could certify that person under this proposed regulation if the railroad obtains the medical examiner's professional medical opinion to that

effect. If necessary, medical examiners could condition their opinion on certain circumstances or restrictions, such as the use of corrective lens.

Paragraph (e) of this section describes what documents the railroad would be required to keep on file with respect to vision acuity testing. Railroads would be required to retain these records for individuals who the railroad certifies as signal employees, as well as those individuals for whom the railroad denies certification. Paragraph (g) of this section addresses the issue of vision deterioration. Once certified signal employees become aware that their vision has deteriorated, they must notify the railroad before performing any subsequent service as a certified signal employee. FRA presumes that certified signal employees would most likely become aware of deterioration in their vision either through their own personal observation or through examination by a medical professional. Should this occur, before a certified signal employee can return to service, they must be reexamined. If upon reexamination, the railroad's medical examiner concludes that the certified signal employee still satisfies the vision acuity standards in this part, the certified signal employee would be allowed to return to service. However, if the medical examiner concludes that the certified signal employee no longer satisfies these requirements, the railroad must deny the person's certification in accordance with § 246.301, regardless of how much time remains before the signal employee's current certificate expires. Certified signal employees should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 246.118 Hearing Acuity

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for hearing acuity testing that a railroad would be required to incorporate in its signal employee program.

Paragraph (c) of this section contains the general hearing standards that a person must satisfy in order to be certified as a signal employee unless they are determined to have sufficient hearing acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the hearing acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. FRA is considering whether hearing acuity standards are necessary for certified signal employees and if so, whether they need to be as stringent as the standards for engineers and conductors. FRA proposes that certified signal employees should have to satisfy certain hearing standards and it seems logical for these standards to be consistent with the hearing standards for engineers and conductors. However, FRA requests comments on whether hearing acuity standards for certified signal employees are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section would permit a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a certified signal employee, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect. If necessary, medical examiners could condition their opinion on certain circumstances or restrictions, such as the use of a hearing aid.

Paragraph (e) of this section describes what documents the railroad would be required to keep on file with respect to hearing acuity testing. Railroads would be required to retain these records for both individuals who the railroad certifies as signal employees and those individuals for whom the railroad denies certification. Paragraph (g) of this section addresses the issue of hearing deterioration. Once certified signal employees become aware that their hearing has deteriorated, they would be required to notify the railroad before performing any subsequent service as a certified signal employee. FRA presumes certified signal employees would most likely become aware of deterioration in their hearing either through their own personal observation or through examination by a medical professional. Before a certified signal employee could return to service, they would have to be reexamined. If upon reexamination, the railroad's medical examiner concludes that the certified signal employee still satisfies the hearing acuity standards in this part, the certified signal employee could return to service. However, if the medical examiner concludes that the certified signal employee no longer satisfies these requirements, the railroad would be required to deny the person's certification in accordance with § 246.301, regardless of how much time remains before the signal employee's current certificate expires. Certified signal employees should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 246.119 Training Requirements

This proposed section, derived from 49 CFR 240.123, 240.213, and 242.119, would require railroads to provide initial and periodic training to signal employees. Such training is necessary to ensure certified signal employees have the knowledge, skills, and abilities necessary to safely perform all of the safety-related duties mandated by Federal law, regulations, and orders.

Paragraph (b) of this section would require railroads to address in their certification programs whether the railroad will accept responsibility for training persons who have not been previously certified as signal employees and thus obtain authority to provide initial signal employee certification or whether the railroad will only recertify signal employees who were previously certified by other railroads. If a railroad accepts responsibility for training persons who have not been previously certified as signal employees, paragraph (c) of this section would require the railroad to state in its certification program whether it will conduct the training or whether the railroad will employ a training program that has been adopted and ratified by the railroad, but will be conducted by another entity on its behalf.

Under this section, railroads would have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) of this section contain proposed requirements for railroads that elect to train persons who have not been previously certified as signal employees. Pursuant to paragraph (d), a railroad that makes this election would be required to determine how training will be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, practical demonstration, on-the-job training, or other formal training. Paragraph (d)(3) would also require railroads to review and modify their training programs whenever new safety-related railroad laws, regulations, orders, and procedures are issued, as well as whenever new signal systems,

technologies, software, or equipment are introduced into the workplace.

Paragraph (f) of this section provides the requirements a person not previously certified as a signal employee would have to satisfy in order to become a certified signal employee. Paragraph (f)(2) states the person must demonstrate on-the-job proficiency by successfully completing the tasks, and using the signal systems and technology necessary, to be a certified signal employee on the railroad. A certification candidate may perform these tasks under the direct onsite supervision of a certified signal employee who has at least one year of experience as a signal employee. FRA requests comments, including any supporting data, on whether this ''one year of experience'' requirement for certified signal employees supervising certification candidates is sufficient. The final proposed requirement, found in paragraph (f)(3), is that the previously uncertified person must demonstrate their knowledge of the railroad's signal systems, technologies, software, and equipment deployed on the railroad's territory. If the railroad uses a written test to fulfill this requirement, paragraph (f)(3) would require the railroad to provide the person(s) being tested with an opportunity to consult with a qualified instructor to explain a test question. This requirement is equivalent to 49 CFR 242.119(f) and is included so that certification candidates being tested can obtain clarification of test questions from someone who possesses knowledge of the signal systems, technologies, software and equipment deployed in the relevant territory.

Paragraph (g) of this section would require railroads to retain written documentation of the listed determinations. Paragraph (g)(1) would only apply to people who have not been previously certified as signal employees, whereas paragraph (g)(2) would apply to all persons seeking signal employee certification.

Paragraph (h) would require all railroads, regardless of their election in paragraph (b) of this section, to provide comprehensive training on the installation, operation, testing, maintenance, and repair of the signal systems and related technology deployed on their territory. (This training must include training on both signal software and signal equipment.) In order to implement this requirement, paragraph (h) requires railroads to address in their certification program how such training will be provided and how the railroad will ensure that each certified signal employee receives this comprehensive training before the employee is required to install, operate, test, maintain, or repair any signal system or related technology deployed on the railroad's territory.

Paragraph (h)(3) would also require railroads to discuss in their programs the maximum amount of time that a certified signal employee can be absent from performing various types of safety-sensitive work on signal systems before refresher training will be required. This provision is intended to require railroads to address situations in which a certified signal employee may have been working on signal system installations for an extended period and was not involved in the intricacies of maintenance and repair of those systems during that time. This time period cannot exceed twelve months. However, railroads would be allowed to choose a shorter time period if they desire.

Paragraph (j) of this section would require each railroad to provide for the continuing education of their certified signal employees to ensure each certified signal employee maintains the necessary knowledge and skills concerning compliance with all applicable Federal laws, regulations, and orders; compliance with all applicable railroad signal system safety and operating rules; and compliance with all applicable standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of new and existing signal systems and new and existing signal-related technology deployed on its territory. Given the formal annual review and analysis of railroad certification programs that each Class I railroad, commuter railroad, and Class II railroad would be required by § 246.215 to conduct, FRA anticipates that these railroads will address issues identified during the annual review and analysis of their certification programs in their continuing education programs. Thus, FRA expects the annual review and analysis required by § 246.215 will help improve the overall quality of the railroads' training programs.

Paragraph (k) is intended to ensure that each certified signal employee receives comprehensive training on the installation, operation, testing, maintenance, and repair of new signal systems (including software and equipment) and new signal-related technology deployed on the railroad's territory before the employee is required to install, operate, test, maintain, or repair any such system or signal-related technology.

Section 246.121 Knowledge Testing

This proposed section, derived from 49 CFR 240.125, 240.209, and 242.121, would require railroads to provide for the initial and periodic testing of certified signal employees. Paragraph (b) of this section outlines the general requirements for such testing. This testing will have to effectively examine and measure a signal employee's knowledge of: (a) all applicable Federal railroad safety laws, regulations, and orders governing signal systems and related technology, (b) all applicable railroad safety and operating rules, and (c) all applicable railroad standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems and related technology.

Under this section, railroads would have discretion to design the tests that will be employed; for most railroads that would entail some modification of their existing ''book of rules'' examination to include new subject areas. This section does not specify the minimum number of questions to be asked or the passing score to be obtained. However, it would require that the test be conducted without open reference books unless use of such materials is part of a test objective. Also, this section would require that knowledge testing include a practical demonstration component, with other test components in written or electronic form. Since the testing procedures and requirements selected by the railroad would be submitted to FRA for approval, FRA expects the railroad would describe how it will exercise its discretion to ensure certified signal employees on its territory demonstrate their knowledge concerning the safe discharge of their responsibilities. FRA would also monitor the exercise of discretion being afforded to railroads by this section.

Paragraph (c) of this section mirrors 49 CFR 242.121(e) and would require the railroad to provide the person(s) being testing with an opportunity to consult with a qualified instructor to explain one or more test questions.

Paragraph (d) of this section states that if a person fails a test, the railroad cannot allow that person to serve as a certified signal employee until they achieve a passing score on reexamination. The railroad would decide how much time, if any, mut pass after a test failure before a certification candidate can be reexamined. Furthermore, the railroad would decide what additional training, if any, a candidate would receive after a test

failure. The railroad would also decide whether there should be a limit on the number of times a candidate could retake a test, and if so, the number of test retakes the railroad will allow.

Section 246.123 Monitoring Operational Performance

This proposed section, derived from 49 CFR 240.129 and 242.123, contains proposed requirements for conducting unannounced compliance tests. Paragraph (a) of this section would require each railroad to describe in its certification program how it will monitor the conduct of its certified signal employees by performing unannounced compliance tests on the railroad's signal standards, test procedures, and Federal regulations concerning signal systems, as well as monitoring the performance of signal-related tasks. Paragraph (a)(3) would require railroads to indicate the types of actions they will take if they identify deficiencies in a certified signal employee's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies in a signal employee's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this regulation to be as flexible as possible. There are a variety of actions and approaches that a railroad could take, such as developing and providing formal remedial training for certified signal employees who fail tests or have deficiencies in their performance. Railroads could also implement formal procedures whereby certified signal employees are given the opportunity to explain, in writing, the factors that they believe caused their test failure or performance deficiency. These explanations could help railroads identify areas of training on which to focus or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could be considered and evaluated by railroads and their certified signal employees. FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization.

Paragraph (a)(4) would require railroads to describe how they will monitor the performance of signal-related tasks by their certified signal employees. For example, railroad monitoring could include unaccompanied, post-installation inspections of signal cut-overs (conducted within three days of the installation) to verify that the certified signal employee properly installed and tested the signal system in accordance with the railroad's signal standards. Paragraph (b) of this section provides proposed requirements for these unannounced compliance tests, including signal system tests that must be performed and who would be allowed to conduct the tests. Paragraph (b)(3) specifies that each railroad would be required to give each of its certified signal employees at least one unannounced compliance test each calendar year, except as provided in paragraph (d) of this section. FRA recognizes that before these unannounced compliance tests can be performed in conformance with this section, a railroad's certification program must first be approved by FRA. Thus, at the latest, FRA expects railroads to perform these unannounced compliance tests on all of their certified signal employees during the calendar year immediately following the year their certification program is first approved by FRA. For example, if FRA approves one railroad's program in January 2025 and another railroad's program in December 2025, both of these railroads would be required to perform unannounced compliance tests on all of their certified signal employees starting in 2026. While FRA would encourage these railroads to commence the unannounced tests after their programs are approved in 2025, FRA recognizes it may not be practical to perform unannounced tests on all of their certified signal employees by the end of 2025, especially for the railroad whose program was not approved until December 2025.

Paragraph (c) of this section reflects FRA's recognition that some certified signal employees may not be performing tasks that require certification. Therefore, a railroad would not be required to provide those certified signal employees with an annual, unannounced compliance test. For example, a certified signal employee may be on furlough, in military service, off with an extended illness, or working in another craft. In situations like these where a certified signal employee is not performing tasks that require certification, the railroad would not have to give an unannounced compliance test. However, when the certified signal employee resumes work on signal systems that requires certification, they would have to be given an unannounced compliance test within 30 days. Moreover, the railroad would be required to retain a written record documenting the dates on which the certified signal employee stopped performing tasks requiring certification, the date the certified signal employee resumed performing signal system work requiring certification, and the date the certified signal employee received their unannounced compliance test following their resumption of signal system work requiring certification.

Section 246.124 Mentoring

This proposed section would require railroads to include, in their certification programs, procedures for mentoring signal employees who have not been certified by the railroad (such as newly-hired signal employees who were certified by their previous employers). By allowing for the mentoring of these signal employees, railroads can allow uncertified signal employees to perform signal work under the direct oversight and supervision of a mentor until these signal employees are certified by the railroad.

After a railroad's certification program has been approved by FRA, paragraph (b) of this section would require that the railroad assign either a signal employee that it has certified pursuant to this part or a signal employee who is working under the direct observation and supervision of a mentor to perform work on a signal system or signal-related technology that requires certification. Therefore, if the railroad assigns a signal employee that it has not certified to perform work on a signal system or signal-related technology that requires certification, paragraph (b) would require the railroad to assign a mentor who can directly oversee and supervise the work performed by the signal employee.

Paragraph (c) of this section would only apply to railroads who elect to classify their certified signal employees into more than one occupational category or subcategory, in accordance with § 246.107. These railroads would be required by paragraph (c) to address in their certification programs how mentoring will be provided for certified signal employees who move into a different occupational category or subcategory of certified signal service.

Paragraph (e) of this section reflects FRA's intent that mentors must be held accountable for the work performed by the signal employees who are working under their direct oversight and supervision. Therefore, paragraph (e)

would require railroads to address in their certification programs how they will hold mentors accountable for the work performed by signal employees who are working under their direct oversight and supervision.

Section 246.125 Certification Determinations Made by Other Railroads

This section of the proposed rule, derived from 49 CFR 240.225 and 242.125, contains requirements that would apply when a certified or previously certified signal employee is about to begin work for a different railroad. This section would allow a railroad to rely on determinations made by another railroad concerning a person's certification.

As noted previously in the discussion above related to § 246.124, railroads would be required to provide mentoring for signal employees with some signal system work experience who have not been certified by the railroad. However, this section would also require railroads to address in their certification programs how they will administer training for previously uncertified signal employees with extensive signal experience or previously certified signal employees who have had their certification expire. In both scenarios, FRA would allow the railroad to reduce the on-the-job training that might otherwise be required if these signal employees were treated as having no signal system work experience. However, if a railroad's certification program fails to specify how the railroad will train a previously certified signal employee hired from another railroad, all signal employees hired by that railroad would be required to take the hiring railroad's entire training program (regardless of the signal employee's prior certification status).

Subpart C—Administration of the Certification Program

Section 246.201 Time Limitations for Certification

This proposed section, derived from 49 CFR 240.217 and 242.201, contains various time constraints that preclude railroads from relying on stale information when evaluating a candidate for certification or recertification. For example, when making a determination of eligibility based on prior safety conduct on a different railroad pursuant to § 246.113, paragraph (a)(1) would prohibit a railroad from relying on information provided more than one year before the railroad's certification decision. However, paragraph (b) goes on to explain that the time constraints listed in paragraph (a) would not apply to railroads who are making certification or recertification decisions based on the eligibility determination that have already been made by another railroad in accordance with § 246.125.

Paragraph (c) would prohibit a railroad from certifying a person as a signal employee for more than three years except for those individuals who are designated as certified signal employees under § 246.105(c) or (d). When a railroad designates a person as a certified signal employee under § 246.105(c) or (d), that certification can last for three years after the date that FRA initially approves the railroad's certification program. This could, however, lead to situations where a certificate could be valid for more than three years. For example, if a railroad designates a person as a certified signal employee in January 2025, but FRA does not approve the railroad's certification program until January 2026, the signal employee's certification could last until January 2029 (four years in total). However, any subsequent recertifications for that signal employee could only last for three years. In other words, if the signal employee in the previous example got recertified in January 2029, that certificate would expire no later than January 2032.

Paragraph (d) would require railroads to issue certificates that comply with § 246.207 to their certified signal employees within 30 days from the date of the railroad's decision to certify or recertify that person.

Section 246.203 Retaining Information Supporting Determinations

This proposed section, derived from 49 CFR 240.215 and 242.203, contains recordkeeping requirements for railroads that employ certified signal employees. Paragraph (b) lists the documents that railroads would be required to retain for each of their certified signal employees and certification candidates, while paragraph (e) would require railroads to retain these records for six (6) years from the date of the certification, recertification, denial, or revocation decision. Paragraph (e) would also require railroads to make these records available to FRA representatives, upon request, in a timely manner.

Paragraph (f) would prohibit railroads and individuals from falsifying records that railroads are required to retain pursuant to this section. Paragraph (g) contains minimum standards for electronic recordkeeping with which railroads would be required to comply to maintain electronic versions of the required records. These minimum standards for electronic recordkeeping are virtually identical to the electronic recordkeeping standards contained in 49 CFR 242.203.

Section 246.205 List of Certified Signal Employees and Recordkeeping

This proposed section, derived from 49 CFR 240.221 and 242.205, would require a railroad to maintain a list of its certified signal employees. Paragraph (b) of this section would also require railroads to update their lists of certified signal employees at least annually and to make its list of certified signal employees available, upon request, to FRA representatives in a timely manner.

Paragraph (c) contains minimum standards for electronic recordkeeping with which railroads would be required to comply, in order to maintain an electronic version of the list of certified signal employees required by this section. These minimum standards are similar to the electronic recordkeeping standards contained in 49 CFR 242.205.

Paragraph (d) would prohibit railroads and individuals from falsifying the list of certified signal employees that railroads are required to maintain pursuant to this section.

Section 246.207 Certificate Requirements

This proposed section contains proposed requirements for the certificate that each certified signal employee would be required to carry. The requirements in paragraphs (a)–(e) of this section, which pertain to the proposed minimum content for certificates and authorization of the person who would be designated to sign the certificates, are derived from 49 CFR 240.223 and 242.207.

Paragraph (a) of this section specifies that railroads have the option of issuing certificates electronically or in paper form. Paragraph (a)(1) would require that the signal employee certificate identify the railroad issuing the certificate. Therefore, a certified signal employee who works for more than one railroad would be required to have a separate certificate for each railroad with whom the signal employee is certified. For railroads who choose to classify their certified signal employees into occupational categories or subcategories, pursuant to § 246.107, paragraph (a)(2) would require the railroad to indicate the specific signal employee category(ies) or subcategory(ies) for which the person has been certified.

Paragraph (a)(7) would require the certificate to be signed by an individual who has been designated by the railroad

as an authorized signatory of signal employee certificates, as described in paragraph (c) of this section. Electronic signatures are permitted under this proposed rule. In addition, paragraph (e) of this section would prohibit railroads and individuals from falsifying certificates.

Paragraphs (f) and (i) are derived from 49 CFR 240.305 and 242.209. These paragraphs would require signal employees to have their certificates in their possession while on duty, display their certificates when requested by an FRA representative, State inspectors [21] authorized under 49 CFR part 212, or certain railroad officers, and to notify a railroad if they are called to serve as a signal employee in a service that would cause the employee to exceed their certificate limits.

Paragraph (g), derived from 49 CFR 240.301 and 242.211(a), would require a railroad to promptly replace a certified signal employee's certificate at no cost to the employee, if the certificate is lost, stolen, mutilated, or becomes unreadable. However, unlike § 242.211(b), this section does not contain detailed requirements for temporary replacement certificates. Temporary replacement certificates generally contain most of the information provided on official certificates. Therefore, it does not appear to be especially burdensome for railroads to issue temporary certificates to replace certificates that have been lost, stolen, mutilated, or become unreadable. Nonetheless, by refraining from proposing a formal process for the issuance of temporary replacement certificates, FRA would allow railroads to decide how and when to issue temporary replacement certificates to signal employees. FRA is soliciting comment on this proposed approach.

Section 246.213 Multiple Certifications [22]

This proposed section, derived from 49 CFR 240.308 and 242.213, establishes how railroads would handle certified signal employees who are also certified in another railroad craft. FRA recognizes that while it is fairly common for an individual to work as both an engineer and a conductor, it is less common for a signal employee to also work in another craft that requires certification. However, because situations may arise where a certified signal employee is also certified to work in another craft, such as a locomotive engineer or conductor, FRA would like to address how railroads would be required to handle such situations.

Paragraph (a) of this section would allow a certified signal employee to become certified in one or more of the other railroad crafts that require certification such as locomotive engineer or conductor. If a person is certified in multiple crafts by the same railroad, paragraph (b) would require the railroad to coordinate the expiration dates of those certificates, to the extent possible. While railroads are not required to have all of a person's certificates expire at the same time, it would be beneficial from the standpoint of administrating the certification programs if railroads followed this practice. Thus, FRA encourages railroads to coordinate these expiration dates when possible.

Paragraph (c) of this section would pertain to signal employees who hold signal employee certificates issued by multiple railroads or who are seeking to become certified signal employees for multiple railroads. Paragraph (c)(1) would require the signal employee to immediately notify their employer(s) and all railroads with whom the signal employee holds a signal employee certificate, if a railroad denies, suspends, or revokes the signal employee's certification or recertification. Certified signal employees should note that willful noncompliance with the notification requirements in this paragraph will likely result in enforcement action including, but not limited to, disqualification from safety-sensitive service.

Paragraph (c)(2) would prohibit an individual from working as a certified signal employee for *any* railroad while their signal employee certification is suspended or revoked by a railroad, except as provided for in § 246.124(d). For example, if an individual is a certified signal employee with Railroad ABC and Railroad DEF, and ABC suspends and/or revokes the individual's certificate, that individual would not be able to work as a certified signal employee for DEF, or any other railroad, during the period of suspension and/or revocation. (Section 246.124(d) would, however, allow the individual to perform work on signal systems, if allowed by a railroad's certification program, under the direct oversight and supervision of a mentor.)

Paragraph (c)(3) states that if a person has their signal employee certification suspended or revoked by one railroad and that person attempts to become a certified signal employee with another railroad during the certificate suspension or revocation period, they must notify the railroad from whom they are seeking certification that their signal employee certificate has been suspended or revoked. Therefore, if a person is seeking signal employee certification with Railroad XYX when their signal employee certificate is suspended or revoked by Railroad ABC, they must notify XYZ of their current suspended or revoked certification status.

Paragraphs (d), (e), and (f) of this section address how the revocation of a person's signal employee certification would affect that person's ability to work in another railroad craft requiring certification and vice versa. If a person's signal employee certification is revoked because of a drug or alcohol violation, as described in § 246.303(e)(11), then that person would be ineligible to work in any craft requiring certification, such as a locomotive engineer or conductor, for any railroad during the period of revocation. Such person would also be prohibited from obtaining certification in any of those crafts from any railroad while their signal employee certification is revoked. Likewise, if a person's non-signal employee certification, such as locomotive engineer or conductor, is revoked because of an alcohol or drug violation, as described in § 219.101 of this chapter, that person will be ineligible to work as a certified signal employee or obtain a signal employee certificate from any railroad during the revocation period. In contrast, if a signal employee's certification is revoked for a violation that does not involve alcohol or drugs, as described in §§ 246.303(e)(1) through (10), that person would still be able to work in any other railroad craft requiring certification, such as a locomotive engineer or conductor, during the period of revocation, as long as the person is certified in that craft. Likewise, a person could still work as a certified signal employee if their certificate for another railroad craft, such as locomotive engineer or conductor, was revoked due to a violation that did not involve drugs or alcohol.

FRA's reasoning for this line of delineation between revocable events that involve alcohol and drugs and those that do not is rooted in railroad safety. If someone shows up to work as

[21] Although State inspectors authorized under 49 CFR part 212 could be considered FRA representatives, they are mentioned separately in this section to ensure there is no dispute regarding their authority.

[22] To the extent possible, FRA has attempted to match the section numbers in this proposed rule to analogous sections in the conductor certification rule (49 CFR part 242). Since 49 CFR 242.213 addresses multiple certification issues, FRA is proposing to use section number 246.213 for the multiple certification section in this proposed rule instead of the next sequential section number, which would be 246.209.

a certified signal employee under the influence of alcohol or drugs, it stands to reason that they could likely show up to work for another craft, such as a locomotive engineer or conductor, under the influence as well. Thus, it makes sense for an individual's alcohol or drug violations as a certified signal employee to impact their eligibility to work in another craft that requires certification and vice versa. With respect to revocable events that do not involve alcohol or drugs, FRA finds that the tasks performed by a certified signal employee are so inherently different from the tasks performed in another certified craft, such as an operating crew member, that it does not automatically follow that a person's revocable event as a certified signal employee indicates they are more likely to also have a revocable event while performing in another craft. Thus, FRA is taking the position that the revocation of a signal employee certificate which does not involve alcohol or drugs should not affect that person's eligibility to work in another railroad craft requiring certification, and vice versa. However, FRA solicits comments on this issue.

Paragraphs (f) and (g) would prohibit a railroad from denying or revoking a signal employee's certification just because their attempt at certification or recertification in another railroad craft, such as locomotive engineer or conductor, was denied and vice versa. Paragraph (h) would allow a railroad to issue a single certificate to an individual who is certified in multiple railroad crafts that require certification. If a railroad exercises this option, it must ensure that the single certificate contains all of the components required for that craft. Alternatively, railroads are also welcome to issue multiple certificates to an individual who is certified in multiple crafts (one certificate for each craft). Thus, if a person is certified as both a signal employee and conductor, the railroad could issue the person a single certificate for both crafts or it could issue one signal employee certificate and one conductor certificate.

Finally, paragraph (i) of this section denotes that if a person is certified in multiple crafts and they are involved in a revocable event, that event can only lead to the revocation of a certificate for a single railroad craft. The railroad would be required to determine which certificate should be revoked based on the work the individual was performing at the time of the event. In such instances, while the railroad may only revoke a certificate for a single craft, that revocation could affect a person's eligibility to perform other crafts. For example, if a person who is certified as a signal employee and a conductor violates § 246.303(e)(11) while on duty as a signal employee, the railroad should only revoke the person's signal employee certification. The person's conductor certification could not be revoked for the incident that occurred while the individual was on duty as a signal employee. However, as discussed in paragraph (d)(1) of this section, this person would not be able to work as a conductor while their signal employee certificate was revoked for this offense.

Section 246.215 Railroad Oversight Responsibilities

This proposed section, derived from 49 CFR 240.309 and 242.215, would require each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified signal employees. FRA has formulated the information collection requirements of this proposed section to ensure that railroads collect data on signal employee safety behavior and feed that information into their operational monitoring efforts, thereby enhancing safety.

This section would require each Class I railroad (including the National Railroad Passenger Corporation), railroad providing commuter service, and Class II railroad to have an internal auditing plan to keep track of events involving poor safety conduct by certified signal employees. For each such event, the railroad would be required to indicate how it responded to that event. The railroad would then be required to evaluate this information, together with data showing the results of annual testing and causation of FRA reportable train accident/incidents, to determine whether additional or different actions, if any, are needed to improve the safety performance of its certified signal employees. FRA would not, however, require railroads to furnish this data or their analysis of the data to FRA. Instead, FRA would require that railroads be prepared to submit such information when requested.

As set forth in paragraph (i), an instance of poor safety conduct involving a person who is a certified signal employee and is certified in another railroad craft (such as a locomotive engineer or conductor) need only be reported once under the appropriate section of this chapter (*e.g.,* under § 240.309, § 242.215, or under this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred. This determination is similar to the determination made under part 225, in which railroads determine whether an accident was caused by poor performance of what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, etc.) or whether it was caused by poor performance of what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, etc.)

Subpart D—Denial and Revocation of Certification

This subpart parallels part 240 and part 242's approach to adverse decisions concerning certification (*i.e.,* decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this proposed rule is predicated principally on the theory that decisions to deny certification or recertification will come at the conclusion of a prescribed evaluation process which would be conducted in accordance with the provisions set forth in this subpart. Thus, this proposed rule contains specific procedures designed to ensure that a person in jeopardy of being denied certification or recertification would be given a reasonable opportunity to examine and respond to negative information that may serve as the basis for being denied certification or recertification.

When considering revocation, this proposed rule contemplates that decisions to revoke certification would only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions would only be made after a certified signal employee has been afforded an opportunity for an investigatory hearing at which the presiding officer would determine whether there is sufficient evidence to establish that the signal employee's conduct warranted revocation of their certification.

This subpart also provides for certificate suspension in certain circumstances. Certificate suspension would be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension would be applicable in instances where a person is awaiting an investigatory

hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules, or committed a violation of certain signal standards, procedures, or practices, and situations in which the person is being evaluated or treated for an active substance abuse disorder.

Section 246.301 Process for Denying Certification

This proposed section, derived from 49 CFR 240.219 and 242.401, establishes minimum procedures that must be offered to a certification candidate before a railroad denies the candidate certification or recertification. Paragraph (a) of this section gives a certification candidate a reasonable opportunity to explain or rebut adverse information, including written documents or records, that the railroad intends to use as the basis for its decision to deny certification or recertification.

Paragraph (b) of this section requires that a written explanation of an adverse decision be 'served' on a certification candidate within 10 days of the railroad's decision. Paragraph (b) also requires that the basis for a railroad's denial decision address any explanation or rebuttal information that the certification candidate may have provided pursuant to paragraph (a) of this section.

Paragraph (c) of this section prohibits a railroad from denying certification based on a failure to comply with a railroad test procedure, signal standard, or practice which constitutes a violation under § 246.303(e)(1) through (10) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the signal employee's ability to comply with that railroad test procedure, signal standard, or practice. This paragraph is derived from the intervening cause exception for revocation in § 246.307(h).

Section 246.303 Criteria for Revoking Certification

This proposed section, derived from 49 CFR 240.117, 240.305, and 242.403, provides the circumstances under which a signal employee may have their certification revoked. In addition, paragraph (a) of this section makes it unlawful to fail to comply with any of the railroad test procedures, signal standards and practices described in paragraph (e) of this section. Paragraph (a) is needed so that FRA can initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person who is not a certified signal employee violates a railroad test procedure, signal standard or practice described in paragraph (e) of this section. (Railroads should, however, note that they may not revoke a signal employee's certificate, including a designated signal employee's certificate, until they have obtained FRA approval of their certification programs pursuant to § 246.103.)

Paragraph (b) of this section provides that a certified signal employee who fails to comply with a railroad test procedure, signal standard or practice described in paragraph (e) will have their signal employee certification revoked. Paragraph (c) provides that a certified signal employee who is monitoring, mentoring, or instructing another signal employee could have their certification revoked if the certified signal employee fails to take appropriate action to prevent a violation of a railroad test procedure, signal standard or practice described in paragraph (e) of this section. As explained in paragraph (c), ''appropriate action'' does not mean that a supervisor, certified signal employee, mentor, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the signal employee, as appropriate, of a potential or foreseeable violation.

Paragraph (d) provides that a certified signal employee who is called by a railroad to perform a duty other than that of a signal employee would not have their signal employee certification revoked based on actions taken or not taken while performing that duty. In general, this paragraph would apply regardless of whether the individual was called to perform a certified craft, such as locomotive engineer or conductor, or a non-certified craft. However, this exemption would not, however, apply to violations described in paragraph (e)(11) of this section. Therefore, certified signal employees working in other capacities that do not require certification, who violate certain alcohol and drug rules would have their signal employee certification revoked for the appropriate period of time pursuant to § 246.115. However, if the certified signal employee was working in another certified craft, such as a locomotive engineer or conductor, at the time of the alcohol or drug violation, their certificate for the craft that they were performing at the time of the violation would be revoked as opposed to their signal employee certificate.

If a certified signal employee who is also certified in another craft, such as locomotive engineer or conductor, violates § 219.101 while performing a craft that does not require certification, the railroad must select one, and only one, certificate to revoke. For example, if a person who is a certified signal employee and conductor violates § 219.101 while working as a brakeman, the railroad must decide to revoke either their signal employee or conductor certificate, but it cannot revoke both certificates. Regardless of which certificate the railroad chooses to revoke, however, the person will be unable to work as a signal employee or conductor during the period of revocation. *See* § 246.213(d).

Paragraph (e) provides the eleven types of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1) through (11) are derived in part from the revocable events provided in 49 CFR 242.117(e) but have been modified to account for the duties and responsibilities of a certified signal employee.

Paragraph (e)(1) refers to action(s) taken by a certified signal employee that interfere with the normal functioning of a highway-rail grade crossing warning system or signal system, if alternative means of protecting motorists and other crossing users have not already been provided. (For this purpose, railroads shall only consider violations of paragraph (e)(1) that result in an activation failure or false proceed signal.)

Paragraph (e)(2) refers to action(s) taken by a certified signal employee that fail to comply with a railroad rule or procedure when removing one or more of the following devices and systems from service: (a) highway-rail or pathway grade crossing warning devices and systems; (b) wayside signal devices and systems; or (c) other devices or systems subject to this part. Similarly, paragraph (e)(3) refers to action(s) taken by a certified signal employee that fail to comply with a railroad rule or procedure when placing these devices and systems in service or restoring them back to service.

Paragraph (e)(4) refers to violations involving a certified signal employee's failure to conduct certain inspections and tests on highway-rail and pathway grade crossing warning devices and systems that are required by railroad rule, signal standard, or railroad procedures. These required inspections and tests would include post-installation and post-repair testing and inspections that are required by FRA's grade crossing and signal regulations in parts 234 and 236, as well as inspections and tests that are required after modification or disarrangement of grade crossing warning devices and other types of signal systems.

Paragraph (e)(5) refers to a certified signal employee's failure to restore power to a train detection or highway-rail or pathway grade crossing warning device or system after manual interruption of the power source. (For violations of this nature, railroads would, however, be directed to consider only those violations that result in activation failure.)

Paragraph (e)(6) refers to a certified signal employee's failure to comply with railroad validation or cutover procedures.

Paragraph (e)(7) refers to a certified signal employee's failure to comply with FRA's Roadway Worker Protection regulations in 49 CFR part 214. However, for purposes of this part, paragraph (e)(7) would require railroads to consider only those violations that directly involve a certified signal employee who failed to ascertain whether on-track safety was being provided before fouling the railroad track.

Paragraphs (e)(8) through (e)(10) refer to a certified signal employee's failure to comply with FRA's Railroad Operating Practices regulations related to work performed on, under, or between rolling equipment. Paragraph (e)(11) refers to a certified signal employee's failure to comply with the alcohol and drug use prohibitions in § 219.101 of FRA's alcohol and drug regulations.

Paragraph (f) proposes a three-year period for considering certified signal employee conduct that failed to comply with a Federal regulation or railroad test procedure, signal standard or practice described in paragraphs (e)(1) through (10) of this section. However, when alcohol and drug violations are at issue, the time period for evaluating prior operating rule misconduct would be dictated by § 246.115, which would establish a period of 60 consecutive months prior to the date of review for such evaluations.

Paragraph (g) provides that if a single incident contravenes more than one Federal regulatory provision or railroad test procedure, signal standard, or practice listed in paragraph (e) of this section, the incident would be treated as a single violation. FRA considers a single incident to be a unique identifiable occurrence caused by a certified signal employee's violation of one or more railroad operating rules or practices listed in paragraph (e). However, a certified signal employee could be involved in more than one incident during a single tour of duty, if the incidents are separated by time, distance, or circumstance.

Paragraph (h) provides that a certified signal employee may have their certification revoked for violation of a railroad test procedure, signal standard, or practice listed in paragraph (e) that occurs during a properly conducted monitoring test. However, as reflected in paragraph (i), violations of railroad test procedures, signal standards, or practices that occur during monitoring tests that are not conducted in compliance with this part, the railroad's testing procedures, or the railroad's program under § 217.9 will not be considered for revocation purposes.

Section 246.305 Periods of Ineligibility

This section of the proposed rule, derived from 49 CFR 240.117 and 242.405, describes how a railroad would determine the period of ineligibility (*e.g.,* for revocation or denial of certification) for a certified signal employee or candidate for signal employee certification. Paragraph (a) of this section provides the starting date for a period of ineligibility. For persons who are not certified as signal employees, a period of ineligibility would begin on the date of the railroad's written determination that an incident involving a potential violation of one or more regulatory requirements in § 246.303(e)(1) through (10) has occurred. For example, if the railroad made a written determination on March 10th that an incident involving a potential violation of one or more regulatory requirements in § 246.303(e)(1) through (10) occurred on March 1st, the period of ineligibility would begin on March 10th for persons who are not certified signal employees. However, for certified signal employees and candidates for signal employee recertification, a period of ineligibility would begin on the date the railroad notifies the candidate for signal employee recertification that recertification has been denied or the date the railroad notifies the certified signal employee that their certification has been suspended.

Even though some certified signal employees will be subsequently notified that their certification will be revoked as a result of the incident, the period of ineligibility will begin on the date the railroad notifies the certified signal employee that their certification has been suspended. This is because once a person's certificate is suspended, they are ineligible to work as a certified signal employee pending a determination as to whether their certification should be revoked.

With respect to revocation, paragraph (b) of this section provides that once a railroad determines that a certified signal employee has failed to comply with its test procedures, signal standards, or practices listed in § 246.303(e), two consequences would occur. First, the railroad would be required to revoke the signal employee's certification for a period of time provided in this section. Second, that revocation would initiate a period during which the signal employee would be subject to an increasingly more severe period of revocation if additional revocable events occur within the next 24 to 36 months.

The standard periods of revocation proposed in this section track the revocation periods provided in parts 240 and 242. One revocable event would result in revocation for 30 days. Two revocable events within 24 months of each other would result in revocation for six (6) months. Three revocable events within 36 months of each other would result in revocation of one (1) year. Four revocable events within 36 months of each other would result in revocation for three (3) years.

While paragraph (c) of this section contains a provision that parallels § 242.405(b) and provides that all periods of revocation may consist of training, paragraph (d) contains a provision that parallels §§ 240.117(h) and 242.405(c). Paragraph (d) provides that a person whose signal employee certification is denied or revoked would be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if they can satisfy all of the criteria listed in the paragraph.

Section 246.307 Process for Revoking Certification

This proposed section, derived from 49 CFR 240.307 and 242.407, provides the procedures a railroad would be required to follow if it acquires reliable information regarding a certified signal employee's violation of a railroad test procedure, signal standard, or practice described in § 246.303(e) or 246.115(d). Paragraph (b)(1) of this section would require a railroad to suspend a signal employee's certification immediately, upon receipt of reliable information regarding a violation of a railroad test procedure, signal standard, or practice described in § 246.303(e). Prior to, or upon suspending, the signal employee's certificate, paragraph (b)(3) would require the railroad to provide either verbal or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice would have to be promptly confirmed in writing. The amount of time the railroad would have to confirm the verbal notice in writing would depend on whether or not a collective bargaining agreement is

in effect and applicable. In the absence of such an agreement, a railroad would have four days to provide written notice. If a notice of suspension is amended after a hearing is convened or does not contain citations to all railroad test procedure, signal standards, and practices that may apply to the potentially revocable event, the Certification Review Board (CRB or Board), if asked to review the revocation decision, might subsequently find that this constitutes procedural error pursuant to § 246.405.

Paragraph (b)(5) of this section would require the railroad, no later than the start of the hearing, to provide the signal employee with a copy of the written information and a list of witnesses that the railroad will present at the hearing. If requested, a recess to the start of the hearing would be granted if the written information and list of witnesses is not provided until just prior to the start of the hearing. If the information that led to the suspension of the signal employee's certificate pursuant to paragraph (b)(1) of this section is provided through statements of an employee of the convening railroad, the railroad would be required to make that employee available for examination during the hearing. Examination may be telephonic or virtual when it is impractical to provide the witness at the hearing. These provisions in paragraph (b)(5) of this section are intended to ensure that signal employees are provided with information and/or witnesses necessary to defend themselves at their hearings. Even if a railroad conducts a hearing pursuant to the procedures in an applicable collective bargaining agreement, the railroad would still have to comply with the provisions of paragraph (b)(5). It is not, however, FRA's intent to require railroads to call every witness included on the railroad's list of witnesses to testify at the hearing. If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case and that calling a witness on its list to testify would be unduly repetitive, the railroad would not be obligated to call that witness to testify. Of course, the opposing party could request that the witness be produced to testify, but the hearing officer would have the authority pursuant to paragraph (d)(4) of this section to determine whether the witness's testimony would be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

Paragraph (d)(2) of this section provides the presiding officer with the powers necessary to regulate the conduct of the hearing. Thus, a presiding officer would be permitted to deny excessive hearing request delays by the signal employee. Moreover, a presiding officer could find implied consent to postpone a hearing when a signal employee's witnesses are not available within 10 days of the date the certificate is suspended. However, the CRB may grant a petition on review if the CRB finds that the hearing schedule caused the petitioner substantial harm.

Paragraph (e) of this section contains requirements regarding the written decision in a railroad hearing. FRA believes these requirements would ensure that railroads issue clear and detailed decisions. In turn, clear and detailed decisions would allow a signal employee to understand exactly why their certification was revoked and would allow the CRB to have a more detailed understanding of the case if asked to review the revocation decision pursuant to subpart E of this proposed rule.

Paragraph (f) credits the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of § 246.305. For example, if a signal employee's certificate is suspended on July 1st and on July 11th, the railroad issues a decision to revoke the signal employee's certificate for 30 days, the time between July 1st and July 11th would count towards the 30-day revocation period. Thus, the signal employee's certificate would only be revoked for an additional 20 days after the railroad issued its revocation decision.

Paragraph (g) would require a railroad to revoke a signal employee's certification if it discovers that another railroad has revoked that individual's signal employee certification. The revocation period would coincide with the period of revocation imposed by the railroad that initially revoked the signal employee's certification. For example, if a signal employee is certified by Railroad ABC and Railroad XYZ, and ABC revokes the signal employee's certification from November 1st through November 30th, XYZ must revoke the signal employee's certification through November 30th once it learns of ABC's revocation. The revocation hearing requirement in this rule would be satisfied if any railroad holds a revocation hearing for the signal employee that arises from the same set of facts.

Paragraphs (h) and (i) provide two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to these provisions, either defense would have to be proven by sufficient evidence. Paragraph (h) would prohibit railroads from revoking a signal employee's certificate when there is sufficient evidence of an intervening cause that prevented or materially impaired the signal employee's ability to comply. For example, a railroad should consider assertions that a qualified instructor failed to take appropriate action to prevent an uncertified signal employee or signal employee trainee from using defective equipment. However, FRA does not intend to imply that all equipment failures and errors caused by others will serve to absolve signal employees from certification revocation under this proposed rule. The factual issues presented by each incident would need to be analyzed on a case-by-case basis.

Paragraph (i) would allow railroads to exercise discretion when determining whether to revoke a signal employee's certification ''if sufficient evidence exists to establish that the violation of the railroad test procedure, signal standard, or practice described in § 246.303(e) was of a minimal nature and had no direct or potential effect on rail safety.'' However, FRA acknowledges that the determination as to whether an incident meets this criterion could be subject to different interpretations. For this reason, paragraph (j) would require railroads to retain information about the evidence relied upon when exercising this discretion. Unless a railroad fails to retain information as required in paragraph (j) or acts in bad faith, FRA does not anticipate taking enforcement action against the railroad even if FRA believes the railroad could have revoked the signal employee's certification.

Paragraph (j) of this section would require railroads to keep records of those violations in which they must not or elect not to revoke a signal employee's certificate pursuant to paragraph (h) or (i) of this section. Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a signal employee's certificate for an alleged violation of a railroad test procedure, signal standard, or practice pursuant to § 246.303(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad will have immunity from civil enforcement for making what the agency believes to be an incorrect determination. However, if railroads do

not conduct a reasonable inquiry or act in good faith, they could be subject to civil penalty assessment under this rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against an individual responsible for the noncompliance by assessing a civil penalty against the individual or issuing an order prohibiting the individual from performing safety-sensitive functions in the rail industry for a specified period of time pursuant to part 209, subpart D.

Subpart E—Dispute Resolution Procedures

This subpart details the opportunities and procedures for a person to challenge a railroad's decision to deny certification or recertification or to revoke a signal employee's certification. While the proposed dispute resolution process for signal employees largely mirrors the processes for engineers under part 240 and conductors under part 242, FRA proposes some modifications in this proposed rule that will be discussed below. In addition, FRA has undertaken efforts to simplify these regulations to make them clear and comprehensible to all interested parties.

Section 246.401 Review Board Established

This proposed section, derived from 49 CFR 240.401 and 242.501, provides that a person who is denied certification or recertification or has had their signal employee certification revoked may petition FRA to review the railroad's decision. Pursuant to this section, FRA delegates initial responsibility for adjudicating such disputes to the CRB. Although creation of the CRB will require issuance of an internal FRA order, FRA anticipates that the CRB will mirror the Operating Crew Review Board (OCRB) which currently adjudicates disputes under parts 240 and 242.[23] Under this proposed rule, this newly created Board would adjudicate certification disputes for all certified crafts, including locomotive engineers, conductors, and signal employees. FRA is fully aware that these different job disciplines require different knowledge bases and skill sets. While the specific process for selecting CRB members would be delineated in an FRA order or other internal document, FRA would ensure that the CRB is composed of employees with sufficient backgrounds in these various disciplines. Only those CRB members with sufficient knowledge of signaling would be able to participate as a voting member on a petition filed under this part.

Section 246.403 Petition Requirements

This proposed section, derived from 49 CFR 240.403 and 242.503, contains proposed requirements for obtaining FRA review of a railroad's decision to deny or revoke certification, or deny recertification. Paragraph (b) of this section would require petitioners to seek review in a timely fashion once the adverse decision is served on them. In the interest of consistency and uniformity with parts 240 and 242, petitioners would have 120 days from the date the adverse decision was served upon them to file a petition for review by the CRB.

Paragraph (b)(3) would require petitioners to file their petitions through *https://www.regulations.gov.* Petitioners and their representatives would, however, be well-advised to save some form of proof of filing, in case an error occurs in the *regulations.gov* system and they have to submit proof that their petition was timely filed. All documents associated with a CRB petition would be posted to the docket on *Regulations.gov* and all DOT dockets on *Regulations.gov* are available to the public. You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477–78).

Paragraph (b)(4) would require that a petition contain contact information, including an email address, for the petitioner and their representative, if any. The OCRB only communicates with parties via email. Therefore, FRA anticipates the CRB will operate in a similar manner and will only send communications to the parties via email. If a petition only contains an email address for the petitioner's representative, but not the petitioner, the CRB will only send any necessary communications to the representative. Accordingly, a petition filed in accordance with this part need not include a mailing address for petitioner or their representative, unlike petitions for review filed pursuant to parts 240 and 242. Lastly, if any required contact information for petitioner or their representative, such as a phone number or email address, changes during the pendency of a petition before the CRB, it would be the responsibility of the petitioner or their representative to provide the CRB and the railroad with the new contact information.

Paragraph (b)(6) would require petitioners or their representatives to state the facts and arguments in support of their petition. In other words, they would need to explain to the CRB why they think the railroad was incorrect in denying or revoking the petitioner's certification. Paragraph (b)(7) would require petitioners to submit all documents related to the railroad's decision that are in their possession or reasonably available to them. This may include the transcript and exhibits from the petitioner's denial or revocation hearing. In most cases, these documents will be essential to the Board's ability to make an informed decision on the petition. If neither the petitioner nor the railroad provides these documents, the Board may have to specifically request these documents which would likely to delay the Board's adjudication of the petition. Therefore, it is in the petitioner's interest to include these documents as part of their petition.

Paragraph (c) of this section is intended to clarify a petitioner's responsibilities with respect to a petition seeking review of a railroad decision based on petitioner's alleged failure to comply with a drug or alcohol-related rule or a return-to-service agreement. If requested by the CRB, paragraph (c) would require a petitioner to supplement the petition with ''a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees.'' This paragraph would also require a petitioner to provide a written explanation in response to a CRB request if the petitioner does not supply the Board with written documents that should be reasonably available under 49 CFR 40.329.

Paragraph (d) of this section would give the CRB discretion to grant a request for additional time to file a petition if certain circumstances are met. As an initial matter, the petitioner would be required to show good cause for granting the extension. Thus, a petitioner would have to demonstrate a reasonable justification for granting the extension of time. This justification should be as detailed as possible to assist the Board in its determination. In addition to showing good cause for an extension, a petitioner would be required to submit their extension request before the deadline for filing their petition or, if the deadline has already passed, they must allege facts constituting ''excusable neglect'' for failing to meet the deadline. The mere assertion of excusable neglect, unsupported by facts, would be insufficient. Excusable neglect would require a demonstration of good faith on the part of the party seeking an

[23] In a future rulemaking, FRA expects to revise parts 240 and 242 to refer to the CRB instead of the OCRB.

extension of time, and some reasonable basis for the party's failure to comply with the time frame specified in this proposed rule. Absent a showing along these lines, relief would be denied. The Board would make determinations on whether ''good cause'' and/or ''excusable neglect'' has been shown on a case-by-case basis.

Paragraph (e) explains that a decision by the CRB to deny a petition for untimeliness or lack of compliance with the requirements of § 246.303 may be appealed directly to the FRA Administrator. Normally an appeal to the Administrator can only occur after a case has been heard by FRA's hearing officer. However, petitions that the Board finds to be untimely or incomplete are the two exceptions where a party can skip petitioning the hearing officer and go directly to filing an appeal with the Administrator.

Section 246.405 Processing Certification Review Petitions

This section of the proposed rule, derived from 49 CFR 240.405 and 242.505, details how petitions for review by the CRB would be handled. Paragraph (a) of this section notes that when FRA receives a CRB petition, FRA would send a written notification to the parties involved in the petition. FRA proposes to send these acknowledgments via email. If a representative files a petition on behalf of a petitioner, the petition must include the petitioner's email address, if the petitioner also wants to receive the acknowledgment email and any other correspondence (including the Board's decision) from FRA. The acknowledgment email would include the docket number for the petition so that both parties can access the documents in the case on *https://www.regulations.gov.* FRA would not send a copy of the petition to the railroad.

Paragraph (b) of this section would provide railroads with the opportunity to respond to a petition. While it is always optional for a railroad to respond to a petitioner's arguments, if the petitioner did not include relevant documents in their petition, such as hearing transcripts or exhibits, the railroad is required to provide FRA with those documents, even if it does not respond to the arguments in the petition. Railroads would have 60 days, from the date FRA sends the acknowledgment email, to file a response to the petition in the docket on *https://www.regulations.gov.* Railroads would be permitted to submit responses after the 60-day deadline, but the Board would only review such late filings if practicable. In other words, there is no guarantee that the Board would review a late response prior to issuing a decision; thus, if a railroad wishes to respond to a petition, it should meet the 60-day filing deadline. The railroad could fulfill its requirement to serve a copy of its response on the other parties by sending its response via email to petitioner, petitioner's representative, and petitioner's employer (if different from the railroad that revoked petitioner's certification).

Paragraph (c) of this section explains when a case would be referred to the Board, and what authority the Board would have. If a railroad files a response before the 60-day deadline in paragraph (b) of this section, the petition would be referred to the Board upon receipt of the response. Otherwise, the petition would be referred to the Board 60 days after the date the acknowledgment email was sent. The Board would have the authority to grant a petition (rule in favor of the petitioner), deny a petition (rule in favor of the railroad), or dismiss a petition. An example of when the Board would dismiss a petition would be if the respondent railroad did not deny or revoke the petitioner's certification, and thus, there was no case or controversy before the Board. If there is insufficient evidence in the record for the Board to make a decision on the merits of a petition, the Board may choose to remand a petition or issue an interim order, so that additional fact-finding can occur.

Paragraphs (d), (e), and (f) of this section provide the standards of review that the Board would employ for procedural issues, factual issues, and legal issues, respectively. These standards mirror the standards of review used by the OCRB to review locomotive engineer and conductor petitions. The Board would not correct all procedural errors committed by a railroad. Instead, the Board would only grant a petition if the respondent railroad's procedural error caused substantial harm to the petitioner. For factual issues, the petitioner would be required to show that the respondent railroad did not have substantial evidence to support its decision to deny or revoke the petitioner's certification. If the Board must decide a legal issue, it would conduct *de novo* review, meaning that it would not give deference to any decision or interpretation made by the railroad.

Paragraph (g) of this section acknowledges that the Board's decision-making power would be limited to granting or denying a petition. In other words, the Board would only be empowered to make determinations concerning qualifications under this proposed regulation. The Board would not be empowered to mitigate the consequences of a railroad decision if the decision is valid under this proposed regulation. The contractual consequences, if any, of these determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay, in the event of a finding that a railroad wrongfully denied certification.

Paragraph (h) of this section would require the Board to issue a written decision that would be served on all affected parties. FRA would send the decision to the parties by email and it will also be posted in the case's docket on *https://www.regulations.gov.*

Section 246.407 Request for a Hearing

This proposed section, derived from 49 CFR 240.407 and 49 CFR 242.507, provides that a party who has been adversely affected by a CRB decision would have the opportunity to request an administrative proceeding as prescribed in § 246.409. Paragraph (b) of this section contains the instructions and the deadline for submitting a hearing request. Just like CRB petitions, parties would be required to file hearing requests electronically. To file a hearing request, the adversely affected party would upload the request to the docket on *https://www.regulations.gov* that was used while the case was before the Board. This docket would also be used to file documents while the case is before the hearing officer. After the 20-day deadline to file a hearing request has passed, FRA would check the docket on *https://www.regulations.gov* to see if a hearing request was filed. Paragraph (c) of this section contains a list of elements that would be required for a hearing request, including the docket number assigned to the case when it was before the Board. With respect to the signature requirement in paragraph (c), FRA would accept electronic signatures.

Paragraph (d) of this section states that FRA would arrange for the appointment of a presiding officer. The presiding officer would then schedule a hearing for the earliest practicable date.

Paragraph (e) of this section provides that a party who fails to request an administrative hearing in a timely fashion would lose the right to further administrative review and the CRB's decision would constitute final agency action.

Section 246.409 Hearings

This section of the proposed rule, derived from 49 CFR 240.409 and 49 CFR 242.509, describes the authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing would be governed. Paragraph (b) of this section provides that the proceeding would afford an aggrieved party a *de novo* hearing at which the relevant facts would be adduced and the correct application of this part would be determined. When the issues presented are purely legal, or when only limited factual findings are necessary to determine issues, the presiding officer may determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer could then grant full or partial summary judgment.

Paragraph (d) of this section provides that the presiding officer may authorize discovery. It would also authorize the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) of this section would require that documents in the nature of pleadings be signed. This signature could be electronic and would constitute a certification of factual and legal good faith. Paragraph (f) of this section contains a proposed requirement for service and for certificates of service. Paragraph (g) of this section would give the presiding officer authority to address noncompliance with a law or directive. This provision is intended to ensure that the presiding officer will have the authority to control the proceeding so that an efficient and fair hearing can be conducted.

Paragraph (h) of this section states the right of each party to appear and be represented. Paragraph (i) of this section is intended to protect witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) of this section would allow any party to request consolidation or separation of hearings of two or more petitions when appropriate under established jurisprudential standards. This option is intended to allow for more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k) of this section, the presiding officer could, with certain exceptions, extend deadlines for action required in the proceedings, provided substantial prejudice would not result to a party. The authority to deny an extension request submitted after a deadline has already passed shows the preference for use of this authority to provide extensions of time as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) of this section would establish motions as the appropriate method for requesting action by the presiding officer. This paragraph also provides the proposed form of motions and the proposed response period for written motions. Paragraph (m) of this section contains proposed rules for the mode of hearing and record maintenance, including proposed requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) of this section would direct the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence, and would permit the presiding officer to determine what evidence may be received. Further, paragraph (o) of this section provides additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) of this section would require that the petitioner before the CRB, the railroad that took the certification action at issue, and FRA serve as mandatory parties to the administrative proceeding. Paragraph (q) of this section explains which party would be the hearing petitioner and which parties would be the respondents. If the Board granted the petition, the railroad would be the hearing petitioner and the signal employee or signal employee candidate would be a respondent. If the Board denied the petition, the signal employee or signal employee candidate would be the hearing petitioner and the railroad would be a respondent. The actions of the signal employee (or certification candidate) and the railroad would be at issue in the hearing—not the actions of the CRB. Thus, it is appropriate that the signal employee and the railroad fill the roles of petitioner and respondent for the hearing.

Paragraph (q) also provides that FRA would be a mandatory party in the proceeding. In all proceedings, FRA would initially be considered a co-respondent. If, based on evidence acquired after the filing of a hearing petition, FRA concludes that the public interest in safety is more closely aligned with the position of the petitioner than the respondent, FRA could request that the hearing officer exercise their inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would rarely occur. FRA would represent the interests of the government; hence, parties and their representatives would have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself. Paragraph (q) also notes that the party requesting the hearing would have the burden of proving its case by the preponderance of evidence.

Paragraph (r) of this section would give the presiding officer authority to close the record in a case. Paragraph (s) of this section would also give the presiding officer authority to issue a decision and includes proposed requirements for that decision.

Section 246.411 Appeals

This proposed section, derived from 49 CFR 240.411 and 49 CFR 242.511, would permit any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) of this section provides that if no appeal is timely filed, the presiding officer's decision would constitute final agency action. The appeal must be filed in the same docket on *https://www.regulations.gov* used when the case was before the Board and the presiding officer.

Paragraph (b) of this section allows for a party to reply to the appeal. Paragraphs (c) and (d) of this section describe the Administrator's authority to conduct the proceedings of an appeal. Paragraph (e) of this section addresses the Administrator's options for ruling on an appeal. The phrase ''except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted'' is included in this proposed rule because a remand, or other intermediate decision, would not constitute final agency action. The inclusion of this phrase is intended to clarify this potential outcome to those parties who are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Paragraph (f) of this section provides instructions for handling appeals to the Administrator that come directly from the CRB. The only cases that would be allowed to proceed directly from the Board to the Administrator would be cases in which the Board denied a petition for being untimely or incomplete. If the Administrator vacates and remands the Board's decision, the case would return to the Board. If the Administrator affirms the Board's decision, that would constitute final agency action.

Appendices

FRA has included two appendices with this proposed rule. Appendix A, derived from appendix C to part 240 and appendix C to part 242, provides a narrative discussion of the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B, derived from appendix D to part 240 and appendix D to part 242, provides a narrative discussion of the procedures that a railroad would be required to employ when administering the vision and hearing requirements of §§ 246.117 and 246.118. This appendix discusses test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

V. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This proposed rule is not a significant regulatory action within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review. Details on the estimated costs of this NPRM can be found in the Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket (FRA–2021–0020).

FRA is proposing regulations establishing a formal certification process for railroad signal employees. As part of that process, railroads would be required to develop a program for training current and prospective signal employees, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a record of safety compliance infractions that other railroads can review when considering individuals for certification. This proposed regulation would ensure that signal employees are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

The RIA presents estimates of the costs likely to occur over the first 10 years of the proposed rule. The analysis includes estimates of costs associated with development of training programs, initial and periodic training, knowledge testing, and monitoring of operational performance. Additionally, costs are estimated for vision and hearing tests, certification determinations made by other railroads, and Government administrative costs.

FRA estimated 10-year costs of $8.3 million discounted at 7 percent. The annualized cost would be $1.2 million discounted at 7 percent. The following table shows the estimated 10-year costs of the proposed rule.

TOTAL 10-YEAR DISCOUNTED COSTS

[2020 Dollars]

Category	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Development of Certification Program	1,140,385	1,168,920	162,365	137,033
Certification Eligibility Requirements	87,507	100,380	12,459	11,768
Recertification Eligibility Requirements	203,790	259,653	29,015	30,439
Training	2,079,835	2,379,911	296,122	278,998
Knowledge Testing	746,865	898,884	106,337	105,377
Vision and Hearing	1,097,523	1,320,891	156,263	154,849
Monitoring Operational Performance	832,102	994,414	118,473	116,576
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	103,175	124,175	14,690	14,557
Petitions and Hearings	42,451	50,731	6,044	5,947
Government Administrative Cost	1,653,360	1,914,063	235,401	224,387
Total	8,277,337	9,566,001	1,178,507	1,121,427

This rule is expected to reduce the likelihood of an accident occurring due to signal employee error. FRA has analyzed accidents over the past 10 years to categorize those where signal employee may have caused the accident. FRA then estimated benefits based on that analysis.

The following table shows the estimated 10-year benefits of the proposed rule. The total 10-year estimated benefits would be $2.9 million (PV, 7%) and annualized benefits would be $0.4 million (PV, 7%).

TOTAL 10-YEAR DISCOUNTED BENEFITS

[2020 Dollars]

Category	Present value 7% ($)	Present value 3% ($)	Annualized 7% ($)	Annualized 3% ($)
Grade Crossing Accidents	1,766,028	2,064,676	251,443	242,043
Train Accidents/Incidents	989,123	1,156,391	140,829	135,564
Business Benefits from Fewer Activation Failures	159,526	186,503	22,713	21,864
Total	2,914,678	3,407,570	414,985	399,471

Additional benefits are discussed, but not quantified, in this analysis. This proposed rule would require railroads to check with prior employers when hiring a new signal employee. This would include a check of their prior safety

record and whether the prospective signal employee had their certification revoked in the past.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA prepared this IRFA to facilitate public comment on the potential small business impacts of the requirements in this NPRM.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from adoption of the proposals in this NPRM. FRA particularly encourages small entities that could potentially be impacted by the proposed rule to participate in the public comment process. FRA will consider all information and comments received in the public comment process when making a determination of the economic impact on small entities.

1. Reasons for Considering Agency Action

FRA is concerned with accidents caused by signal employee error. Railroads' signal employee training programs may not be covering all aspects of a signal employee's job responsibility. Additionally, railroads may not be testing signal employees and ensuring that their knowledge is maintained continuously.

This NPRM would require railroads to develop a signal employee certification program. This proposed rule would ensure that railroads examine railroad safety with respect to signal employees. If FRA did not issue the rule as proposed, railroads would be free to hire and train signal employees as they see fit.

2. A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

This proposed rule may reduce the rate of signal employee-caused accidents. The annual operational performance monitoring would ensure that signal employees maintain their knowledge after the initial certification process.

FRA is proposing regulations for the certification of signal employees, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008 (RSIA). Also, the general authority of the Secretary states, in relevant part, that the Secretary ''as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.'' [24] The Secretary delegated this authority to the Federal Railroad Administrator.[25]

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. ''Small entity'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a ''small entity'' in the railroad industry is a for profit ''line-haul railroad'' that has fewer than 1,500 employees, a ''short line railroad'' with fewer than 1,500 employees, a ''commuter rail system'' with annual receipts of less than $16.5 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than $16.5 million.[26]

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA has published a proposed statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues,[27] and commuter railroads or small Governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003) (codified at Appendix C to 49 CFR part 209). FRA is using this definition for the proposed rule.

When shaping the proposed rule, FRA considered the impact that the proposed rule would have on small entities.

The proposed rule would be applicable to all railroads with signal systems. However, some small railroads do not have a signal system as part of their operations. FRA estimates there are 744 Class III railroads, of which 704 operate on the general system. These railroads are of varying size, with some belonging to larger holding companies. Approximately 490 Class III railroads would be impacted by this rulemaking because they have a signal system. The remaining Class III railroads do not have a signal system, thus would have no need for signal employee certification program.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Would be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

Railroads would be required to submit information to FRA for approval of signal employee certification programs. For small railroads that choose to develop their own certification programs, they would likely be less complex than larger railroads' operations. This would ease some of the burden on small railroads.

The training program, and annual railroad responsibilities would be prepared by a professional or administrative employee. The type of professional skills needed by an employee responsible for submitting a special approval request includes the ability to plan and organize work. Such an employee would also need good verbal and written communication skills and attention to detail.

Summary of Class III Railroad Costs

Class III Railroads would have all the same cost components as larger railroads except they would not be required to perform annual railroad oversight responsibilities in accordance with the proposed rule. Therefore, that

[24] 49 U.S.C. 20103.

[25] 49 CFR 1.89(a).

[26] U.S. Small Business Administration, ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes, August 19, 2019. *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019,%202019.pdf.*

[27] The Class III railroad revenue threshold is $40.4 million or less, for 2021. (The Class II railroad threshold is between $40.4 million and $900 million.) *See* Surface Transportation Board (STB), available at *https://www.stb.gov/news-communications/latest-news/pr-21-16/.*

cost has been excluded for Class III railroads.

The following table shows the annualized cost for Class III railroads over the 10-year analysis period. The total estimated 10-year costs for Class III railroads would be $2.4 million and the annualized cost for all Class III railroads would be $346,052 (PV, 7 percent).

TOTAL 10-YEAR AND ANNUALIZED COSTS, CLASS III RAILROADS

Category	Present value 7% ($)	Annualized 7% ($)
Development of Certification Program	309,067	44,004
Certification Eligibility Requirements	21,877	3,115
Recertification Eligibility Requirements	50,947	7,254
Training	519,959	74,030
Knowledge Testing	186,716	26,584
Vision and Hearing	1,097,523	156,263
Monitoring Operational Performance	208,026	29,618
Certification Card	25,794	3,672
Petitions and Hearings	10,613	1,511
Total	2,430,522	346,052

The industry trade organization representing small railroads, ASLRRA, reports the average freight revenue per Class III railroad is $4.75 million.[28] The following table summarizes the average annual costs and revenue for Class III railroads.

AVERAGE CLASS III RAILROADS' COSTS AND REVENUE

Total cost for Class III railroads, annualized 7%	Number of Class III railroads with signal systems	Average annual cost per Class III railroad ($)	Average Class III annual revenue ($)	Average annual cost as a percent of revenue
a	b	c = a ÷ b	d	e = c ÷ d
346,052	535	647	4,750,000	0.01%

The average annual cost for a Class III railroad impacted by this rule would be $647. This represents a small percentage (0.01%) of the average annual revenue for a Class III railroad.

The estimates above show that the burden on Class III railroads would not be a significant economic burden. FRA requests comments on this estimate and will consider all comments when making a determination for the final rule.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant Federal rule that duplicates, overlaps with, or conflicts with this NPRM. This proposed rule is complementary to, rather than duplicative of, other recent regulatory initiatives FRA has issued or is in the process of developing. These initiatives include: the implementation of positive train control (PTC) systems by required railroads;[29] training, qualification, and oversight;[30] railroad safety risk reduction programs;[31] and the development of fatigue risk management programs.[32]

6. A Description of Significant Alternatives to the Rule

This analysis considered two alternatives to the rule: the baseline approach, and an approach that would certify just the training program. The baseline alternative (no action) would not ensure that signal employees are being properly trained. Without this rule, railroad operations may be less safe if railroads are not providing adequate training to their signal employees.

The alternative of certifying only the training program would require a railroad to enhance their training of signal employees. Training, however, is only a part of the certification process. The additional requirements of this proposed rule would ensure that signal employees' hearing, vision, prior safety conduct at other railroads, and other aspects have been reviewed and are consistent with railroad safety.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.[33] The entire table contains the new information collection requirements and the estimated time to fulfill each requirement are as follows:

[28] American Short Line and Regional Railroad Association, *Short Line and Regional Railroad Facts and Figures,* p. 10 (2017 pamphlet).

[29] *See generally* 49 CFR part 236, subpart I; and press release in which FRA announces full implementation of positive train control (Dec. 29, 2020), *available at https://railroads.dot.gov/sites/fra.dot.gov/files/2020-12/fra1920.pdf.*

[30] 49 CFR part 243.

[31] 49 CFR parts 270 and 271.

[32] 85 FR 83484 (Dec. 22, 2020) (proposing to amend 49 CFR parts 270 and 271 to require certain railroads to develop and implement a Fatigue Risk Management Program as one component of the railroads' larger railroad safety risk reduction programs).

[33] 44 U.S.C. 3501 *et seq.*

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) [34]	Total cost equivalent (E) = C * D
246.9—Waivers—Petitions	553 railroads	10.00 petition	3 hours	30.00	$77.44	$2,323.20
246.101/.103—Certification program required and FRA review of certification program—Development of signal employee certification program in accordance with this part and procedures contained under § 246.106 (Note: Each certification program includes procedure requirements under § 246.111 through § 246.121.).	553 railroads + ASLRRA and holding companies.	187.66 plans (14.33 Class I and commuter railroads plans + 3.33 generic program developed by ASLRRA and holding companies plans + 170 Class II and III railroads plans).	120 hours + 120 hours + 6 hours.	3,139.20	115.24	361,761.41
—(d)(1) Signal employees certification submission—Copies of the program provided to the president of each rail labor organization (RLO) that represents the railroad's employees that are subject to this part.	553 railroads	2 copies	15 minutes	.50	77.44	38.72
—(d)(2) Affirmative statements that the railroad has provided a copy of the program to RLOs.	553 railroads	2 affirmative statements.	15 minutes	.50	77.44	38.72
—(e) Comment Period—Affirmed comments on a railroad's program by any designated representative of employees subject to this part or any directly affected employee who does not have a designated representative.	553 railroads	31 comments	4 hours	124.00	77.44	9,602.56
—(g) Material Modifications of FRA-approved program—Railroad to submit a description of how it intends to modify the program and a copy of the modified program to FRA.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(h) Resubmission—Railroad can resubmit its program or material modification as described in paragraph (f)(2) of this section after addressing all of the deficiencies noted by FRA and the resubmission must conform with the procedures and requirements contained in § 246.106.	553 railroads + ASLRRA and holding companies.	4.67 revised plans (3.67 revised plans Class I and commuter railroads + 1 revised plan ASLRRA and holding companies).	21 hours + 20 hours	94.40	77.44	7,310.34
—(i) Rescinding Prior Approval of Program—Railroad to resubmit its certification program and the program must conform with the procedures and requirements contained in § 246.106.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
246.105(c)(1)–(d)(1)—Implementation schedule for certification programs—Designation of certified signal employee.	553 railroads	3,781 designated lists	5 minutes	315.08	77.44	24,399.80
—(c)(2)–(d)(2) Issue a certificate that complies with § 246.207 to each person that it designates.	553 railroads	3,781 issued certificates.	3 minutes	189.05	77.44	14,640.03
—(f) Written requests for delayed certification—Railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program.	FRA anticipates zero submissions.					
—(g) Testing and evaluation—Railroad shall only certify or recertify a person as a signal employee if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.	The paperwork burden for testing and evaluation is included in the economic burden and the burden for certificates is included under § 246.105.					
246.106—Requirements for Certification Programs—Procedures for Submission and Approval of Dispatcher Certification Programs.	The paperwork requirements described in this section are accounted for throughout this table.					
246.109(a)—Determinations required for certification and recertification—Eligibility requirements.	The paperwork burden for this requirement is covered under § 246.111 through § 246.121 and § 246.303.					

CFR section	Respondent universe	Total annual responses	Average time per responses	Total annual burden hours	Wage rate	Total cost equivalent
		(A)	(B)	(C) = A * B	(D) [34]	(E) = C * D
246.111(a)–(c)—Prior safety conduct as motor vehicle operator—Eligibility requirements of this section involving prior conduct as a motor vehicle operator.	553 railroads	1,706 motor vehicle records.	5 minutes	142.17	77.44	11,009.64
—(e) If driver information is not obtained as required pursuant to paragraph (g) of this section, that person or the railroad certifying or recertifying that person may petition for a waiver in accordance with the provisions of part 211 of this chapter.	553 railroads	2 waivers	2 hours	4.00	77.44	309.76
—(f) Individual's duty—Consent to make information concerning driving record available to that railroad.	This is usual and customary procedure. The consent form is signed at the time of hiring to make driving information available to the railroad.					
—(g)–(h) Request to obtain driver's license information from licensing agency.	553 railroads	1,706 written requests.	5 minutes	142.17	59.00	8,388.03
—(i) Requests for additional information from licensing agency.	The paperwork burden for this requirement is included under § 246.111(g)–(h).					
—(j) Notification to railroad by persons of never having a license.	553 railroads	2 notices	10 minutes	.33	77.44	25.56
—(k) Report of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the employing railroad within 48 hours.	553 railroads	40 self-reports	10 minutes	6.67	77.44	516.52
—(l)–(m) Evaluation of person's driving record by railroad.	553 railroads	1,706 motor vehicle record evaluations.	5 minutes	142.17	71.89	10,220.60
—(n)(1) DAC referral by railroad after report of driving drug/alcohol incident.	553 railroads	36 DAC referrals	5 minutes	3.00	115.24	345.72
—(n)(2) DAC request and supply by persons of prior counseling or treatment.	553 railroads	1 request and supplied record.	30 minutes	.50	115.24	57.62
—(n)(3) Conditional certifications recommended by DAC.	553 railroads	3 conditional certification recommendations.	4 hours	12.00	115.24	1,382.88
246.113(b)—Prior safety conduct as an employee of a different railroad—Certification candidate has not been employed by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (d) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.	This is usual and customary procedure and therefore there is no paperwork burden.					
—(c) Person seeking certification or recertification under this part shall submit a written request to each railroad that employed the person within the previous five years.	553 railroads	43.00 requests	15 minutes	10.75	77.44	832.48
—(e) and (g) Railroad shall provide the information requested to the railroad designated in the written request.	553 railroads	43.00 records	15 minutes	10.75	77.44	832.48
—(f) An explanation shall state why the railroad cannot provide the information within the requested time frame or cannot provide the requested information.	FRA anticipates zero submissions.					
246.115(a)—Substance abuse disorders and alcohol drug rules compliance—Determination that person meets eligibility requirements.	553 railroads	1,535 determinations	2 minutes	51.17	77.40	3,960.56
—(b) Written documents from DAC that person is not affected by a disorder.	553 railroads	79 filed documents	30 minutes	39.50	115.24	4,551.98
—(c)(3) Fitness requirement—Voluntarily self-referral by signal employee for substance abuse counseling or treatment under the policy required by § 219.1003 of this chapter.	553 railroads	2 self-referrals	10 minutes	.33	115.24	38.03
—(d)(1)–(d)(2) Prior alcohol/drug conduct; Federal rule compliance.	553 railroads	1,535 certification reviews.	10 minutes	255.83	115.24	29,481.85
—(d)(3)(i) Written determination that most recent incident has occurred.	553 railroads	30 written determinations.	1 hour	30.00	115.24	3,457.20
—(d)(3)(ii) Notification to person that recertification has been denied.	553 railroads	30 notifications	30 minutes	15.00	77.44	1,161.60

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) [34]	Total cost equivalent (E) = C * D
—(d)(4) Persons/conductors waiving investigation/de-certifications.	553 railroads	20 waived investigations.	10 minutes	3.33	77.44	257.88
246.117(a)–(c)—Vision acuity—Determination vision standards met—Medical examiner certificate/record.	553 railroads	400 records	2 minutes	13.33	71.89	958.29
—(d)(1) Request for retest and another medical evaluation—Medical examiner certificate/record.	553 railroads	10 records	2 minutes	.33	71.89	23.72
—(d)(2) Railroad to provide a copy of this part to medical examiner.	553 railroads	400 copies	5 minutes	33.33	71.89	2,396.09
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification.	553 railroads	5 consultations + 5 conditional certifications.	30 minutes + 10 minutes.	3.33	71.89	239.39
—(g) Notification by certified signal employee of deterioration of vision.	553 railroads	1 notification	10 minutes	.17	71.89	12.22
246.118—Hearing acuity—Determination hearing standards met—Medical records.	553 railroads	400 medical records	2 minutes	13.33	71.89	958.29
—(d)(1) Request for retest and another medical evaluation—Medical examiner certificate/record.	553 railroads	10 records	2 minutes	.33	71.89	23.72
—(d)(2) Railroad to provide a copy of this part to medical examiner.	553 railroads	400 copies	5 minutes	33.33	71.89	2,396.09
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification.	553 railroads	5 consultations + 5 conditional certifications.	30 minutes + 10 minutes.	3.33	71.89	239.39
—(g) Notification by certified signal employee of deterioration of hearing.	553 railroads	25 notifications	10 minutes	4.17	71.89	299.78
246.119(b)–(c)—Training requirements—A railroad's election for the training of signal employees shall be stated in its certification program.	The paperwork burden for this requirement is covered under § 246.101/.103.					
—(d) Initial training program for previously untrained person to be a signal employee.	553 railroads	184 training programs.	3 hours	553.00	115.24	63,727.72
—(d)(3) Modification to training program when new safety-related railroad laws, regulations and etc. are introduced into the workplace.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(e) Relevant information or materials on safety or other rules made available to certification candidates.	The paperwork burden for this requirement is covered under § 246.101/.103.					
—(f) and (g) Completion of initial training program by a person being certified as a signal employee—Written documentation showing completed training program that complies with paragraph (d) of this section.	553 railroads	3,781 written documents or records.	10 minutes	630.17	77.44	48,800.36
—(f)(3) Employee consultation with qualified supervisory employee if given written test to fulfill this requirement, the railroad must provide the certification candidate with an opportunity to consult with a qualified instructor to explain a question.	The paperwork burden for this requirement is covered under § 246.119.					
—(h) Certification program is submitted in accordance with the procedures and requirements described in § 246.106.	The paperwork burden for this requirement is covered under § 246.101/.103.					
—(i) Familiarization training for signal employee of acquiring railroad from selling company/railroad prior to commencement of new operation.	FRA anticipates zero submissions.					
—(j) Continuing education of certified signal employees.	553 railroads	2,000 training records	15 minutes	500.00	71.89	35,945.00
246.120—Requirements for qualification—Determining eligibility and.	The paperwork burden for this requirement is covered under § 246.119.					
—(b) Notification by persons not qualified on the signal system.	The paperwork burden for this requirement is covered under § 246.119.					
246.121(a)–(c)—Knowledge testing—Determining eligibility.	553 railroads	2,000 test records	5 minutes	166.67	77.44	12,906.92
—(d) Reexamination of the failed test	553 railroads	20 examination records.	5 minutes	1.67	77.44	129.32

CFR section	Respondent universe	Total annual responses	Average time per responses	Total annual burden hours	Wage rate	Total cost equivalent
		(A)	(B)	(C) = A * B	(D) [34]	(E) = C * D
246.123(c)—Monitoring operational performance—Unannounced compliance tests—Retention of a written record.	553 railroads	7,348 records	2 minutes	244.93	77.44	18,967.38
246.125—Certification determinations made by other railroads.	553 railroads	11.00 determinations	30 minutes	5.50	77.44	425.92
246.203(b)—Retaining information supporting determination—Records.	553 railroads	2,000 record retentions.	15 minutes	500.00	77.44	38,720.00
—(g) Amended electronic records	553 railroads	2 amended record	15 minutes	.50	77.44	38.72
246.205—List of certified signal employees and recordkeeping..	The paperwork requirement for this burden is covered under § 246.105(c)(1)–(d)(1).					
246.207(a)–(f)—Certificate requirements	The paperwork requirement for this burden is covered under § 246.105(c)(2)–(d)(2).					
—(b) Notification by signal employees that railroad request to serve exceeds certification.	553 railroads	110 notifications	30 seconds	.92	71.89	66.14
—(g)–(h) Replacement of certificates	553 railroads	45 replacement certificates.	5 minutes	3.75	77.44	290.40
246.213(a)–(h)—Multiple Certificates—Notification of denial of certification by individuals holding multiple certifications.	553 railroads	3 notifications	10 minutes	.50	77.44	38.72
—(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts.	The paperwork requirement for this burden is covered under § 246.105.					
246.215—Railroad oversight responsibility—Review and analysis of administration of certification program.	553 railroads	17.33 annual reviews and analyses.	8 hours	138.64	115.24	15,976.87
—(d) Report of findings and conclusions reached during annual review by railroad to FRA (if requested in writing by FRA) review and analysis effort..	553 railroads	2 reports	4 hours	8.00	115.24	921.92
246.301(a)—Denial of certification—Notification to candidate of information that and candidate response forms basis for denying certification.	553 railroads	6 notices + 3 responses.	1 hour	9.00	77.44	696.96
—(b) Denial Decision Requirements—Written notification of denial of certification by railroad to candidate.	553 railroads	6 notifications	1 hour	6.00	77.44	464.64
246.307(b)(1)–(b)(4)—Process for revoking certification—Immediate suspension of signal employee's certification.	553 railroads	15 suspended certification letters and documentations.	30 minutes	7.50	77.44	580.80
—(b)(5)–(b)(6) Determinations based on the record of the hearing, whether revocation of the certification is warranted.	The paperwork requirement for this burden is covered under § 246.307(e).					
—(b)(7) Retention of record of the hearing for three years after the date the decision is rendered.	553 railroads	15 records	15 minutes	3.75	77.44	290.40
—(d)(9) Hearing Procedures—Written waiver of right to hearing.	553 railroads	3 written waivers	10 minutes	.50	59.00	29.50
—(e) Revocation Decision Requirements—Written decisions by railroad official.	553 railroads	15 written decisions and service of decisions.	2 hours	30.00	115.24	3,457.20
—(g) Revocation of certification based on information that another railroad has done so.	553 railroads	3 revoked certifications.	10 minutes	.50	115.24	57.62
—(j) Placing relevant information in record if sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available.	The paperwork requirement for this burden is covered under § 246.307(b)(7).					
—(k) Good faith determination	553 railroads	3 good faith determinations.	1 hour	3.00	77.44	232.32
Subpart E—Dispute Resolution Procedures—§ 246.401 through § 246.411.	The requirements under these provisions are exempted from the PRA under 5 CFR 1320.4(a)(2). Since these provisions pertain to an administrative action or investigation, there is no PRA burden associated with these requirements.					
Appendix A to Part 246—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data.	The paperwork requirements described in this appendix are accounted for throughout this table.					
Appendix B to Part 246—Medical Standards Guidelines.	The paperwork requirements described in this appendix are accounted for throughout this table.					

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) [34]	Total cost equivalent (E) = C * D
Totals [35]	553 railroads + ASLRRA and holding companies.	35,577 responses	N/A	7,682	N/A	747,257

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Ms. Arlette Mussington, Information Collection Clearance Officer, at email: *arlette.mussington@dot.gov* or telephone: (571) 609–1285 or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908. Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via email to Ms. Mussington at *arlette.mussington@dot.gov* or Ms. Swafford at *joanne.swafford@dot.gov.*

OMB is required to decide concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, Federalism,[36] requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that 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.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreements Act of 1979 [37] prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This proposed rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act [38] (NEPA), the Council on Environmental Quality's NEPA implementing regulations,[39] and FRA's NEPA implementing regulations [40] and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.[41] Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review.[42]

The main purpose of this rulemaking is to establish certification requirements for signal employees. This rule would not directly or indirectly impact any environmental resources and would not

[34] Throughout the tables in this document, the dollar equivalent cost is derived from the 2020 Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

[35] Totals may not add due to rounding.

[36] 64 FR 43255 (Aug. 10, 1999).

[37] 19 U.S.C. Ch. 13.

[38] 42 U.S.C. 4321 *et seq.*

[39] 40 CFR parts 1500–1508.

[40] 23 CFR part 771.

[41] 40 CFR 1508.4.

[42] *See* 23 CFR 771.116(c)(15) (categorically excluding ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise'').

result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.[43] FRA has concluded that no such unusual circumstances exist with respect to this proposed rule and it meets the requirements for categorical exclusion.[44]

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.[45] FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).[46] Further, FRA reviewed this proposed rulemaking and found it consistent with Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad.''

G. Executive Order 12898 (Environmental Justice)

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,'' and DOT Order 5610.2C [47] require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,[48] each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act [49] further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and Tribal governments and the private sector. This proposed rule would not result in the expenditure, in the aggregate, of $100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' [50] FRA evaluated this proposed rule under Executive Order 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

K. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this proposed rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The proposed rule would not have a substantial direct effect on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

List of Subjects in 49 CFR Part 246

Administrative practice and procedure, Signal Employee, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

■ For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B, of title 49 of the Code of Federal Regulations, by adding part 246 to read as follows:

PART 246—CERTIFICATION OF SIGNAL EMPLOYEES

Sec.

Subpart A—General

246.1 Purpose and scope.
246.3 Application and responsibility for compliance.
246.5 Effect and construction.
246.7 Definitions.
246.9 Waivers.
246.11 Penalties and consequences for noncompliance.

Subpart B—Program and Eligibility Requirements

246.101 Certification program required.
246.103 FRA review of certification programs.
246.105 Implementation schedule for certification programs.
246.106 Requirements for certification programs.
246.107 Signal service classifications.
246.109 Determinations required for certification and recertification.
246.111 Prior safety conduct as motor vehicle operator.

[43] 23 CFR 771.116(b).

[44] 23 CFR 771.116(c)(15).

[45] *See* 16 U.S.C. 470.

[46] *See* Department of Transportation Act of 1966, as amended (Public Law 89–670, 80 Stat. 931); 49 U.S.C. 303.

[47] *Available at https://www.transportation.gov/sites/dot.gov/files/Final-for-OST-C-210312-003-signed.pdf.*

[48] Public Law 104–4, 2 U.S.C. 1531.

[49] 2 U.S.C. 1532.

[50] 66 FR 28355 (May 22, 2001).

246.113 Prior safety conduct with other railroads.
246.115 Substance abuse disorders and alcohol drug rules compliance.
246.117 Vision acuity.
246.118 Hearing acuity.
246.119 Training requirements.
246.121 Knowledge testing.
246.123 Monitoring operational performance.
246.124 Mentoring.
246.125 Certification determinations made by other railroads.

Subpart C—Administration of the Certification Program

246.201 Time limitations for certification.
246.203 Retaining information supporting determinations.
246.205 List of certified signal employees and recordkeeping.
246.207 Certificate requirements.
246.213 Multiple certifications.
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Authority: 49 U.S.C. 20103, 20107, 20162, 21301, 21304, 21311; 28 U.S.C. 2461 note; 49 CFR 1.89; and Public Law 110–432, sec. 402, 122 Stat. 4884.

Subpart A—General

§ 246.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as certified signal employees, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all signal employees to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The signal employee certification requirements prescribed in this part apply to any person who meets the definition of signal employee contained in § 246.7, regardless of the fact that the person may have a job classification title other than that of signal employee.

§ 246.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) Railroads that do not have a signal system as defined in § 246.7;

(2) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 246.7);

(3) Tourist, scenic, historic, or excursion operations conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operations on the track) and only on track inside an installation that is insular; *i.e.,* the operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of the public—except a business guest, a licensee of the railroad or an affiliated entity, or a trespasser—would be affected by the operation. An operation will not be considered insular, for purposes of this part, if one or more of the following exists on its line:

(i) A public highway-rail grade crossing that is in use;

(ii) A public pathway grade crossing that is in use;

(iii) An at-grade rail crossing that is in use;

(iv) A bridge over a public road or waters used for commercial navigation; or

(v) A common corridor with a railroad, *i.e.,* its operations are within 30 feet of those of any railroad; or

(4) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, as defined in § 246.7, who performs any function required by this part must perform that function in accordance with this part.

§ 246.5 Effect and construction.

(a) FRA does not intend, by use of the term signal employee in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who is engaged in installing, troubleshooting, testing, repair, or maintenance of railroad signal systems.

(b) FRA does not intend by issuance of these regulations to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 246.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 246.7 Definitions.

As used in this part:

Administrator means the Administrator of the FRA or the Administrator's delegate.

Alcohol means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

Contractor means a person under contract with a railroad, including but not limited to, a prime contractor or a subcontractor.

Controlled substance has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301 through 1316).

Disable means to render a device or system incapable of proper and effective action or to materially impair the functioning of that device or system.

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a ''Substance Abuse Professional'' (SAP), as provided in 49 CFR part 40.

File, filed, and *filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad

Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified State railroad safety inspector acting under part 212 of this chapter.

Ineligible or *ineligibility* means that a person is legally disqualified from serving as a certified signal employee. The term covers a number of circumstances in which a person may not serve as a certified signal employee. Revocation of certification pursuant to § 246.307 and denial of certification pursuant to § 246.301 are two examples in which a person would be ineligible to serve as a certified signal employee. A period of ineligibility may end when a condition or conditions are met, such as when a person meets the conditions to serve as a certified signal employee following an alcohol or drug violation pursuant to § 246.115.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

Mentor means a certified signal employee who has at least one year of experience as a certified signal employee. For purposes of this part, a mentor also provides direct supervision and oversight over the work of one or more signal employees.

On-the-job training means job training that occurs in the workplace, *i.e.,* the employee learns the job while doing the job.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. Physical characteristics includes how signal systems and related technology are deployed within the territory, for purposes of this part.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified instructor means a person who:

(1) Has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction;

(2) Where applicable, has the necessary experience to effectively instruct in the field;

(3) Is a certified signal employee under this part; and

(4) If the railroad has designated employee representation, has been selected by a designated railroad officer, in concurrence with the designated employee representative, or has a minimum of one year of service working as a certified signal employee.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad officer means any supervisory employee of a railroad.

Serve or service, in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of ''filing'' in this section.

Signal employee means a person who is engaged in installing, troubleshooting, testing, repairing, or maintaining railroad signal systems or related technology.

Signal system, for purposes of this part, includes the following: block signal systems, cab signal systems, train control systems, positive train control systems, highway-rail and pathway grade crossing warning systems, unusual contingency detection devices, power-assisted switches, broken rail detection systems, switch point indicators, as well as other safety-related devices, appliances, technology, and systems installed on the railroad in signaled or non-signaled territory.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is ''active'' within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in 49 CFR part 40.

Unusual contingency detection device means a device used in the detection of defective conditions on locomotives and rolling stock (*e.g.,* high-wide load, hot or defective bearing, defective wheel detectors) or other unsafe conditions (*e.g.,* high-water, high wind, sliding or slumping soil, rock or snow slide detectors). These devices need not be connected to a signal system for this part to apply.

§ 246.9 Waivers.

(a) A person subject to a requirement of this part may petition FRA for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If FRA finds that a waiver of compliance is in the public interest and is consistent with railroad safety, FRA may grant the waiver subject to any conditions FRA deems necessary.

§ 246.11 Penalties and consequences for noncompliance.

(a) Any person, as defined in § 246.7, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation. However, penalties may be assessed against individuals only for willful violations, and a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed, where:

(1) A grossly negligent violation, or a pattern of repeated violations, has created an imminent hazard of death or injury to persons, or

(2) A death or injury has occurred. *See* 49 CFR part 209, appendix A.

(b) Each day a violation continues constitutes a separate offense.

(c) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(d) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(e) In addition to the enforcement methods referred to in paragraphs (a) through (d) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

(f) FRA's website at *https://railroads.dot.gov/* contains a schedule of civil penalty amounts used in connection with this part.

Subpart B—Program and Eligibility Requirements

§ 246.101 Certification program required.

(a) Each railroad subject to this part shall have a written signal employee certification program.

(b) Each certification program shall include all of the following:

(1) If applicable, an explanation and discussion of the occupational categories of certified signal service that comply with the requirements in § 246.107;

(2) A procedure for evaluating prior safety conduct as a motor vehicle operator that complies with the criteria established in § 246.111;

(3) A procedure for evaluating prior safety conduct with other railroads that complies with the criteria established in § 246.113;

(4) A procedure for evaluating potential substance abuse disorders and compliance with railroad alcohol and drug rules that complies with the criteria established in § 246.115;

(5) A procedure for evaluating visual and hearing acuity that complies with the criteria established in §§ 246.117 and 246.118;

(6) A procedure for training that complies with the criteria established in § 246.119;

(7) A procedure for knowledge testing that complies with the criteria established in § 246.121;

(8) A procedure for monitoring operational performance that complies with the criteria established in § 246.123; and

(9) A procedure for mentoring uncertified signal employees that complies with the criteria established in § 246.124.

(c) Each certification program shall be version controlled. Any change from the previous version of the certification program must be tracked.

§ 246.103 FRA review of certification programs.

(a) *Certification program submission schedule for railroads with signal systems in operation.* With the exception of railroads exempted by § 246.3(a), each railroad with a signal system in operation as of [EFFECTIVE DATE OF FINAL RULE] shall submit its signal employee certification program to FRA, in accordance with the procedures and requirements contained in § 246.106, according to the following schedule:

(1) All Class I railroads (including the National Railroad Passenger Corporation) and railroads providing commuter service shall submit their programs to FRA no later than [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE].

(2) All Class II railroads and Class III railroads (including a switching and terminal or other railroad not otherwise classified) shall submit their programs to FRA no later than [DATE 16 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE].

(b) *Certification program submission for new railroads.* Each railroad that commences operations after [EFFECTIVE DATE OF FINAL RULE] shall submit, and obtain approval of, its written signal employee certification program to FRA, in accordance with the procedures and requirements contained in § 246.106, prior to installing, implementing, or operating a signal system subject to this part.

(c) *Method for submitting certification programs to FRA.* Railroads must submit their written certification programs and their requests for approval (described in § 246.106(a)) by uploading the program to FRA's secure document submission site.

(d) Each railroad that submits a program to FRA must:

(1) Simultaneously with its submission, provide a copy of the program and the request for approval to the president of each labor organization that represents the railroad's signal employees and to all of the railroad's signal employees who are subject to this part; and

(2) Include in its submission to FRA, a statement affirming that the railroad has provided a copy of the program and request for approval to the president of each labor organization that represents the railroad's signal employees and to all of the railroad's signal employees who are subject to this part, along with a list of the names and email addresses of each president of a labor organization who was provided a copy of the program.

(e) *Comment period.* Any designated representative of signal employees subject to this part or any directly affected person who does not have a designated representative may comment on a railroad's program provided that:

(1) The comment is submitted no later than 45 days after the date the program was submitted to FRA;

(2) The comment includes a concise statement of the commenter's interest in the matter;

(3) The commenter affirms that a copy of the comment was provided to the railroad; and

(4) The comment was emailed to *FRASIGNALCERTPROG@dot.gov.*

(f) *FRA review period.* Upon receipt of a complete program, FRA will commence a thorough review of the

program to ensure that it satisfies all of the requirements under this part.

(1) If FRA determines that the program satisfies all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been approved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA.

(2) If FRA determines that the program does not satisfy all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been disapproved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA and will identify the deficiencies found in the program that must be corrected before the program can be approved. After addressing these deficiencies, railroads can resubmit their programs in accordance with paragraph (h) of this section.

(3) If a railroad does not receive an approval or disapproval letter from FRA within 90 days of the date the program was submitted to FRA, FRA's decision on the program will remain pending until such time that FRA issues a letter either approving or disapproving the program. A certification program is not approved until FRA issues a letter approving the program.

(g) *Material modifications.* A railroad that intends to make one or more material modifications to its FRA-approved program must submit a description of how it intends to modify the program and a copy of the modified program which indicates changes from the last approved version.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The description of the modification and the modified program must conform with the procedures and requirements contained in § 246.106.

(3) The process for submission and review of material modifications shall conform with paragraphs (c) through (f) of this section.

(4) A railroad shall not implement a material modification to its program until FRA issues its approval of the material modification in accordance with paragraph (f)(1) of this section.

(h) *Resubmissions.* If FRA disapproves a railroad's program or material modification, as described in paragraph (f)(2) of this section, the railroad may resubmit its program or material modification after addressing all of the deficiencies noted by FRA.

(1) The resubmission must conform with the procedures and requirements contained in § 246.106.

(2) The process for submission and review of resubmitted programs and resubmitted material modifications shall conform with paragraphs (c) through (f) of this section.

(3) The following deadlines apply for railroads that have their programs or material modifications disapproved by FRA:

(i) For a railroad that submitted its program pursuant to paragraph (a) of this section, the railroad must resubmit its program within 30 days of the date that FRA notified the railroad of the deficiencies in its program. If a railroad fails to resubmit its program within this timeframe and continues its rail operations, FRA may consider such actions to be a failure to implement a program.

(ii) For a railroad that submitted its program pursuant to paragraph (b) of this section, there is no FRA-imposed deadline for resubmitting its program. However, pursuant to § 246.105(b), the railroad shall not install, implement, or operate signal systems subject to this part until its program has been approved by FRA.

(iii) For a railroad that submitted a material modification to its FRA-approved program, there is no FRA-imposed deadline for resubmitting the material modification. However, pursuant to paragraph (g)(4) of this section, the railroad cannot implement the material modification until it has been approved by FRA.

(i) *Rescinding prior approval of program.* FRA reserves the right to revisit its prior approval of a railroad's program at any time.

(1) If upon such review FRA discovers deficiencies in the program, FRA shall issue the railroad a letter rescinding its prior approval of the program and notifying the railroad of the deficiencies in its program that must be addressed.

(2) Within 30 days of FRA notifying the railroad of the deficiencies in its program, the railroad must address these deficiencies and resubmit its program to FRA. The resubmitted program must conform with the procedures and requirements contained in § 246.106.

(3) The process for submission and review of resubmitted programs under this paragraph shall conform with paragraphs (c) through (f) of this section.

(4) If a railroad fails to resubmit its program to FRA within the timeframe prescribed in paragraph (i)(2) of this section and the railroad continues its rail operations, FRA may consider such actions to be a failure to implement a program.

(5) If FRA issues a letter disapproving the railroad's resubmitted program, the railroad shall continue to resubmit its program in accordance with this paragraph (i).

(6) A program that has its approval rescinded under paragraph (i)(1) of this section may remain in effect until whichever of the following happens first:

(i) FRA approves the railroad's resubmitted program; or

(ii) FRA disapproves the railroad's second attempt at resubmitting its program.

(7) If FRA disapproves a railroad's second attempt at resubmitting its program under this paragraph and the railroad continues its rail operations, FRA may consider such actions to be a failure to implement a program.

(j) *Availability of certification program documents.* The following documents will be available on FRA's website (*railroads.dot.gov*):

(1) A railroad's originally submitted program, a resubmission of its program, or a material modification of its program;

(2) Any comments, submitted in accordance with paragraph (e) of this section, to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program; and

(3) Any approval or disapproval letter issued by FRA in response to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program.

§ 246.105 Implementation schedule for certification programs.

(a) Each railroad that submits its signal employee certification program to FRA in accordance with § 246.103(a), must comply with 49 CFR parts 233, 234, 235, and 236 while it awaits approval of its program by FRA. However, if FRA disapproves a railroad's program on two occasions and the railroad continues rail operations, FRA may consider such actions to be a failure to implement a program.

(b) Each railroad that submits its signal employee certification program to FRA in accordance with § 246.103(b), must have its program approved by FRA prior to installing, implementing, or operating signal systems subject to this part. If a railroad installs, implements, or operates a signal system before its program is approved by FRA, FRA may consider such actions to be a failure to implement a program.

(c) By [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as certified signal employees all persons authorized by the railroad to perform the duties of a certified signal employee or, if

applicable, each category or subcategory of certified signal employee identified by the railroad pursuant to § 246.107 as of [EFFECTIVE DATE OF FINAL RULE]; and

(2) Issue a certificate that complies with § 246.207 to each person that it designates.

(d) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as a certified signal employee any person who has been authorized by the railroad to perform the duties of a certified signal employee or, if applicable, any category or subcategory of certified signal employee identified by the railroad pursuant to § 246.107 between [EFFECTIVE DATE OF FINAL RULE] and the date FRA approves the railroad's certification program; and

(2) Issue a certificate that complies with § 246.207 to each person that it designates.

(e) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], no railroad shall permit or require a person to perform service as a certified signal employee unless that person is a certified signal employee.

(f) No railroad shall permit or require a person, designated as a certified signal employee under the provisions of paragraph (c) or (d) of this section, to perform service as a certified signal employee for more than three years after the date FRA approves the railroad's certification program unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (f)(3) of this section, a person who has been designated as a certified signal employee under the provisions of paragraph (c) or (d) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date the certifying railroad's program is approved, may request, in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until three years from the date the certifying railroad's program is approved.

(2) Upon receipt of a written request pursuant to paragraph (f)(1) of this section, a railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program. If a railroad grants any request, it must grant request all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 or 242 of this chapter may not make a request pursuant to paragraph (f)(1) of this section.

(g) After a railroad's certification program has been approved by FRA, the railroad shall only certify or recertify a person as a signal employee if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

§ 246.106 Requirements for certification programs.

(a) *Railroad certification program submission.* (1) A railroad's certification program submission must include a copy of its certification program and a request for approval.

(2) The request for approval can be in letter or narrative format.

(3) A railroad will receive approval or disapproval notices from FRA by email.

(4) FRA may electronically store any materials required by this part.

(b) *Organization of the certification program.* Each certification program must be organized to present the required information in the six sections described in paragraphs (b)(1) through (6) of this section Each section of the certification program must begin with the name, title, telephone number, and email address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

(1) *Section One of the certification program: General information and elections.* (i) The first section of the certification program must contain the name of the railroad, the person to be contacted to discuss that section (including the person's name, title, telephone number, and email address), and a statement electing either to accept responsibility for training persons not previously certified as signal employees or to not accept this responsibility.

(ii) If a railroad elects not to provide certification training to persons not previously certified as signal employees, the railroad will be limited to recertifying signal employees initially certified by another railroad. A railroad may change its election by obtaining FRA approval of a material modification to its certification program in accordance with § 246.103(g).

(iii) If a railroad elects to accept responsibility for training persons not previously certified as signal employees, the railroad must submit information on how such persons will be trained but is not required to actually perform such training. A railroad that elects to accept responsibility for the training of such persons may authorize another railroad or a non-railroad entity to provide the training. The electing railroad remains responsible for ensuring that the authorized training provider(s) adhere to the training program the railroad submits.

(iv) If a railroad elects to classify its certified signal employees into more than one occupational category or subcategory by class, task, location, or other suitable terminology, the railroad shall include the following in this section of its certification program:

(A) An up-to-date list and description of each occupational category or subcategory of certified signal employee;

(B) A statement of the roles and responsibilities of each occupational category or subcategory of certified signal employee; and

(C) A detailed list of the safety-related tasks and subtasks performed by each category or subcategory of certified signal employee.

(2) *Section Two of the certification program: Training previously certified signal employees.* The second section of the certification program must contain information concerning the railroad's program for training previously certified signal employees, including all of the following information:

(i) As provided for in § 246.119(j), each railroad must have a program for the ongoing education of its certified signal employees to ensure that they maintain the necessary knowledge concerning all applicable Federal safety laws, regulations, and orders; knowledge concerning all applicable railroad signal system safety and operating rules; and knowledge concerning all applicable standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of signal systems and related technology deployed on the railroad. The railroad must describe in this section of its certification program how it will ensure that its certified signal employees maintain the necessary knowledge and skills to safely discharge their responsibilities so as to comply with the standard set forth in § 246.119(j);

(ii) In accordance with § 246.119(h), the railroad must provide sufficient detail in the second section of its certification program to permit effective evaluation of the contents and scope of the railroad's training program on the signal systems and signal-related technology deployed on its territory. FRA anticipates that railroads will address, in this section of their

certification programs, the frequency and duration of training sessions (including the interval between attendance at such training sessions), the training environment(s) that will be employed (*e.g.,* classroom, computer-based training, use of film or slide presentations, or on-the-job training) and which aspects of the training program will be voluntary or mandatory;

(iii) How the training will address a certified signal employee's loss of retained knowledge over time; and

(iv) How the training will address changed circumstances over time, such as the introduction of new or modified signal system equipment and related technology (including software modifications), so as to comply with the training standard set forth in § 246.119.

(3) *Section Three of the certification program: Testing and evaluating previously certified signal employees.* The third section of the certification program must contain information about the railroad's program for testing and evaluating previously certified signal employees, including all of the following information:

(i) The railroad must describe in this section how it will ensure that its previously certified signal employees demonstrate their knowledge concerning the safe discharge of their responsibilities, so as to comply with the standards set forth in § 246.121; and

(ii) The railroad must describe in this section how it will have ongoing testing and evaluation to ensure that its previously certified signal employees have the required vision and hearing acuity as provided in §§ 246.117 and 246.118. This section must also address how the railroad will ensure that its medical examiners have sufficient information concerning the railroad's operations, as well as the safety-related tasks performed by certified signal employees, to allow for effective and appropriate determinations about the ability of a particular individual to safely perform as a certified signal employee.

(4) *Section Four of the certification program: Training, testing, and evaluating persons who have not been certified as signal employees.* Unless a railroad has made an election not to accept responsibility for conducting the initial signal employee certification training, the fourth section of the certification program must contain information about the railroad's program for educating, testing, and evaluating persons who have not been previously certified as signal employees, including all of the following information:

(i) As provided for in § 246.119, a railroad that is issuing an initial signal employee certification to a person must have a program for the training, testing, and evaluation of its signal employee certification candidates to ensure that they acquire the necessary knowledge and skills. A railroad must describe in this section of its certification program how it will ensure that its signal employee certification candidates acquire sufficient knowledge and skills and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities. A railroad must also discuss in this section of its certification program its procedures for mentoring candidates for signal employee certification, in accordance with § 246.124;

(ii) This section of the railroad's certification program must contain the same level of detail concerning the initial training program and testing and evaluation of previously uncertified signal employees as is required for previously certified signal employees in § 246.106(b)(2) and (3) (Sections Two and Three of the railroad's certification program);

(iii) Railroads that elect to rely on other entities to conduct signal employee certification training away from the railroad's own territory must explain how training will be provided to signal employee certification candidates on the signal systems and related technology deployed on the railroad's territory.

(5) *Section Five of the certification program: Monitoring operational performance by certified signal employees.* The fifth section of the certification program must contain information about the railroad's program for monitoring the operational performance of its certified signal employees, including all of the following information:

(i) Section 246.123 requires that a railroad conduct ongoing monitoring of its certified signal employees and that each certified signal employee have an annual unannounced compliance test. A railroad must describe in this section of its certification program how the railroad will ensure that it has an ongoing program for monitoring its certified signal employees that requires them to demonstrate their ability to safely discharge their responsibilities.

(ii) A railroad must describe in this section the scoring system used by the railroad during operational monitoring observations and unannounced compliance tests that are administered in accordance with § 246.123.

(6) *Section Six of the certification program: Procedures for routine administration of the signal employee certification program.* The final section of the certification program must contain a summary of how the railroad's program and procedures will implement various aspects of the regulatory provisions in this part that relate to the routine administration of the railroad's certification program for signal employees. Specifically, this section must address the procedural aspects of the following provisions and must describe the manner in which the railroad will implement its program so as to comply with each of the following provisions:

(i) Section 246.301 which provides that each railroad must have procedures for review and comment on adverse information;

(ii) Sections 246.111, 246.113, 246.115, and 246.303 which require each railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as a railroad worker;

(iii) Sections 246.109, 246.201, and 246.301 which place a duty on the railroad to make a series of determinations. When describing how it will implement its certification program to comply with these sections, a railroad must describe: the procedures it will utilize to ensure that all of the necessary determinations have been made in a timely fashion; who will be authorized by the railroad to determine whether a person will or will not be certified; and how the railroad will communicate adverse decisions;

(iv) Sections 246.109, 246.117, 246.118, 246.119, and 246.121, which place a duty on the railroad to make a series of determinations. When describing how the railroad will implement its program to comply with these sections, a railroad must describe how it will document the factual basis the railroad relied upon when making determinations under these sections;

(v) Section 246.124 which require each railroad to have procedures for mentoring signal employees who have not been certified;

(vi) Section 246.125 which permits reliance on signal employee certification determinations made by other railroads; and

(vii) Sections 246.207 and 246.307 which contain the requirements for replacing lost certificates and the conduct of certification revocation proceedings.

§ 246.107 Signal service classifications.

(a) A railroad may classify its certified signal employees in occupational categories or subcategories by class, task, location, or other suitable

terminology, in accordance with an FRA-approved certification program that complies with the requirements of this part.

(b) Any certified signal employee called to work on a signal system or signal-related technology on which they have not been certified shall immediately notify the railroad or their employer that they are not certified to work on the signal system or signal-related technology.

(c) No railroad shall permit a certified signal employee to work on a signal system or signal-related technology on which the employee has not been certified, unless the certified signal employee works under the direct oversight and supervision of a mentor in accordance with § 246.124.

§ 246.109 Determinations required for certification and recertification.

(a) After FRA has approved a railroad's signal employee certification program, the railroad, prior to initially certifying or recertifying any person as a signal employee, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the prior safety conduct eligibility requirements of §§ 246.111 and 246.113;

(2) The individual meets the eligibility requirements of §§ 246.115 and 246.303;

(3) The individual meets the vision and hearing acuity standards of §§ 246.117 and 246.118;

(4) If applicable, the individual has completed a training program that meets the requirements of § 246.119;

(5) The individual has the necessary knowledge, as demonstrated by successfully completing testing and practical demonstration that meet the requirements of § 246.121.

(b) Nothing in this section, § 246.111, or § 246.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 246.111 or § 246.113.

§ 246.111 Prior safety conduct as motor vehicle operator.

(a) Except as provided in paragraphs (b) through (e) of this section, after FRA has approved a railroad's signal employee certification program, the railroad, prior to certifying or recertifying any person as a signal employee, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(b) A railroad shall certify a person as a signal employee for 60 days if the person:

(1) Requested the information required by paragraph (g) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5).

(c) A railroad shall recertify a person as a signal employee for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (g) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5).

(d) Except as provided in paragraph (e) of this section, if a railroad who certified or recertified a person for 60 days pursuant to paragraph (b) or (c) of this section does not obtain and evaluate the information requested pursuant to paragraph (g) of this section within 60 days, that person will be ineligible to perform as a certified signal employee until the information can be evaluated by the railroad.

(e) If a person requests the information required pursuant to paragraph (g) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (a) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5).

(f) Except for persons designated as signal employees under § 246.105(c) or (d) or for persons covered by paragraph (j) of this section, each person seeking certification or recertification under this part shall, within one year prior to the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (g) through (i) of this section to make information concerning their driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning their driving record available to that railroad.

(g) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (h) of this section provide a copy of that agency's available information concerning their driving record to the railroad that is considering such certification or recertification.

(h) Each person shall request the information required under paragraph (g) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a State or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

(i) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in the files of a State agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

(j) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (g) of this section but shall notify the railroad of that fact in accordance with procedures established by the railroad in its certification program.

(k) Each certified signal employee or person seeking certification as a signal employee shall report motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to their employer(s) (if employed by a railroad or contractor to a railroad), all prospective certifying railroads (if applicable), and all railroad(s) with whom the person holds a signal employee certificate within 48 hours of:

(1) Being convicted for such violations, or

(2) A completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for such violations. For purposes of this paragraph and paragraph (m) of this section, "State action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For purposes of signal employee certification, no railroad shall require reporting earlier than 48 hours

after the conviction, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license.

(l) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule; or

(2) More than three years before the date of the railroad's certification decision; or

(3) At a time other than that specifically provided for in § 246.111, § 246.113, § 246.115, or § 246.303.

(m) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; or

(2) A conviction for, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(n) If such an incident, described in paragraph (m) of this section, is identified:

(1) The railroad shall provide the data to the railroad's Drug and Alcohol Counselor (DAC), together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder.

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the DAC in the context of such evaluation.

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in 49 CFR part 219, subpart H, as well as 49 CFR part 40.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 246.115(c) will apply.

(5) If the person fails to comply with the requirements of paragraph (n)(2) of this section, the person shall be ineligible to perform as a certified signal employee until such time as the person complies with the requirements.

(o) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.113 Prior safety conduct with other railroads.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the certification candidate meets the eligibility requirements of this section.

(b) If the certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.

(c) Except as provided for in paragraph (b) of this section, each person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years to provide the following information to the railroad that is considering whether to certify or recertify that person as a signal employee:

(1) Information about that person's compliance with § 246.111 within the three years preceding the date of the request;

(2) Information about that person's compliance with § 246.115 within the five years preceding the date of the request; and

(3) Information about that person's compliance with § 246.303 within the five years preceding the date of the request.

(d) Each person submitting a written request required by paragraph (c) of this section shall:

(1) Submit the request no more than one year before the date of the railroad's decision on certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning their service record available to the railroad.

(e) Within 30 days after receipt of a written request that complies with paragraph (c) of this section, a railroad provide the information requested to the railroad designated in the written request.

(f) If a railroad is unable to provide the information requested within 30 days after receipt of a written request that complies with paragraph (c) of this section, the railroad shall provide an explanation, in writing, of why it cannot provide the information within the requested time frame. If the railroad will ultimately be able to provide the requested information, the explanation shall state approximately how much more time the railroad needs to supply the requested information. If the railroad will not be able to provide the requested information, the railroad shall provide an adequate explanation for why it cannot provide this information. Copies of this explanation shall be provided to the railroad designated in the written request and to the person who submitted the written request for information.

(g) When evaluating a person's prior safety conduct with a different railroad, a railroad shall not consider information concerning prior safety conduct that occurred:

(1) Prior to [EFFECTIVE DATE OF FINAL RULE]; or

(2) At a time other than that specifically provided for in § 246.111, § 246.113, § 246.115, or § 246.303.

(h) Each railroad shall adopt and comply with a program that complies with the requirements of this section. When any person (including but not limited to a railroad; any manager, supervisor, official, or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or contractor) violates any requirement of a program that complies with the requirements of this subject, that person shall be considered to have violated the requirements of this section.

§ 246.115 Substance abuse disorders and alcohol drug rules compliance.

(a) *Eligibility determination.* After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person meets the eligibility requirements of this section.

(b) *Documentation.* In order to make the determination required under paragraph (c) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which

states their professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(c) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a signal employee.

(2) Except as provided in paragraph (f) of this section, a certified signal employee who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (e) of this section.

(3) In the case of a current employee of a railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 246.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(d) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a signal employee, a railroad shall consider conduct described in paragraph (d)(2) of this section that occurred within a period of five consecutive years prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph (d).

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this section shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of one violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (e) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of nine months (unless identification of the violation was through a qualifying referral program described in § 219.1001 of this chapter and the signal employee waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (e) of this section). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) If a person refuses to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative, the person shall be ineligible to hold a certificate for a period of nine months.

(e) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had their certification suspended or revoked as a result of conduct described in paragraph (d) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a Substance Abuse Professional (SAP) to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) In accordance with the testing procedures of 49 CFR part 219, subpart H, has had a return-to-duty alcohol test with an alcohol concentration of less than .02 and a return-to-duty body fluid sample that tested negative for controlled substances.

(2) A certified signal employee placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than five years following return to service. Follow-up tests shall include not fewer than six alcohol tests and six drug tests during the first year following return to service.

(3) Return-to-duty and follow-up alcohol and drug tests shall be performed consistent with the requirements of 49 CFR part 219, subpart H.

(4) This paragraph (e) does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a signal employee. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(f) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a signal employee who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its referral policy, as required pursuant to § 219.1003(j) of this chapter, a provision that, at least with respect to a certified signal employee or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

(g) *Complying with certification program.* Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.117 Vision acuity.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person meets the standards for visual acuity prescribed in this section and Appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each certified signal employee shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in Appendix B to this part.

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a certified signal employee. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in Appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a certified signal employee.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a certified signal employee, the railroad may conclude that the person satisfies the vision acuity requirements of this section to be a certified signal employee. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the vision acuity standards prescribed in paragraph (c) of this section.

(2) If necessary under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the vision acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's vision acuity prevents the candidate from being able to safely perform as a certified signal employee.

(f) If the examination required under this section shows that the person needs corrective lenses to meet the standards for vision acuity prescribed in this section and appendix B to this part, that person shall use corrective lenses at all times while performing as a certified signal employee unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a certified signal employee without corrective lenses.

(g) When a certified signal employee becomes aware that their vision has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a certified signal employee. The individual cannot return to service as a certified signal employee until they are reexamined and determined by the railroad's medical examiner to satisfy the vision acuity standards prescribed in this section and appendix B to this part.

(h) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.118 Hearing acuity.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person meets the standards for hearing acuity prescribed in this section and appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each certified signal employee shall have hearing acuity that meets or exceeds the following thresholds with or without use of a hearing aid: The person does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram used to show a person's hearing acuity shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of, and is maintained and used in accordance with, a formal industry standard, such as American National Standards Institute (ANSI) S3.6, ''Specifications for Audiometers.''

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a certified signal employee. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in Appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a certified signal employee.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a certified signal employee, the railroad may conclude that the person satisfies the hearing acuity requirements of this section to be a certified signal employee. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the hearing acuity standards prescribed in paragraph (c) of this section.

(2) If necessary under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the hearing acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's hearing acuity prevents the candidate from being able to safely perform as a certified signal employee.

(f) If the examination required under this section shows that the person needs a hearing aid to meet the standards for hearing acuity prescribed in this section and appendix B to this part, that person shall use a hearing aid at all times while performing as a certified signal employee unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a certified signal employee without a hearing aid.

(g) When a certified signal employee becomes aware that their hearing has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a certified signal employee. The person cannot return to service as a certified signal employee until they are reexamined and determined by the railroad's medical examiner to satisfy the hearing acuity standards prescribed in this section and appendix B to this part.

(h) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.119 Training requirements.

(a) After FRA has approved a railroad's certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person has successfully completed training, in accordance with the requirements of this section.

(b) As further explained in § 246.106, a railroad's certification program shall state the railroad's election either:

(1) To accept responsibility for training persons who have not been previously certified as signal employees and thereby obtain authority to provide signal employee certification; or

(2) To recertify signal employees previously certified by other railroads.

(c) A railroad that elects to accept responsibility for the training of persons who have not been previously certified as signal employees shall state in its certification program whether it will conduct the training or employ a training program conducted by another entity on its behalf, but adopted and ratified by the railroad.

(d) A railroad that elects to train persons not previously certified as signal employees shall address the following requirements in its certification program:

(1) An explanation of how training will be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, practical demonstration, on-the-job training, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. The training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) An on-the-job training component which shall include the following:

(i) A syllabus describing content, required tasks, and related steps the employee learning the job shall be able to perform within a specified timeframe;

(ii) A statement of the conditions (*e.g.,* prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(3) A description of the processes to review and modify its training program when new safety-related laws, regulations, orders, and procedures are issued and when new signal systems, technologies, software or equipment are introduced into the workplace. This description shall also explain how the railroad will determine if additional or refresher training is needed.

(e) Prior to beginning the initial signal employee tasks associated with on-the-job exercises referenced in paragraph (d)(2) of this section, each railroad shall make any relevant information or materials, such as signal standards, test procedures, operating rules, safety rules, or other rules, available for referencing by certification candidates.

(f) Prior to initial certification of a person as a certified signal employee, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to perform the tasks necessary to be a certified signal employee;

(2) Demonstrate on-the-job proficiency, with input from a qualified instructor, by successfully completing the tasks and using the signal systems and technology necessary to be a certified signal employee on the certifying railroad. A certification candidate may perform such tasks under the direct onsite supervision of a certified signal employee who has at least one year of experience as a signal employee; and

(3) Demonstrate knowledge of the signal systems, technology, software, and equipment deployed on the railroad's territory. If the railroad uses a written test to fulfill this requirement, the railroad must provide the certification candidate with an opportunity to consult with a qualified instructor to explain a question.

(g) In making the determination required under paragraph (a) of this section, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section (if the person has not previously been certified as a signal employee); and

(2) The person demonstrated their knowledge by achieving a passing grade under the testing, practical demonstration, and evaluation procedures of the training program.

(h) Notwithstanding the railroad's election in paragraph (b) of this section, each railroad shall provide comprehensive training on the installation, operation, testing, maintenance, and repair of the signal systems (including software and equipment) and signal-related technology deployed on its territory as part of its certification program required

under this part and submitted in accordance with the procedures and requirements in § 246.106. In its certification program, each railroad shall address:

(1) How comprehensive training will be provided on the installation, operation, testing, maintenance, and repair of the signal systems (including software and equipment) and signal-related technology deployed on the railroad's territory; and

(2) How the railroad will ensure that the comprehensive training discussed in this paragraph is provided to each certified signal employee before the employee is required to install, operate, test, maintain, or repair any signal system (including software and equipment) or signal-related technology deployed on the railroad's territory; and

(3) The maximum time periods in which a certified signal employee can be absent from performing safety-sensitive work on signal systems before refresher training will be required. This time period cannot exceed 12 months.

(i) If ownership of a railroad is being transferred from one company to another, the signal employees of the acquiring company may receive familiarization training from the selling company prior to the acquiring company commencing operation.

(j) Each railroad shall provide for the continuing education of its certified signal employees to ensure that each certified signal employee maintains the necessary knowledge and skills concerning:

(1) Compliance with all applicable Federal laws, regulations, and orders;

(2) Compliance with all applicable railroad signal system safety and operating rules; and

(3) Compliance with all applicable standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of new and existing signal systems (including new and existing software and equipment) and new and existing signal-related technology deployed on the railroad.

(k) Each railroad shall provide comprehensive training on the installation, operation, testing, maintenance, and repair of new signal systems (including software and equipment) and signal-related technology to its certified signal employees before requiring any certified signal employee to install, operate, test, maintain, or repair any new signal system (including software or equipment) or new signal-related technology on its territory.

(l) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.121 Knowledge testing.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person has demonstrated sufficient knowledge of the railroad's signal standards, test procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems in accordance with the requirements of this section.

(b) In order to make the knowledge determination required by paragraph (a) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a signal employee that shall be:

(1) Designed to examine a person's knowledge of:

(i) All applicable Federal railroad safety laws, regulations, and orders governing signal systems and related technology;

(ii) All applicable railroad safety and operating rules; and

(iii) All applicable railroad standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems and related technology, including:

(A) The railroad's rules and standards for disabling and removing signal systems from service; and

(B) The railroad's rules and standards for placing signal systems back in service;

(2) Objective in nature;

(3) Include a practical demonstration component;

(4) In written or electronic form;

(5) Sufficient to accurately measure the person's knowledge of the subjects listed in paragraph (b)(1) of this section; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on their ability to use such reference books or materials.

(c) The railroad shall provide the certification candidate with an opportunity to consult with a qualified instructor to explain one or more test questions.

(d) If a person fails the test, no railroad shall permit or require that person to work as a certified signal employee prior to that person's achieving a passing score during a reexamination of the test.

(e) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.123 Monitoring operational performance.

(a) Each railroad's certification program shall describe how it will monitor the operational performance of its certified signal employees by including procedures for:

(1) Giving each certified signal employee at least one unannounced compliance test each calendar year on the railroad's signal system standards, test procedures, and Federal regulations concerning signal systems, except as provided for in paragraph (d) of this section;

(2) Giving unannounced compliance tests to certified signal employees who return to signal service after performing service that does not require certification pursuant to this part, as described in paragraph (d) of this section;

(3) What actions the railroad will take if it finds deficiencies in a certified signal employee's performance during an unannounced compliance test; and

(4) Monitoring the performance of signal-related tasks.

(b) An unannounced compliance test shall:

(1) Test certified signal employees for compliance with one or more signal system standards or test procedures in accordance with the railroad's certification program and § 217.9 of this chapter;

(2) Be performed by a certified signal employee;

(3) Be given to each certified signal employee at least once each calendar year, except as provided for in paragraph (d) of this section; and

(4) If the railroad's certification program classifies signal employees, the unannounced compliance test shall be within scope of the signal employee's classification.

(c) A certified signal employee who is not performing service that requires certification pursuant to this part does not need to be given an unannounced compliance test. However, when the certified signal employee returns to

service that requires certification pursuant to this part, the railroad shall:

(1) Give the certified signal employee an unannounced compliance test within 30 days of their return to signal service; and

(2) Retain a written record that includes the following information:

(i) The date the certified signal employee stopped performing service that required certification pursuant to this part;

(ii) The date the certified signal employee returned to performing service that required certification pursuant to this part; and

(iii) The date and the result of the unannounced compliance test was performed following the signal employee's return to service requiring certification.

(d) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.124 Mentoring.

(a) Each railroad's certification program shall include procedures for mentoring signal employees who have not been certified by the railroad.

(b) After FRA has approved a railroad's certification program, the railroad shall not permit or require any person to perform work on a signal system or signal-related technology on its territory that requires certification unless the railroad first determines that:

(1) The person is a certified signal employee who has been certified by the railroad; or

(2) The person is a signal employee who is working under the direct observation and supervision of a mentor.

(c) If the railroad elects to classify its certified signal employees into more than one occupational category or subcategory pursuant to § 246.107, the railroad shall address in its certification program how mentoring will be provided for certified signal employees who move into a different occupational category or subcategory of certified signal service.

(d) If allowed by the railroad's certification program, any work on a signal system performed by a signal employee whose certification has been revoked shall be performed under the direct oversight and supervision of a mentor.

(e) Each railroad's certification program shall address how mentors will be held accountable for the work performed by signal employees when they are working under the mentor's direct oversight and supervision.

§ 246.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a signal employee may rely on certain determinations made by another railroad concerning that person's certification.

(b) A railroad's certification program shall address how the railroad will administer the training of previously uncertified signal employees with extensive signal experience or previously certified signal employees who have had their certification expire. If a railroad's certification program fails to specify how it will train these signal employees, then the railroad shall require these signal employees to successfully complete the certifying railroad's entire training program.

(c) A railroad relying on certification determinations made by another railroad shall be responsible for determining that:

(1) The prior certification is still valid in accordance with the provisions of §§ 246.201 and 246.307;

(2) The person has received training on the railroad's signal standards, test procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems, technology, software, and equipment deployed on a railroad's territory pursuant to § 246.119; and

(3) The person has demonstrated the necessary knowledge concerning the railroad's operating rules, territory, signal systems, technology, software, and equipment deployed on a railroad's territory in accordance with § 246.121.

Subpart C—Administration of the Certification Program

§ 246.201 Time limitations for certification.

(a) After FRA approves a railroad's signal employee certification program, that railroad shall not certify or recertify a person as a signal employee if the railroad is making:

(1) A determination concerning eligibility under §§ 246.111, 246.113, 246.115, and 246.303 and the eligibility data being relied on was furnished more than one year before the date of the railroad's certification decision;

(2) A determination concerning visual or hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than one year before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than two years before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 246.121 at intervals that do not exceed two years.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with § 246.125.

(c) Except if a person is designated as a certified signal employee under § 246.105(c) or (d), no railroad shall certify a person as a signal employee for an interval of more than three years.

(d) Each railroad shall issue each certified signal employee a certificate that complies with § 246.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 246.203 Retaining information supporting determinations.

(a) After FRA approves a railroad's signal employee certification program, any time the railroad issues, denies, or revokes a certificate after making the determinations required under § 246.109, it shall maintain a record for each certified signal employee and certification candidate. Each record shall contain the information, described in paragraph (b) of this section, that the railroad relied on in making the determinations required under § 246.109.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct and eligibility;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning their eligibility;

(5) The relevant test results data concerning vision and hearing acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the

adequacy of the person's vision or hearing acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure on knowledge test(s) under § 246.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced tests the railroad performed to monitor the signal employee's performance in accordance with § 246.123.

(c) If a railroad is relying on successful completion of a training program conducted by another entity, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

(d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(e) All records required under this section shall be retained by the railroad for a period of six years from the date of the certification, recertification, denial, or revocation decision and shall be made available to FRA representatives, upon request, in a timely manner.

(f) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment; and

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

§ 246.205 List of certified signal employees and recordkeeping.

(a) After a railroad's certification program has received its initial approval from FRA, pursuant to § 246.103(f)(1), the railroad must maintain a list of each person who is currently certified as a signal employee by the railroad. The list must include the date of the railroad's certification decision and the date the person's certification expires.

(b) The list shall:

(1) Be updated at least annually;

(2) Be made available, upon request, to FRA representatives in a timely manner; and

(3) Be available either:

(i) In electronic format pursuant to paragraph (c) of this section; or

(ii) At the divisional or regional headquarters of the railroad.

(c) If a railroad elects to maintain its list in an electronic format, it must:

(1) Maintain an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) Have its program and data storage system protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Have any amendment to the list either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Ensure that each amendment to the list uniquely identifies the person making the amendment;

(5) Ensure that the system employed for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives within a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

§ 246.207 Certificate requirements.

(a) Each person who becomes a certified signal employee in accordance with this part shall be issued a paper or electronic certificate that must:

(1) Identify the railroad that is issuing the certificate;

(2) Indicate that it is a signal employee certificate, along with any additional signal employee categories or subcategories developed by the railroad pursuant to § 246.107;

(3) Provide the following information about the certified signal employee:

(i) Name;

(ii) Employee identification number;

(iii) Year of birth; and

(iv) Either a physical description or photograph of the person;

(4) Identify any conditions or limitations, including conditions to ameliorate vision or hearing acuity deficiencies, that restrict, limit, or alter the person's abilities to work as a certified signal employee;

(5) Show the effective date of the certification;

(6) Show the expiration date of the certification, except as provided for in paragraph (b) of this section;

(7) Be signed by an individual designated in accordance with paragraph (c) of this section; and

(8) Be electronic or be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) A certificate does not need to include an expiration date, as required under paragraph (a)(6) of this section, if the person was designated as a certified signal employee under § 246.105(c) or (d).

(c) Each railroad shall designate in writing any person it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(d) Nothing in this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(e) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on a certificate; or

(2) Otherwise falsify a certificate through material misstatement, omission, or mutilation.

(f) Except as provided for in paragraph (h) of this section, each certified signal employee shall:

(1) Have their certificate in their possession while on duty as a signal employee; and

(2) Display their certificate upon request from:

(i) An FRA representative;

(ii) A State inspector authorized under part 212 of this chapter;

(iii) An officer of the issuing railroad; or

(iv) An officer of the signal employee's employer if the signal employee is not employed by the issuing railroad.

(g) If a signal employee's certificate is lost, stolen, mutilated, or becomes unreadable, the railroad shall promptly replace the certificate at no cost to the signal employee.

(h) A certified signal employee is exempt from the requirements of paragraph (f) of this section if:

(1) The railroad made its certification or recertification decision within the last 30 days and the signal employee has not yet received their certificate; or

(2) The signal employee's certificate was lost, stolen, mutilated, or became unreadable, and the railroad has not yet issued a replacement certificate to the signal employee.

(i) Any signal employee who is notified or called to serve as a signal employee and such service would cause the signal employee to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that they are not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(j) Nothing in this section shall be deemed to alter a certified signal employee's duty to comply with other provisions of this chapter concerning railroad safety.

§ 246.213 Multiple certifications.

(a) A person who holds a signal employee certificate may:

(1) Hold a signal employee certificate for multiple types of signal service; and

(2) Be certified in other crafts, such as a locomotive engineer or conductor.

(b) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(c)(1) A person who holds a current signal employee certificate from more than one railroad shall immediately notify their employer(s) and all railroad(s) with whom they hold a signal employee certificate if they are denied signal employee certification or recertification under § 246.301 by a railroad or have their signal employee certification suspended or revoked under § 246.307 by a railroad.

(2) If a person has their signal employee certification suspended or revoked by a railroad under § 246.307, they shall not work as a certified signal employee for any railroad during the period that their certification is suspended or revoked, except as provided for in § 246.124(d).

(3) If a person has their signal employee certification suspended or revoked by a railroad under § 246.307, they shall notify any railroad from whom they are seeking signal employee certification that their signal employee certification has been suspended or revoked by another railroad.

(d) Paragraphs (d)(1) through (3) of this section apply to people who are currently certified as a signal employee and also currently certified in another railroad craft, such as a locomotive engineer or conductor:

(1) If a person's signal employee certification is revoked under § 246.307 for a violation of § 246.303(e)(11), they shall not work in another certified railroad craft, such as a locomotive engineer or conductor, during the period of revocation.

(2) If a person's signal employee certification is revoked under § 246.307 for a violation of § 246.303(e)(11), they shall not obtain certification for any other railroad craft pursuant to this chapter during the period of revocation.

(3) If a person's signal employee certification is revoked under § 246.307 for a violation of § 246.303(e)(1) through (10), they may work in another certified railroad craft, such as a locomotive engineer or conductor, during the period of revocation.

(e) Paragraphs (e)(1) through (3) of this section also apply to people who are certified as a signal employee and certified in another railroad craft, such as a locomotive engineer or conductor:

(1) A person whose certification in any railroad craft has been revoked for failure to comply with § 219.101 of this chapter shall not work as a certified signal employee for any railroad during the revocation period.

(2) A person whose certification in any railroad craft has been revoked for failure to comply with § 219.101 of this chapter shall not obtain signal employee certification pursuant to this part from any railroad during the revocation period.

(3) A certified signal employee who has had their certification in another railroad craft suspended or revoked for any reason other than a failure to comply with § 219.101 of this chapter may work as a certified signal employee during the suspension or revocation period.

(f) A railroad that denies a person signal employee certification or recertification under § 246.301 shall not, solely on the basis of that denial, deny or revoke that person's certifications or recertifications in another railroad craft.

(g) A railroad that denies a person's certification or recertification, pursuant to this chapter, in any railroad craft other than signal employee shall not, solely on the basis of that denial, deny or revoke that person's signal employee certification or recertification.

(h) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts as long as the single certificate complies with all of the certificate requirements for those crafts.

(i) A person who is certified in multiple crafts and who is involved in a revocable event, as described in this chapter, may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke must be based on the work the person was performing at the time the revocable event occurred.

§ 246.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year [YEAR THAT IS 3 YEARS AFTER EFFECTIVE DATE OF FINAL RULE]), each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service,

and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified signal employees during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported accidents/incidents attributed to poor safety performance by signal employees; and

(3) The number and type of operational monitoring test failures recorded by certified signal employees conducting compliance tests pursuant to § 246.123.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future accidents/incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving noncompliance with railroad rules and procedures governing the removal from service of:

(i) Highway-rail and pathway grade crossing warning devices and systems; and

(ii) Wayside signal devices and systems;

(iii) Other devices or signal systems subject to this part.

(2) Incidents involving noncompliance with railroad rules and procedures governing the restoration of service of:

(i) Highway-rail and pathway grade crossing warning devices and systems; and

(ii) Wayside signal devices and systems;

(iii) Other devices or signal systems subject to this part.

(3) Incidents involving interference with the normal functioning of:

(i) Highway-rail and pathway grade crossing warning devices and systems; and

(ii) Wayside signal devices and systems.

(4) Incidents involving noncompliance with railroad rules and test procedures governing the inspection and testing of grade crossing warning devices and systems after installation, modification, disarrangement, maintenance, testing, and repair.

(5) Incidents involving noncompliance with railroad test procedures on devices or signal systems subject to this part.

(6) Incidents resulting in a signal false proceed, grade crossing activation failure, or accident or personal injury related to the same.

(7) Incidents involving noncompliance with the on-track safety requirements in part 214 of this chapter.

(8) Incidents involving noncompliance with part 219 of this chapter.

(f) For reporting purposes, each category of detected poor safety conduct identified in paragraph (e) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report under part 225 of this chapter; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

(g) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken, and the number of events subdivided so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the railroad:

(i) The person was withheld from service;

(ii) The person was dismissed from employment; or

(iii) The person was issued demerits. If more than one form of punishment was imposed only the punishment deemed the most severe shall be shown.

(iv) The person's classification or type of signal service was removed or reduced.

(h) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment, or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, an instance of poor safety conduct involving an individual who is a certified signal employee and is certified in another craft such as locomotive engineer or conductor, need only be reported once (*e.g.,* either under this section or § 240.309 or § 242.215 of this chapter). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

Subpart D—Denial and Revocation of Certification

§ 246.301 Process for denying certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the signal employee candidate with any documents or records, including written statements, related to failure to meet a requirement of this part that support its pending denial decision.

(b) If a railroad denies a person certification or recertification, it shall issue a decision that complies with all of the following requirements:

(1) It must be in writing;

(2) It must explain the basis for the railroad's denial decision;

(3) It must address any explanation or rebuttal information that the certification candidate provides pursuant to paragraph (a) of this section;

(4) It must include the date of the railroad's decision; and

(5) It must be served on the candidate no later than 10 days after the railroad's decision.

(c) A railroad shall not deny the person's certification for failing to comply with a railroad test procedure, signal standard, or practice which

constitutes a violation under § 246.303(e)(1) through (10) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the signal employee's ability to comply with that railroad test procedure, signal standard, or practice.

§ 246.303 Criteria for revoking certification.

(a) It shall be unlawful to fail to comply with any of the railroad rules or practices described in paragraph (e) of this section.

(b) A certified signal employee who has demonstrated a failure to comply with a railroad test procedure, signal standard or practice described in paragraph (e) of this section shall have their certification revoked.

(c) A certified signal employee who is monitoring, mentoring, or instructing a signal employee and fails to take appropriate action to prevent a violation of a railroad test procedure, signal standard or practice described in paragraph (e) of this section shall have their certification revoked. Appropriate action does not mean that a supervisor, mentor, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the signal employee of a potential or foreseeable violation.

(d) A certified signal employee who is called by a railroad to perform a duty other than that of a signal employee shall not have their signal employee certification revoked based on actions taken or not taken while performing that duty except for violations described in paragraph (e)(11) of this section.

(e) When determining whether to revoke a signal employee's certification, a railroad shall only consider violations of Federal regulatory provisions or railroad rules, procedures, signal standards, and practices that involve:

(1) Interfering with the normal functioning of a highway-rail grade crossing warning system under § 234.209 of this chapter, or signal system under § 236.4 of this chapter, without providing an alternative means of protection. (Railroads shall only consider those violations that result in an activation failure or false proceed signal.)

(2) Failure to comply with a railroad rule or procedure when removing from service:

(i) Highway-rail or pathway grade crossing warning devices and systems;

(ii) Wayside signal devices and systems; or

(iii) Other devices or signal systems subject to this part.

(3) Failure to comply with railroad rule or procedure when placing in service or restoring to service:

(i) Highway-rail and pathway grade crossing warning devices and systems;

(ii) Wayside signal devices and systems; or

(iii) Other devices or signal systems subject to this part.

(4) Failure to perform an inspection or test to ensure a highway-rail or pathway grade crossing warning device or system functions as intended, when required by railroad rule or procedure, after:

(i) Installation, maintenance, testing or repair of the warning device or system;

(ii) Modification or disarrangement of the warning device or system; or

(iii) Malfunction or failure of the warning device or system;

(5) Failure to restore power to train detection device or highway-rail or pathway grade crossing warning device or system after manual interruption of the power source. (Railroads shall consider only those violations that result in activation failures.)

(6) Failure to comply with railroad validation or cutover procedures.

(7) Failure to comply with §§ 214.313, 214.319, 214.321, 214.323, 214.325, 214.327, and 214.329. Railroads shall consider only those violations directly involving the signal employee who failed to ascertain whether on-track safety was being provided before fouling a track.

(8) Failure to comply with § 218.25 of this chapter (Workers on a main track);

(9) Failure to comply with § 218.27 of this chapter (Workers on other than main track);

(10) Failure to comply with § 218.29 of this chapter (Alternate methods of protection);

(11) Failure to comply with § 219.101 of this chapter.

(f) In making the determination as to whether to revoke a signal employee's certification, a railroad shall only consider conduct described in paragraphs (e)(1) through (10) of this section that occurred within the three years prior to the determination.

(g) If in any single incident the person's conduct contravened more than one Federal regulatory provision or railroad rule, procedure, signal standard, or practice listed in paragraph (e) of this section, that event shall be treated as a single violation for the purposes of this section.

(h) A violation of one or more railroad rules, procedures, signal standards, or practices described in paragraphs (e)(1) through (10) of this section that occurs during a properly conducted compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 246.305.

(i) A compliance test that is not conducted in accordance with this part, the railroad's operating rules, or the railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of skill or knowledge and will not be considered for revocation purposes.

(j) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

§ 246.305 Periods of ineligibility.

(a) The starting date for a period of ineligibility described in this section shall be:

(1) For a person not currently certified, the date of the railroad's written determination that the most recent incident has occurred; or

(2) For a person currently certified, the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(b) A period of ineligibility shall be determined according to the following standards:

(1) In the case of a single incident involving a violation of one or more of the Federal regulatory provisions or railroad rules, procedures, signal standards, or practices described in § 246.303(e)(1) through (10), the person shall have their certificate revoked for a period of 30 calendar days.

(2) In the case of two separate incidents involving a violation of one or more of the railroad rules, procedures, signal standards, or practices described in § 246.303(e)(1) through (10), that occurred within 24 months of each other, the person shall have their certificate revoked for a period of 6 months.

(3) In the case of three separate incidents involving violations of one or more of the railroad rules, procedures, signal standards, or practices, described in § 246.303(e)(1) through (10), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of 1 year.

(4) In the case of four separate incidents involving violations of one or more of the railroad rules, procedures, signal standards, or practices, described in § 246.303(e)(1) through (10), that

occurred within 36 months of each other, the person shall have their certificate revoked for a period of 3 years.

(5) Where, based on the occurrence of violations described in § 246.303(e)(1) through (10), different periods of ineligibility may result under the provisions of this section and § 246.115, the longest period of revocation shall control.

(c) Any or all periods of revocation provided in paragraph (b) of this section may consist of training.

(d) A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (b) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half of the pertinent period of ineligibility specified in paragraph (b) of this section has elapsed.

§ 246.307 Process for revoking certification.

(a) If a railroad determines that a signal employee, who is currently certified by the railroad, has violated a railroad test procedure, signal standard or practice described in § 246.303(e), the railroad shall revoke the signal employee's certification in accordance with the procedures and requirements of this section.

(b) Except as provided for in § 246.115(f), if a railroad acquires reliable information that a signal employee, who is currently certified by the railroad, has violated a railroad rule, procedure, signal standard, or practice described in § 246.303(e), the railroad shall undergo the following process to determine whether revocation of the signal employee's certification is warranted:

(1) The signal employee's certification shall be suspended immediately.

(2) The signal employee's employer(s) (if different from the suspending railroad) shall be immediately notified of the certification suspension and the reason for the certification suspension.

(3) Prior to or upon suspending the signal employee's certification, the railroad shall provide the signal employee with notice of: the reason for the suspension; the pending revocation; and an opportunity for a hearing before a presiding officer other than the investigating officer. This notice may initially be given either verbally or in writing. If given verbally, the notice must be subsequently confirmed in writing in a manner that conforms with the notification provisions of the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement notification provision, the written notice must be made within four days of the date the certification was suspended.

(4) The railroad must convene the hearing within the time frame required under the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement or the applicable collective bargaining agreement does not include such a requirement, the hearing shall be convened within 10 days of the date the certification is suspended unless the signal employee requests or consents to a delay to the start of the hearing.

(5) No later than the start of the hearing, the railroad shall provide the signal employee with a copy of the written information and a list of witnesses the railroad will present at the hearing. If this information was provided just prior to the start of the hearing and the signal employee requests a recess to the start of the hearing, such request must be granted. If this information was provided by an employee of the railroad, the railroad shall make that employee available for examination during the hearing.

(6) Following the hearing, the railroad must determine, based on the record of the hearing, whether revocation of the certification is warranted. The railroad shall have the burden of proving that revocation of the signal employee's certification is warranted under § 246.303.

(7) If the railroad determines that revocation of the signal employee's certification is warranted, the railroad shall impose the proper period of revocation provided for in §§ 246.305 and 246.115.

(8) The railroad shall retain the record of the hearing for three years after the date the decision is rendered.

(c) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall satisfy the procedural requirements of this section.

(d) Except as provided for in paragraph (c) of this section, a hearing required under this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be conducted by a presiding officer who can be any proficient person authorized by the railroad other than the investigating officer.

(2) The presiding officer shall convene and preside over the hearing and exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in dispute.

(3) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing; and

(iii) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may assist in achieving a prompt and fair determination of all material issues in dispute.

(4) All relevant and probative evidence shall be received into the record unless the presiding officer determines the evidence to be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(5) Parties may appear at the hearing and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(6) Testimony by witnesses at the hearing shall be recorded verbatim. Witnesses can testify in person, over the phone, or virtually.

(7) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of evidence.

(8) A hearing required under this section may be consolidated with any disciplinary action or other hearing arising from the same facts.

(9) A person may waive their right to a hearing. That waiver shall:

(i) Be made in writing;

(ii) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(iii) Be signed by the person making the waiver.

(e) Except as provided for in paragraph (c) of this section, a decision,

required by this section, on whether to revoke a signal employee's certification shall comply with the following requirements:

(1) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision as to whether the railroad is revoking the signal employee's certification.

(2) The decision shall:

(i) Contain the findings of fact on all material issues as well as an explanation for those findings with citations to all applicable railroad rules, signal standards and procedures and any applicable Federal regulations;

(ii) State whether the railroad official found that the signal employee's certification should be revoked;

(iii) State the period of revocation under § 246.305 (if the railroad official concludes that the signal employee's certification should be revoked); and

(iv) Be served on the employee and the employee's representative, if any, with the railroad retaining proof of service for three years after the date the decision is rendered.

(f) The period that a signal employee's certification is suspended in accordance with paragraph (b)(1) of this section shall be credited towards any period of revocation that the railroad assesses in accordance with § 246.305.

(g) A railroad shall revoke a signal employee's certification if, during the period that certification is valid, the railroad acquires information that another railroad has revoked the person's signal employee certification in accordance with the provisions of this section. Such revocation shall run concurrently with the period of revocation imposed by the railroad that initially revoked the person's certification. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing. No additional hearing is required prior to revocation by more than one railroad arising from the same facts.

(h) A railroad shall not revoke a signal employee's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the signal employee's ability to comply with the railroad test procedure, signal standard, or practice which constitutes a violation under § 246.303.

(i) A railroad may decide not to revoke a signal employee's certification if sufficient evidence exists to establish that the violation of the railroad test procedure, signal standard, or practice described in § 246.303(e) was of a minimal nature and had no direct or potential effect on rail safety.

(j) If sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available, the railroad shall place the relevant information in the records maintained in compliance with:

(1) Section 246.215 for Class I railroads (including that National Railroad Passenger Corporation), railroads providing commuter service, and Class II railroads; and

(2) Section 246.203 for Class III railroads.

(k) If a railroad makes a good faith determination, after performing a reasonable inquiry, that the course of conduct provided for in paragraph (h) or (i) of this section is warranted, the railroad will not be in violation of paragraph (b)(1) of this section if it decides not to suspend the signal employee's certification.

Subpart E—Dispute Resolution Procedures

§ 246.401 Review board established.

(a) Any person who has been denied certification or recertification, or has had their certification revoked and believes a railroad incorrectly determined that they failed to meet the certification requirements of this part when making the decision to deny or revoke certification, may petition the Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Certification Review Board (Board). The Board shall be composed of FRA employees.

§ 246.403 Petition requirements.

(a) To obtain review of a railroad's decision to deny or revoke certification, or deny recertification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be filed no more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner, except as provided for in paragraph (d) of this section;

(3) Be filed on *https://www.regulations.gov;*

(4) Include the following contact information for the petitioner and petitioner's representative (if petitioner is represented):

(i) Full name;

(ii) Daytime telephone number; and

(iii) Email address;

(5) Include the name of the railroad and the name of the petitioner's employer (if different from the railroad that revoked petitioner's certification);

(6) Contain the facts that the petitioner believes constitute the improper action by the railroad and the arguments in support of the petition; and

(7) Include all written documents in the petitioner's possession or reasonably available to the petitioner that document the railroad's decision.

(c) If requested by the Board, the petitioner must provide a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide a written explanation in response to a Board request if written documents, that should be reasonably available to the petitioner, are not supplied.

(d) The Board may extend the petition filing period in its discretion, provided the petitioner provides good cause for the extension and:

(1) The request for an extension is filed before the expiration of the period provided for in paragraph (b)(2) of this section; or

(2) The failure to timely file was the result of excusable neglect.

(e) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 246.411.

§ 246.405 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall be sent by email to the petitioner (if an email address is provided), petitioner's representative (if any), the railroad, and petitioner's employer (if different from the railroad that revoked petitioner's certification). The acknowledgment shall contain the docket number assigned to the petition and will notify the parties where the petition can be accessed.

(b) Within 60 days from the date of the acknowledgment provided in paragraph (a) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition and shall supplement the record with any relevant documents in its possession, such as hearing transcripts and exhibits, that were not submitted by the petitioner. Late filings will only be considered to the extent practicable. A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number for the petition;

(2) Provide the railroad's email address;

(3) Serve a copy of the information being submitted to FRA to the petitioner and petitioner's representative (if any); and

(4) Be filed on *https://www.regulations.gov.*

(c) The petition will be referred to the Board for a decision after a railroad's response is received or 60 days from the date of the acknowledgment provided in paragraph (a) of this section, whichever is earlier. Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition. If the Board finds that there is insufficient basis for granting or denying the petition, the Board may issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(d) When considering procedural issues, the Board will grant the petition if the petitioner shows:

(1) That a procedural error occurred; and

(2) The procedural error caused substantial harm to the petitioner.

(e) When considering factual issues, the Board will grant the petition if the petitioner shows that the railroad did not provide substantial evidence to support its decision.

(f) When considering legal issues, the Board will determine whether the railroad's legal interpretations are correct based on a *de novo* review.

(g) The Board will only consider whether the denial or revocation of certification or recertification was improper under this part and will grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision. For example,the Board will not consider whether the railroad properly applied its own more stringent requirements.

(h) The Board's written decision shall be served on the petitioner, petitioner's representative (if any), the railroad, and petitioner's employer (if different from the railroad that revoked petitioner's certification).

§ 246.407 Request for a hearing.

(a) If adversely affected by the Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 246.409.

(b) To exercise that right, the adversely affected party shall file a written request for a hearing within 20 days of service of the Board's decision on that party. The request must be filed in the docket on *https://www.regulations.gov* that was used when the case was before the Board.

(c) A written request for a hearing must contain the following:

(1) The name, telephone number, and email address of the requesting party and the party's designated representative (if any);

(2) The name, telephone number, and email address of the respondent;

(3) The docket number for the case while it was before the Board;

(4) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(5) The signature of the requesting party or the requesting party's representative (if any).

(d) Upon receipt of a hearing request complying with paragraph (c) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

(e) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Board's decision will constitute final agency action.

§ 246.409 Hearings.

(a) An administrative hearing for a signal employee certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator.

(b) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(c) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that they have read the document; that to the best of their knowledge, information, and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed in, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 246.407(e) and paragraph (s)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within 14 days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn, or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the ''hearing petitioner.'' The party that the Board issued its decision in favor of will be a respondent. At the start of each proceeding, FRA will be a respondent as well. The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence.

(r) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(s) At the close of the record, the presiding officer shall prepare a written decision in the proceeding. The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each, concerning all material issues of fact or law presented on the record;

(2) Shall be served on all parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

§ 246.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter, or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from a Board decision pursuant to § 246.403(e) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

Appendix A to Part 246—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

(1) The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the proposed requirements of § 246.111. This provision requires that railroads consider the motor vehicle driving record of each person prior to issuing them certification or recertification as a signal employee.

(2) To fulfill that obligation, a railroad is required to review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the State agency that issued the certification candidate's current motor vehicle driver's license. However, a motor vehicle driving record can include multiple documents if the certification candidate has been issued a motor vehicle driver's license by more than one State agency or a foreign country.

Access to State Motor Vehicle Driving Record Data

(3) The right of railroad workers, their employers, or prospective employers to have access to a State motor vehicle licensing agency's data concerning an individual's driving record is controlled by State law. Although many states have mechanisms through which employers and prospective

employers, such as railroads, can obtain such data, there are some states where privacy concerns make such access very difficult or impossible. Since individuals are generally entitled to obtain access to their driving record data that will be relied on by a State motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places the responsibility on individuals who want to serve as certified signal employees to request that their current State motor vehicle licensing agency (or agencies) furnish such data directly to the railroad that is considering certification (or recertification) of the individual as a signal employee. Depending on the procedures established by the State motor vehicle licensing agency, the individual may be asked to send the State agency a brief letter requesting such action or to execute a State agency form that accomplishes the same effect. Requests for an individual's motor vehicle driving record normally involve payment of a nominal fee established by the State agency as well. In rare instances, when a certification (or recertification) candidate has been issued multiple licenses, an individual may be required to submit multiple requests.

(4) Once the railroad has obtained the individual's motor vehicle driving record(s), the railroad is required to afford the certification (or recertification) candidate an opportunity to review and comment on the record(s) in writing pursuant to § 246.301. The railroad is also required to provide this review opportunity before the railroad renders a decision based on information in the record(s). The railroad is required to evaluate the information in the certification (or recertification) candidate's motor vehicle driving record(s) pursuant to the provisions of this part.

Appendix B to Part 246—Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 246.117 and 246.118.

(2) For any examination performed to determine whether a person meets the vision acuity requirements in § 246.117, it is recommended that such examination be performed by a licensed optometrist or a technician who reports to a licensed optometrist. It is also recommended that any test conducted pursuant to § 246.117 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(3) For any examination performed to determine whether a person meets the hearing acuity requirements in § 246.118, it is recommended that such examination be performed by a licensed or certified audiologist or a technician who reports to a licensed or certified audiologist. It is also recommended that any test conducted pursuant to § 246.118 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(4) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

TABLE 1 TO APPENDIX B TO PART 246

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1–15.
AOC—Hardy-Rand-Ritter plates—second edition	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book).
Dvorine—Second edition	3 or more errors on plates 1–15.
Ishihara (14 plate)	2 or more errors on plates 1–11.
Ishihara (16 plate)	2 or more errors on plates 1–8.
Ishihara (24 plate)	3 or more errors on plates 1–15.
Ishihara (38 plate)	4 or more errors on plates 1–21.
Richmond Plates 1983	5 or more errors on plates 1–15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

(5) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that ''yellow signals'' do not always appear to be the same. It is not acceptable to use ''yarn'' or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 246.117(c)(3).

(6)(i) An examinee who fails to meet the criteria in the chart may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a signal employee. The intent of §§ 246.117(d) and 246.118(d) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a certified signal employee.

(ii) Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request, but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(7) Certified signal employees who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

Issued in Washington, DC.

Amitabha Bose,

Administrator.

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Part VI

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 201, 208, 314, et al.

Medication Guides: Patient Medication Information; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201, 208, 314, 606, and 610

[Docket No. FDA–2019–N–5959]

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Medication Guides: Patient Medication Information

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is proposing to amend its human prescription drug product labeling regulations for Medication Guides (FDA-approved written prescription drug product information distributed to patients). This action, if finalized, will require applicants to create a new type of Medication Guide, referred to as Patient Medication Information (PMI), for prescription drug products, including biological products, used, dispensed, or administered on an outpatient basis and for blood and blood components transfused in an outpatient setting. PMI would be a one-page document with standardized format and content that would be submitted to FDA for approval. This proposed rule is intended to improve public health by providing patients with clear, concise, accessible, and useful written prescription drug product information delivered in a consistent and easily understood format to help patients use their prescription drug products safely and effectively.

DATES: Either electronic or written comments on the proposed rule must be submitted by November 27, 2023. Submit written comments (including recommendations) on the collection of information under the Paperwork Reduction Act of 1995 by November 27, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of November 27, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–N–5959 for ''Medication Guides: Patient Medication Information.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 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.

Submit comments on the information collection under the Paperwork Reduction Act of 1995 to the Office of Management and Budget (OMB) at *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The title of this proposed collection is ''Medication Guides: Patient Medication Information.''

FOR FURTHER INFORMATION CONTACT:

With regard to the proposed rule: Chris Wheeler, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3330, Silver Spring, MD 20993, 301–796–0151, *Chris.Wheeler@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.

With regard to the information collection: 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.*

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I. Executive Summary

A. Purpose of the Proposed Rule

FDA is proposing to amend its prescription drug product labeling regulations for Medication Guides to require a new type of Medication Guide, referred to as PMI, for prescription drug products used, dispensed, or administered on an outpatient basis, including blood and blood components transfused in an outpatient setting. For the purposes of this proposed rule, a prescription drug product also includes a biological product licensed under the Public Health Service Act (PHS Act). Currently, Medication Guides are required only for certain prescription drug products that FDA determines pose a significant and serious public health concern and are used primarily on an outpatient basis.

We have long recognized the importance of providing patients with written information about their prescription drug products because there is evidence that such information may help patients use prescription drug products safely and effectively and may potentially reduce preventable adverse drug reactions and improve health outcomes. Patients may currently receive one or more types of written patient information regarding prescription drug products, including patient package inserts (PPIs), Medication Guides, consumer medication information (CMI), and Instructions for Use documents. This written patient information, in certain instances, has been duplicative, incomplete, conflicting, or difficult to read and understand, and has not been sufficient to meet the needs of patients. PMI is intended to improve public health by providing patients with clear, concise, accessible, and useful written prescription drug product information delivered in a consistent and easily understood format to help patients use their prescription drug products safely and effectively.

B. Summary of the Major Provisions of the Proposed Rule

Under the proposed rule, PMI would highlight essential information that the patient needs to know about the prescription drug product and basic directions on how to use the product. PMI would be a one-page document that follows standardized format and content requirements. PMI would consist of the following headings:

- [Insert Drug Name] is
- Important Safety Information
- Common Side Effects
- Directions for Use

In determining specific headings and information to be included in PMI, we researched scientific literature, conducted studies examining several PMI prototypes, held public workshops and hearings, and obtained stakeholder input on what information patients need in order to use their prescription drug products safely and effectively.

When finalized, this proposed rule would require applicants of all new and approved new drug applications (NDAs) and biologics license applications (BLAs) to create PMI for prescription drug products that are to be used, dispensed, or administered on an outpatient basis. Applicants of NDAs and BLAs would be required to submit PMI to FDA for approval. The proposed rule covers NDAs and BLAs for interchangeable biosimilars and non-interchangeable biosimilars.

When finalized, the proposed rule would also require applicants of new and approved abbreviated new drug applications (ANDAs) that refer to a listed drug for which FDA has approved PMI to have PMI that is the same as that of the reference listed drug (RLD) except for certain differences in labeling permitted under the law. As described further in this document, FDA will create a PMI template for approved ANDAs if: (1) the ANDA references a listed drug whose approval has been withdrawn and (2) no PMI was approved for the RLD before the approval of the RLD was withdrawn.

PMI would be stored in an online central repository managed by FDA and would be freely accessible to the public, including patients, healthcare providers, and authorized dispensers.

Authorized dispensers would be required to provide PMI to patients each time a prescription drug product for which an FDA-approved PMI exists is used, dispensed, or administered on an outpatient basis. The default method of distribution for PMI is in paper form. Although authorized dispensers would be required to have paper distribution of PMI available upon request, this proposed rule would allow for electronic distribution instead of paper distribution upon a patient's request and would accommodate future technological advances in the methods used to provide PMI upon a patient's request.

When finalized, this proposed rule would require that PMI be available for distribution to transfusion services of blood and blood components, unless a waiver applies. The requirement to create PMI and make it available for distribution to transfusion services applies to all establishments that collect blood and blood components for

transfusion. However, only licensed blood establishments would be required to submit PMI to FDA for approval. Each time blood or blood components are administered on an outpatient basis, transfusion services would be considered authorized dispensers and would be required to provide PMI to each patient. This approach would ensure that every patient who receives blood or a blood component with an associated PMI on an outpatient basis would receive that PMI.

FDA would withdraw the current regulations requiring Medication Guides for certain prescription drug products after all prescription drug products that currently have Medication Guides have FDA-approved PMI. During the proposed 5-year implementation schedule of the final rule, the current regulations governing Medication Guides would remain in place but would no longer be applicable to a prescription drug product once that prescription drug product has FDA-approved PMI.

FDA would also withdraw the current regulations requiring PPIs for oral contraceptives and estrogen-containing products after all such prescription drug products that had PPIs have FDA-approved PMI. During the proposed 5-year implementation schedule of the final rule, the current regulations for PPIs would remain in place but would no longer be applicable to a prescription drug product once that prescription drug product has FDA-approved PMI. Under this proposed rule, once finalized, we would no longer accept voluntary submissions of PPIs for prescription drug products.

C. Legal Authority

FDA's proposed revisions to the format and content requirements for prescription drug labeling are authorized by the Federal Food, Drug, and Cosmetic Act (FD&C Act) and the PHS Act.

D. Costs and Benefits

This proposed rule would require that all human prescription drug products used, dispensed, or administered on an outpatient basis, including blood and blood components transfused in an outpatient setting, be accompanied by a one-page product information document, or Medication Guide, known as PMI. The public would benefit from this labeling with decreased search costs for information. The public may also benefit from a reduction in risk associated with their drug products, including blood and blood component products transfused in outpatient settings, due to the availability of PMI if the new labeling helps patients make better healthcare decisions. We estimate that the present discounted value of these potential benefits from PMI over 10 years would range between $127.5 million and $4.3 billion using a 3 percent discount rate, with a primary estimate of $1.6 billion; using a 7 percent discount rate, the present-value benefits from PMI would range between $101.0 million and $3.4 billion, with a primary estimate of $1.3 billion. Annualized over 10 years, we estimate that the benefit from PMI would range between $14.9 and $507.9 million per year, with a primary estimate of $188.0 million, using a 3 percent discount rate; with a 7 percent discount rate, we estimate the annualized benefit to range between $14.4 and $486.8 million, with a primary estimate of $180.5 million per year. We estimate that annual benefits would be constant beginning in year 5.

The proposed rule would impose costs on industry, the majority of which would stem from developing PMI. The proposed rule would also impose costs on FDA, primarily from reviewing PMI submissions, developing PMI templates for a small subset of drugs, and establishing and maintaining the online PMI database. We estimate that the total present value of net costs over 10 years would range from $105.0 to $312.5 million, with a primary estimate of $192.8 million, using a 3 percent discount rate and from $89.0 to $263.6 million, with a primary estimate of $162.6 million, using a 7 percent discount rate. Annualizing these costs over 10 years, we estimate the cost would range from $12.3 to $36.6 million per year at a 3 percent discount rate, with a primary estimate of $22.6 million per year, and from $12.7 to $37.5 million per year using a discount rate of 7 percent, with a primary estimate of $23.2 million. We estimate that annual costs would be constant beginning in year 5. Dispensers may face additional costs to distribute PMI that we cannot estimate at this time.

II. Table of Abbreviations and Acronyms Commonly Used in This Document

Abbreviation/acronym	What it means
ANDA	Abbreviated New Drug Application.
BLA	Biologics License Application.
CDC	Centers for Disease Control and Prevention.
CMI	Consumer Medication Information.
DESI	Drug Efficacy Study Implementation.
FD&C Act	Federal Food, Drug, and Cosmetic Act.
FDA	Food and Drug Administration.
HHS	Department of Health and Human Services.
NDA	New Drug Application.
NVICP	National Vaccine Injury Compensation Program.
OMB	Office of Management and Budget.
PHS Act	Public Health Service Act.
PI	Prescribing Information.
PMI	Patient Medication Information.
PPI	Patient Package Insert.
RCAC	FDA Risk Communication Advisory Committee.
REMS	Risk Evaluation and Mitigation Strategy.
RLD	Reference Listed Drug.
VISs	Vaccine Information Statements.

III. Background

A. Introduction

Currently, patients may receive one or more types of written patient prescription drug product information in an outpatient setting when they receive a prescription medication, including: (1) PPIs, (2) Medication Guides, (3) CMI, and (4) Instructions for Use documents. Medication Guides and some PPIs are required under the FD&C Act (see section 505–1 of the FD&C Act (21 U.S.C. 355–1)) and FDA regulations (see part 208 (21 CFR part 208)) and §§ 310.501 and 310.515 (21 CFR 310.501 and 310.515)). CMI is produced by voluntary private sector entities and is intended to provide general written patient prescription drug product information to patients. An Instructions for Use document is developed by applicants and is intended for patients who use prescription drug products that have complicated or detailed patient-use instructions.

1. Patient Package Insert (PPI)

A PPI is written prescription drug product information developed by applicants for patients. Current FDA regulations require that applicants develop PPIs for oral contraceptives and estrogen-containing products (see §§ 310.501 and 310.515). Applicants must submit the required PPIs to FDA for approval and provide FDA-approved PPIs with each package of the drug product that the manufacturer or distributor intends to dispense to patients. Applicants can also voluntarily create a PPI for other prescription drug products and may submit it to FDA for approval as part of a prescription drug product's labeling. However, distribution of a voluntarily submitted PPI is not required, even if it is FDA-approved.

FDA can require a risk evaluation and mitigation strategy (REMS) when FDA determines a REMS is necessary to ensure that the benefits of a prescription drug product outweigh the risks (see section 505–1 of the FD&C Act). Under section 505–1(e) of the FD&C Act, PPIs are one potential element of a REMS if FDA determines that a PPI may help mitigate a serious risk of the prescription drug product.[1]

2. Medication Guide for Prescription Drug Products

Currently, a Medication Guide is FDA-approved written patient prescription drug product information for certain prescription drug products that are used primarily on an outpatient basis (see part 208). Under current regulations, FDA requires a Medication Guide when FDA determines one or more of the following circumstances exist: (1) the prescription drug product is one for which patient labeling could help prevent serious adverse effects; (2) the prescription drug product is one that has a serious risk or risks (relative to benefits) of which patients should be made aware, because information concerning the risk or risks could affect a patient's decision to use or continue to use the product; or (3) the prescription drug product is important to health, and patients' adherence to directions for use is crucial to the prescription drug product's effectiveness (§ 208.1(c) (21 CFR 208.1(c))).

FDA can also require Medication Guides as an element of a REMS under section 505–1(e) of the FD&C Act. In the **Federal Register** of November 18, 2011 (76 FR 71577), FDA published a notice of availability of a guidance for industry entitled ''Medication Guides—Distribution Requirements and Inclusion in Risk Evaluation and Mitigation Strategies (REMS)'' (available at: *https://www.fda.gov/media/79776/download*) to clarify when Medication Guides would be a part of a REMS and to clarify when FDA intended to exercise enforcement discretion regarding when a Medication Guide must be provided to a patient.

Medication Guides contain information that is necessary to a patient's safe and effective use of a prescription drug product. For those selected prescription drug products that currently have Medication Guides, Medication Guides are developed by applicants, approved by FDA, and required to be distributed to patients.

3. Consumer Medication Information (CMI)

CMI is written patient prescription drug product information that is developed by organizations or individuals in the private sector other than the applicant of the prescription drug product. CMI is intended for voluntary distribution to patients when a prescription drug product is dispensed from a pharmacy. CMI is not developed by or in consultation with the applicant, is not approved by FDA, and is not required by FDA to be distributed to patients.

Different organizations and individuals create CMI and make it available to pharmacies for purchase. FDA provides recommendations for creating useful CMI through guidance (available at: *https://www.fda.gov/media/72574/download*). However, CMI is not standardized, and the content, even for the same prescription drug product, can vary greatly depending on which organization or individual created the CMI.

4. Instructions for Use

For certain prescription drug products that have complicated or detailed patient-use instructions, applicants may develop an Instructions for Use document. The Instructions for Use document, if developed, is reviewed and approved by FDA and is generally provided when the drug is dispensed to the patient. In the **Federal Register** of July 15, 2022 (87 FR 42485), FDA published a notice of availability of a final guidance for industry entitled ''Instructions for Use—Patient Labeling for Human Prescription Drug and Biological Products—Content and Format'' (available at: *https://www.fda.gov/media/128446/download*) to provide recommendations for developing the content and format of an Instructions for Use document for human prescription drugs and biological products and drug-device or biologic-device combination products submitted under an NDA or BLA. This guidance represents FDA's current thinking on this topic.

B. Need for the Regulation

We have long recognized the importance of providing written information to patients about their prescription drug products. There is evidence that prescription drug product information may help patients use their prescription drug products safely and effectively, which may reduce preventable adverse drug events and improve health outcomes. For example, written prescription drug product information is an important part of patient counseling because it reinforces verbal instructions or warnings given by healthcare providers, may improve patient understanding and recall of instructions, and provides patients with supplemental information about the prescription drug product after visits with healthcare providers (Ref. 1). We evaluated the current system for written prescription drug product information, which includes Medication Guides, PPIs, CMI, and Instructions for Use. Based on that evaluation (discussed below in detail), we have determined that the current system does not consistently provide patients with clear, concise, accessible, and sufficiently useful written prescription drug product information delivered in a consistent and easily understood format to help patients use their prescription drug

[1] Currently, there are no REMS that contain a PPI as an element.

products safely and effectively. Therefore, we are proposing a new type of Medication Guide to help patients use their prescription drug products safely and effectively.

In addition, a common major public health problem is that some patients do not adhere to prescription drug therapy (*e.g.,* for antihypertensive drugs), and some patients do not use their prescribed drugs as directed by their healthcare providers (Refs. 2 through 4). Reports show that patients' nonadherence to long-term prescription drug product therapies negatively affects patient outcomes and has led to preventable healthcare costs (Refs. 3 and 5). It is estimated that nonadherence contributes to as many as 25 percent of hospital admissions (Ref. 4), 50 percent of treatment failures, and approximately 125,000 deaths in the United States per year (Refs. 2 and 4).

Although the reasons for medication nonadherence are multidimensional (Ref. 2), patients' knowledge about prescription drug products is important for adherence (Ref. 6). To help increase patients' knowledge, information about prescription drug products should be communicated to patients when these products are dispensed, administered, or used on an outpatient basis (Ref. 2). This information can remind patients about important information regarding the prescription drug product and answer questions that arise after patients have visited a healthcare provider (Ref. 7).

1. Previous Efforts To Provide Written Prescription Drug Product Information to Patients

Since the 1970s, we have required that useful patient prescription drug product labeling written in nontechnical language be distributed to patients every time certain prescription drug products are dispensed. Specifically, we published regulations requiring that manufacturers/distributors of oral contraceptive drug products (see § 310.501; 35 FR 9001, June 11, 1970; and 43 FR 4214, January 31, 1978) and estrogen-containing drug products (see § 310.515 and 42 FR 37636, July 22, 1977) provide patients with PPIs containing information about the prescription drug product's benefits and risks.

In the **Federal Register** of July 6, 1979 (44 FR 40016), we published a proposed rule that would have required written patient information for most prescription drug products in addition to PPI for oral contraceptives and estrogen-containing products. However, in the **Federal Register** of September 12, 1980 (45 FR 60754), the final rule instead required procedures for preparing and distributing PPIs for a limited number of prescription drug products in addition to PPI for oral contraceptives and estrogen-containing products.

FDA proposed to revoke the final rule in the **Federal Register** of February 17, 1982 ((47 FR 7200) and reprinted February 19, 1982 (47 FR 7458)). In the **Federal Register** of September 7, 1982 (47 FR 39147), we revoked the final rule.

In the **Federal Register** of August 24, 1995 (60 FR 44182), we published a proposed rule entitled ''Prescription Drug Product Labeling: Medication Guide Requirements'' (1995 proposed rule) (available at: *https://www.govinfo.gov/content/pkg/FR-1995-08-24/pdf/95-21020.pdf*), which was intended to help patients receive useful written information about prescription drug products. If finalized, the 1995 proposed rule would have set specific distribution and quality goals and timeframes for distributing useful written patient information. The proposed rule would have required applicants to prepare and distribute Medication Guides or provide the means to distribute Medication Guides for a limited number of prescription drug products (primarily used on an outpatient basis) that FDA determined posed a serious and significant public health concern requiring the immediate distribution of FDA-approved patient information.

Consistent with the health promotion and disease prevention objectives of Healthy People 2000 (Ref. 8), the 1995 proposed rule would have also set a goal for distributing useful written patient information for those prescription drug products that did not require Medication Guides. The goal was that the private sector initiatives would result in the distribution of useful written patient information to 75 percent of individuals receiving new prescriptions by 2000 and to 95 percent of individuals receiving new prescriptions by 2006.

The 1995 proposed rule described criteria to determine the usefulness of written patient information. We described useful written patient information as information written in nontechnical language and containing a summary of the most important information about a drug product. We also specified that the usefulness of written patient information would be evaluated based on scientific accuracy, consistency with a standard format, nonpromotional tone and content, specificity, comprehensiveness, understandable language, and legibility.

If the 1995 proposed rule had been finalized, we would have periodically evaluated and reported on the private sector's progress towards achieving the target goals. If the goals were not met in the specified timeframes, we proposed that we would either implement a mandatory comprehensive Medication Guide program or seek public comments on whether a comprehensive program should be implemented. Additionally, we would try to determine whether any other steps were needed to meet the goals of patient prescription drug product information.

As we were reviewing the public comments to the 1995 proposed rule, Congress enacted Public Law 104–180 (the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1997) on August 6, 1996. A goal of section 601(b) of Public Law 104–180 was for the private sector to distribute useful written prescription information to 75 percent of individuals receiving new prescriptions by 2000 and to 95 percent of individuals receiving new prescriptions by 2006, consistent with the goals of the 1995 proposed rule. Section 601(a) of the law also required the Secretary of the Department of Health and Human Services (Secretary) (HHS) to organize a committee of interested stakeholders to develop a long-range, comprehensive action plan to achieve this goal.

Section 601(d) of the law prohibited us from taking further regulatory steps at that time to require a uniform content or format for written prescription drug product information that was voluntarily provided to patients if private sector initiatives met the goal within the specified timeframes. FDA was charged with evaluating the private sector's progress in meeting the goal of distributing useful written prescription drug product information beginning January 1, 2001. If, after reviewing the private sector initiatives, FDA determined that the goals of the law had not been met, FDA could seek public comments on alternative initiatives to meet the goal.

In response to the Public Law 104–180 mandate, the Secretary convened a steering committee composed of healthcare professionals, consumer organizations, pharmaceutical manufacturers, prescription drug wholesalers, drug information database companies, CMI developers, and others. The steering committee created a long-term action plan for improving oral and written prescription drug product information, reported in the 1996 ''Action Plan for the Provision of Useful Prescription Medicine Information''

(Keystone Action Plan) (Ref. 9). The Keystone Action Plan endorsed the elements specified in Public Law 104–180 for defining the usefulness of prescription drug product information, specifically that the materials should be scientifically accurate, unbiased in content and tone, sufficiently specific and comprehensive, and presented in an understandable and legible format that is readily comprehensible to patients and is timely and up to date. The Keystone Action Plan explained that written prescription drug product information that meets these criteria for usefulness would enable patients to use their prescription drug products properly and appropriately, receive the maximum benefit from the prescription drug products, and avoid harm.

In the **Federal Register** of December 1, 1998 (63 FR 66378), we published a final rule requiring the mandatory distribution of Medication Guides for a small number of prescription drug and biological products that FDA determines pose a serious and significant public health concern requiring distribution of FDA-approved patient medication information. FDA anticipated that on average, no more than 5 to 10 prescription drug products per year would require such information. However, because of the types and characteristics of the prescription drug products approved, the number of prescription drug products required to have Medication Guides has increased significantly to over 550 Medication Guides since publication of the final rule in 1998 (approximately 20 to 25 per year).

2. FDA's Evaluation of the Private Sector's Progress To Provide Written Prescription Drug Product Information to Patients

Consistent with Public Law 104–180, the Keystone Action Plan required the development of mechanisms to periodically assess the quality of written prescription drug product information. We were charged with evaluating the private sector's progress toward meeting the goal of distributing useful written prescription drug product information (Ref. 9). Subsequently, we contracted with the National Association of Boards of Pharmacy and a group of academics to conduct several studies to determine the private sector's progress toward meeting the goal of Public Law 104–180.

In 1999, an initial study assessed the CMI that was voluntarily provided to patients receiving new prescriptions at pharmacies (the 1999 study) (Ref. 1). The 1999 study assessed the percentage of trained shoppers (acting as patients) who received any written information when receiving a new prescription and the quality of this information received from 306 randomly selected community pharmacies in 8 States. A panel of experts evaluated the written information for usefulness (as defined in the Keystone Action Plan) and quality, using explicit criteria. The results showed that of the 918 new prescriptions presented at pharmacies, the following occurred (Ref. 1):

• 87 percent were dispensed with CMI.
• 81 percent were dispensed with information that was considered unbiased in content and tone.
• 69 percent were dispensed with acceptable information about adverse drug reactions and what to do if an adverse drug reaction occurred.
• 68 percent were dispensed with acceptable information about the drug product and its indications for use.
• 49 percent were dispensed with acceptable directions about how to use the prescription drug product, receive maximum benefits from the drug product, and interpret the benefits of the drug product.
• 19 percent were dispensed with acceptable information about the drug products' contraindications and what to do if a contraindication existed.

FDA presented these 1999 study results at a public workshop held on February 29 and March 1, 2000 (Ref. 10).

A second study was performed in 2001 (the 2001 study) to determine whether the private sector had made further progress toward meeting the goal of Public Law 104–180. The 2001 study expanded upon the initial 1999 study and included 384 randomly selected pharmacies in 44 States. All CMIs received by trained shoppers (acting as patients) with new prescriptions at the pharmacy were sent to an expert panel (consistent with the 1999 study) to evaluate against eight general criteria described in the Keystone Action Plan. The criteria specified that the written patient information must include the following: (1) drug names and indications for use; (2) contraindications and what to do, if applicable; (3) specific directions about how to use, monitor, and get the most benefit; (4) specific precautions and how to avoid harm while using the prescription drug; (5) symptoms of serious or frequent adverse reactions and what to do; (6) general information, a disclaimer, and encouragement to ask questions; (7) scientifically accurate, unbiased, and up-to-date information; and (8) a written format that is legible and comprehensible to the consumer. Consumers were also recruited to evaluate the written information and the extent to which the information was comprehensible, legible, and useful (Ref. 11).

The results of the 2001 study were presented in a final report to HHS and FDA in 2001 and were also published in 2005. The results showed that 89 percent of the 1,367 new prescriptions were dispensed with CMI (Refs. 11 and 12). However, the expert panel judged that fewer than 20 percent of CMI met the criteria for specificity, legibility, and comprehensibility (Ref. 11). Fewer than 10 percent of all leaflets met the quality criteria regarding contraindications, precautions, and how to avoid harm (Ref. 11). Assessments from consumers, consistent with assessments from expert panels, showed that most CMI did not meet the criteria (as described in the Keystone Action Plan) for font size, spacing, use of bullets, and reading difficulty. The 2001 study concluded that CMI ''falls short of the information quality level required in the 1996 federal legislation,'' and additional efforts were needed to meet the federally mandated distribution and quality goal (Ref. 11).

In the **Federal Register** of May 26, 2005 (70 FR 30467), we published a notice of availability of a draft guidance for industry entitled ''Useful Written Consumer Medication Information (CMI).'' In the **Federal Register** of July 18, 2006 (71 FR 40724), we published a notice of availability of a final guidance for industry (the 2006 CMI guidance, available at: *https://www.fda.gov/media/72574/download*). The 2006 CMI guidance is intended to assist organizations and individuals in developing useful CMI.

A third study, conducted in 2008 as a followup to the 1999 and 2001 studies, evaluated the quality and usability of CMI provided with new prescriptions. The results were presented to HHS and FDA in a final report published in 2008 (the 2008 study) (Ref. 13). This study used methods similar to those used in the 2001 study, but the 2008 study also incorporated information from the 2006 CMI guidance on developing useful written CMI. The 2006 CMI guidance, which was written in part based on the results of the 1999 and 2001 studies, assists individuals and organizations in developing useful written CMI.

The 2008 study included 365 pharmacies in 41 States (Ref. 13). The results indicated that although 94 percent of patients received CMI with new prescriptions, only about 70 percent of this information met the minimum criteria for usefulness, and a number of additional deficiencies were noted. Despite the FDA guidance, the

2008 study identified various shortcomings of the evaluated CMI, including lack of information about the management of the prescription drug product, significant redundancy of information that resulted in excessively long leaflets, poor formatting, and inadequate legibility and an inappropriately high reading level. Only half of CMI had specific information about what patients would need to monitor and manage when using their prescription drug therapies and actions to take when side effects or other problems occur. The 2008 study found that the length and format of CMI and the percent of items covered continued to vary considerably from pharmacy to pharmacy. The majority of CMI did not satisfy the criteria recommended in the 2006 CMI guidance. The 2008 study also noted that, although progress had been made, CMI continued to fall short of the Congressionally mandated goal of Public Law 104–180 that 95 percent of new prescriptions be accompanied by useful written patient information by 2006 (Ref. 13).

3. FDA 2007 Public Hearing

In the **Federal Register** of April 9, 2007 (72 FR 17559), we announced a public hearing entitled ''Use of Medication Guides to Distribute Drug Risk Information to Patients'' (the 2007 FDA public hearing) to be held on June 12 and 13, 2007 (Docket No. 2007N–0121). At the 2007 FDA public hearing, we obtained feedback and requested information and views on specific issues associated with the development, distribution, comprehensibility, and accessibility of Medication Guides. FDA officials heard testimony from one member of Congress; 40 individuals representing academia, consumers and consumer groups; the pharmaceutical industry; healthcare professional groups; physicians; pharmacists; and pharmacy organizations (Ref. 14). Although stakeholders stated it was important that patients receive appropriate risk information in the form of Medication Guides to make informed decisions about certain prescription drug products, stakeholders suggested that the current Medication Guide program was too cumbersome and lacked a standard distribution system. Stakeholders urged FDA to: (1) increase awareness of Medication Guides, (2) make Medication Guides easier to read and understand, (3) move toward facilitating the distribution of Medication Guides by electronic means, and (4) consider combining the information in Medication Guides with other information, such as CMI (Ref. 14).

4. Citizen Petition

In June 2008, we received a citizen petition (the 2008 citizen petition) from a large group of stakeholders representing pharmacy practice, medical consumers, and medical communications companies (Docket No. FDA–2008–P–0380). The 2008 citizen petition asked us to adopt an FDA-approved, concise, plain language, single-page patient information document for prescription drugs. The 2008 citizen petition requested that the one-page ''single patient document'' combine and simplify the many documents that patients currently receive at the pharmacy for prescription drug products (Ref. 15). In 2010, the petitioners voluntarily withdrew the 2008 citizen petition, citing FDA's significant work and strides toward achieving the goals of the 2008 citizen petition with the ongoing development of PMI (Ref. 16).

5. The FDA Risk Communication Advisory Committee Meeting

In February 2009, the FDA Risk Communication Advisory Committee (RCAC), which included some members of the FDA Drug Safety and Risk Management Advisory Committee, met to explore approaches to improve the communication of prescription drug product information to patients, specifically regarding CMI, Medication Guides, and PPIs (Ref. 17). The RCAC recommended that FDA adopt a single standard document for communicating essential information about prescription drug products to patients. The single document was proposed as a replacement for CMI, Medication Guides, and PPIs. The RCAC also recommended that the standard document be FDA-approved and subject to a rigorous empirical evaluation of its effectiveness (Ref. 17).

We have determined that the current system fails to consistently provide patients with sufficient information to help them use prescription drug products safely and effectively. Based on the results of the 1999, 2001, and 2008 studies, comments from stakeholders at the 2007 FDA public hearing, the 2008 citizen petition, and recommendations from the 2009 RCAC, we are proposing a new type of Medication Guide to help patients use their prescription drug products safely and effectively.

6. Development of Prototypes

Prior to the development of this proposed rule, FDA developed prototypes for the proposed new type of Medication Guide, called PMI, based on stakeholders' input, research findings, and our knowledge and experience. To solicit further public input on the PMI prototypes and PMI in general, FDA held a public workshop, participated in a series of workshops convened by the Engelberg Center for Health Care Reform at the Brookings Institution (Brookings Institution), held a public hearing following the procedures set forth in part 15 (21 CFR part 15), and research was conducted on prototypes for PMI (OMB control number 0910–0691; Ref. 31).

C. History of the Rulemaking

1. FDA 2009 Public Workshop

On September 24 and 25, 2009, we convened a public workshop (the 2009 public workshop). Participants discussed the optimal content and format of written prescription drug product information to ensure that the information is comprehensible, accurate, and more easily accessible to patients (see 74 FR 33265, July 10, 2009, Docket No. FDA–2009–N–0295). The 2009 public workshop explored the following questions:

- What content is critical for patients to receive and in what order and format?
- How can access be improved?
- How should this information be distributed to patients?
- What parameters are appropriate with regard to evaluating the usefulness of the materials?

We prepared an issue paper to serve as context and background for the 2009 public workshop (Ref. 18).

At the 2009 public workshop, we presented four PMI prototypes for a fictitious drug that used different labeling formats. FDA developed the PMI prototypes based on stakeholders' input, patient information studies and pilots, consumer-focused research, and our knowledge and experience with patient information and current labeling practices. All four PMI prototypes consisted of the same core content, including uses, side effects, what to do while taking the drug, what to avoid while taking the drug, and how to take the drug.

Prototype 1 was modeled on the format of the over-the-counter ''Drug Facts'' section of labeling (see 21 CFR 201.66), was one page in length, and was the most succinct (Ref. 19). Prototype 2 was modeled on the format of the ''Highlights of Prescribing Information'' section of labeling (see § 201.57(a) (21 CFR 201.57(a)), was one page, and was more detailed than Prototype 1 (Ref. 20). Prototype 3 was modeled on the format of the Prescribing Information (PI) and

contained two levels of information (see § 201.57). The first level summarized the information in a concise manner (similar to Highlights of Prescribing Information), and the second level explained the information in detail (similar to the Full Prescribing Information). Prototype 3 was two pages in length, appeared in question-and-answer format, and repeated information (Ref. 21). Prototype 4 was modeled on the current Medication Guide requirements (see part 208), was four pages in length, and was more detailed and comprehensive than the other three prototypes. It appeared in paragraph format and contained standard statements (Ref. 22).

During the 2009 public workshop, attendees identified the strengths and weaknesses of the four PMI prototypes pertaining to format, presentation, and context. Academic panelists described the key attributes and goals of written patient prescription drug product information as follows (Ref. 23):

- Patients should be able to understand what the prescription drug product is used for and how to use it appropriately.
- Patients should be able to find, understand, and retain information about the prescription drug product's contraindications and side effects.
- Patients should know where they can locate additional information about the prescription drug product that is not included in the written prescription drug product information.

Attendees also suggested that user testing of written prescription drug product information during the development stage should be mandatory to ensure that the final product is consumer friendly.

2. Brookings Institution Workshops and Distribution Studies

Based on a cooperative agreement with FDA, the Brookings Institution convened a series of four public workshops that discussed optimizing, implementing, and evaluating the adoption of PMI (Ref. 24).

On July 21, 2010, the Brookings Institution hosted the first workshop. Experts from academia, medical professional groups, stakeholders from the private sector (applicants, consumer organizations, and publishers of CMI), and FDA met to discuss improving written patient prescription drug product information. The following objectives were discussed at the workshop (Ref. 25):

- The overarching principles for effectively communicating prescription drug product information to patients.
- The metrics for evaluating CMI and the most useful content and format of a single paper document for prescription drug product information as represented in FDA's PMI prototypes.
- FDA's proposed strategy for evaluating the PMI prototypes.
- How patients will receive prescription drug product information in the future and whether this has implications for near-term initiatives centered around a single-document solution.

FDA further refined the PMI prototypes based on feedback provided at the first Brookings Institution workshop.

On October 12, 2010, the second Brookings Institution workshop was held to discuss strategies for making PMI easily accessible and how to most effectively distribute PMI to patients. As in July 2010, experts from academia and medical professional groups, stakeholders from the private sector (applicants, consumer organizations, and publishers of CMI), and representatives from FDA explored the following topics at the workshop (Ref. 26):

- Patient preferences for access to and distribution of PMI.
- Potential roles that applicants, publishers, distribution partners, pharmacists, and physicians can play in the development and distribution of PMI.
- Models for effective distribution of PMI within current and future healthcare delivery systems.
- Potential strategies for monitoring and ensuring the effectiveness of PMI.

The third Brookings Institution workshop was held on February 23, 2011. It summarized the first two Brookings Institution workshops and further discussed how to design pilot studies to test the distribution of PMI. The experts discussed the following topics (Ref. 27):

- The goals and objectives of demonstration pilots designed to evaluate feasibility of different methods to distribute the PMI prototype and to assess patient and provider preferences for the PMI prototype that was distributed to patients.
- How to develop a PMI prototype for use in the distribution pilots.
- The framework, development, and evaluation strategy for proposed distribution pilots.

As a result of discussions about PMI distribution at the third Brookings Institution workshop, Catalina Health (now Adheris Health) launched an 8-week quality improvement initiative in August 2012 to disseminate newly designed patient information to patients filling prescriptions at participating pharmacies (Ref. 28). The newly designed patient information was based on FDA's PMI prototypes. Through voluntary telephone and online responses, Catalina Health: (1) surveyed patients to confirm that they received Catalina Health's patient information with their prescription drug product, (2) assessed whether they found the information useful, and (3) determined how they would like to receive this newly formatted patient information in the future. The results revealed that:

- More than 90 percent of patients recalled receiving Catalina Health's patient information and considered the written patient information useful (Ref. 28).
- The majority of patients surveyed (≥92 percent), across all age groups, reported that the new PMI was either ''very useful'' or ''somewhat useful''. Few respondents found this information to be either ''not very useful'' or ''not useful at all'' (≤9 percent across age groups). (Ref. 28).

On July 1, 2014, the Brookings Institution held a fourth public workshop to explore the following (Ref. 29):

- Lessons learned from health literacy researchers engaged in PMI projects.
- The role of stakeholders in moving the PMI initiative forward.

Stakeholders leveraged key findings from the previous three Brookings Institution workshops. Stakeholders developed methods and conducted research geared toward assessing the effectiveness of FDA's PMI prototypes and strategies to distribute PMI. Based on the previous findings and their research, the participants emphasized that enough information now exists to create effective PMI that will provide more value than currently available written prescription drug product information (Ref. 29).

3. FDA 2010 Part 15 Public Hearing

On September 27 and 28, 2010, we hosted a part 15 public hearing to solicit input on a new framework for the development and distribution of PMI to be provided to patients who are prescribed drug products. The purpose of the 2010 part 15 public hearing was to solicit input on the processes and procedures for standardizing PMI using a quality system approach for monitoring the development and distribution of PMI (see 75 FR 52765, August 27, 2010, Docket No. FDA–2010–N–0437).

The hearing was attended by experts from academia, medical professional groups, stakeholders from the private sector (applicants, consumer

organizations, and publishers of CMI), and FDA. Presentations and comments from the attendees offered support for the following principles:

- PMI should be available at pharmacies and should use the existing distribution capabilities of the pharmacy.
- FDA should have an active role in the development and approval of PMI and should design content and format guidelines.
- Plain language should be used to increase comprehension.
- PMI should be consumer tested.
- A range of distribution methods should be used for PMI.

However, attendees disagreed on whether the length of PMI should be limited to one page (Ref. 30).

4. FDA's Research on PMI Prototypes

In developing the four PMI prototypes, FDA focused on creating a standardized format that patients would become familiar with to help them use and understand PMI. Based on the RCAC recommendations, discussions from the 2009 public workshop, the Brookings Institution workshops, the 2010 part 15 public hearing, and comments from stakeholders, we further narrowed down our four PMI prototypes to two PMI prototypes. The two PMI prototypes tested, formatted in either ''Bubbles'' or ''Over-the-Counter'' formats, were based on existing Medication Guide regulations, and developed to be representative of real Medication Guides. These prototypes were selected through an iterative process involving recommendations and empirical data gleaned from several sources, including: (1) input from the previously mentioned entities (*e.g.,* public stakeholders and risk communication experts from government, industry, and academia (Ref. 17)); (2) the application of plain language principles to the content and formatting of these handouts; and (3) findings from qualitative research with patients who had one of the medical conditions (*e.g.,* rheumatoid arthritis) that the fictitious drug described in these PMI prototypes (*i.e.,* Rheutopia) was indicated to treat (Ref. 17).

We announced our research study entitled ''Experimental Study of Patient Information Prototypes'' and requested comments on the proposed collection of information (75 FR 23775, May 4, 2010, Docket No. FDA–2010–N–0184). We explained that the study was designed to use different prototypes to test whether consumers were able to comprehend serious warnings, directions for use, drug indications and uses, contraindications, and side effects in the material presented.

In 2012, RTI International, contracted by FDA, conducted a research study using variations of the two PMI prototypes to test different ways of presenting information about prescription drug products to patients who had obtained a prescription drug product. The study examined the impact of the PMI prototypes on outcomes, including perceived risk, recall, and ease of understanding the information.

The research study included qualitative components and quantitative components to assess the comprehension and the use of the two PMI prototypes for a fictitious drug, Rheutopia, in individuals with and without the chronic health condition for which Rheutopia was indicated. The qualitative phase of RTI International's research explored preferences for format and font used in the PMI prototypes and assessed readability and comprehension. The quantitative phase of RTI International's research investigated whether either of the two PMI prototypes resulted in better recall of the information, increased perceived risk, or increased ease of understanding. The results suggest that content and format may be important predictors of recall of factual information about prescription drug products. We used the results of the 2012 research study in conjunction with additional research to develop several aspects of this proposed rule (Ref. 31).

The information obtained from the hearings, the results of the research performed, and the recommendations provided by stakeholders highlights the importance of providing clear, concise, and accessible information to patients as this may help them to use their prescription drug products safely and effectively.

IV. Legal Authority

In this proposed rule, FDA is addressing legal issues relating to FDA's proposed action to revise the regulations regarding format and content for prescription drug labeling. Our proposed revisions to the format and content requirements for prescription drug labeling are authorized by the FD&C Act (21 U.S.C. 321 *et seq.*) and by the PHS Act (42 U.S.C. 262 and 264).

The FD&C Act provides that a drug shall be deemed to be misbranded if the requirements of section 502 of the FD&C Act are not met (21 U.S.C. 352). This provision applies to all drugs, including those that are also regulated as biological products under the PHS Act. In addition, section 351(b) of the PHS Act (42 U.S.C. 262(b)) provides that ''no person shall falsely label or mark any package or container of any biological product or alter any label or mark on the package or container of the biological product so as to falsify the label or mark.''

Section 502(f) of the FD&C Act deems a drug to be misbranded if its labeling lacks adequate directions for use and adequate warnings against use in those pathological conditions where its use may be dangerous to health, as well as adequate warnings against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users. This section of the FD&C Act further authorizes FDA, on authority delegated from the Secretary, to issue regulations exempting a drug or device from the requirement to bear adequate directions for use upon a determination that such directions are not necessary for the protection of users.

It is well-established that a drug must have adequate directions for use unless the drug is exempt from that requirement by regulation. For a prescription drug to avoid being misbranded under section 502(f) of the FD&C Act, its labeling must conform to regulations issued by FDA. (See, *e.g., U.S.* v. *Articles of Drug,* 625 F.2d 665, 672 (5th Cir. 1980).) FDA has, since 1952, had a regulation that states the conditions under which a prescription drug must be labeled in order to be exempt from the adequate directions for use requirement. (See 17 FR 6818 (July 25, 1952).) The current version of that rule is codified in § 201.100 (21 CFR 201.100). This proposed rule, if finalized, would modify the existing exemption from adequate directions for use for prescription drugs (§ 201.100). We are proposing this rule based on our determination that an additional condition must be present for a prescription drug to be exempt from the requirement to provide adequate directions for use. This additional condition is that, when PMI is required under part 208 or proposed § 606.123 (21 CFR 606.123), the drug must have FDA-approved PMI and be dispensed with such PMI (as described in proposed part 208 or § 606.123) as applicable.

In addition, section 502(a) of the FD&C Act deems a drug to be misbranded ''if its labeling is false or misleading in any particular.'' Under section 201(n) of the FD&C Act (21 U.S.C. 321(n)), when considering whether labeling is misleading, FDA shall consider whether the labeling fails to reveal facts that are material with

respect to consequences that may result from the use of the drug under the conditions of use prescribed in the labeling or advertising thereof or under usual or customary conditions of use. If a prescription drug does not have PMI after it is required for that drug, its labeling will fail to reveal material information to patients.

Furthermore, the premarket approval provisions for drugs require that product labeling adequately address the safety and effectiveness of the drug product. Under section 505 of the FD&C Act (21 U.S.C. 355), we will approve an NDA only if the drug is shown to be both safe and effective for use under the conditions set forth in the drug's labeling. Under 21 CFR 314.125, we will not approve an NDA unless, among other things, there is adequate safety and effectiveness information for the labeled uses and the product labeling complies with the requirements of 21 CFR part 201. Under section 351(a)(2)(C)(i)(I) of the PHS Act, we are authorized to license a biological product only upon a demonstration that the biological product is safe, pure, and potent. This demonstration would be assessed in the context of the labeling for that product.

Section 701(a) of the FD&C Act (21 U.S.C. 371(a)) authorizes us to issue regulations for the efficient enforcement of the FD&C Act. Section 361 of the PHS Act (42 U.S.C. 264) authorizes us to make and enforce regulations determined to be necessary to prevent the introduction, transmission, or spread of communicable disease into the United States or from one State or possession into any other State or possession. For blood and blood components intended for transfusion on an outpatient basis, the proposed requirement to include information on the risks associated with blood transfusion, including transfusion-transmitted infections, in PMI may aid in preventing the introduction, transmission, or spread of communicable disease.

Furthermore, section 505–1 of the FD&C Act, authorizes FDA to require a Medication Guide, such as PMI, as one element of a REMS when necessary to help mitigate a serious risk of the prescription drug product.

With regard to generic drug products, section 505(j)(2)(A)(v) of the FD&C Act requires an ANDA to include information showing that the proposed generic drug product's labeling is the same (with some exceptions) as the labeling approved for the corresponding RLD. Thus, because under this proposal PMI will be approved drug labeling, FDA has authority to require drug product manufacturers seeking approval of ANDAs to adopt PMI that is the same as the PMI for the RLD, if an approved PMI for their RLD exists, except that the PMI for the ANDA could reflect certain permissible differences in accordance with section 505(j)(2)(A)(v) of the FD&C Act and § 314.94(a)(8)(iv) (21 CFR 314.94(a)(8)(iv)). If the ANDA is already approved when the PMI for its RLD is first approved, FDA believes it is appropriate that the ANDA product also adopt PMI that is the same as that approved for the RLD, except that again, the PMI for the ANDA could reflect certain permissible differences. The statutory bases for this requirement with respect to approved ANDAs are the misbranding provisions cited previously. Where an ANDA applicant seeks approval of an ANDA referencing a listed drug whose approval has been withdrawn and for which no PMI was approved for the RLD before the approval of the RLD was withdrawn, the ANDA applicant must submit PMI that corresponds to an FDA-created template once FDA has provided a template. Again, the statutory bases for this requirement are the misbranding provisions.

We note that Federal courts have affirmed that FDA has authority to require the dispensing of patient labeling for prescription drugs and that such requirements do not interfere with the practice of medicine. (See *Pharmaceutical Manufacturers Association* v. *Food and Drug Administration,* 484 F. Supp. 1179 (D. Del. 1980), aff'd per curiam, 634 F. 2d 106 (3rd Cir. 1980).)

V. Description of the Proposed Rule

We are proposing to revise the part heading and all subparts of current part 208. The part heading would be revised to ''Medication Guides.'' FDA is proposing to require a new type of Medication Guide for patients that will be called PMI. These proposed requirements for patient labeling would ensure that clear, concise, accessible, and useful written prescription drug product information would be delivered to patients in a consistent and easily understood format to help patients use all of their prescription drug products safely and effectively when dispensed in an outpatient setting.

Proposed part 208 (Medication Guides) would be the successor regulation to current part 208 (Medication Guides for Prescription Drug Products). Therefore, current Medication Guides would continue to be available as a potential element of a REMS under section 505–1(e) of the FD&C Act as described in section V.J of this document until FDA has approved PMI for the prescription drug product.

Consistent with proposed part 208, FDA is proposing to add § 606.123 to part 606, subpart G, to require establishments that collect blood and blood components intended for transfusion to create and distribute PMI consistent with proposed part 208.

A detailed description of the proposed revisions and a description of each proposed section are provided in sections V.A through V.L of this document.

A. Placement and Removal of the Current Requirements for Medication Guides for Prescription Drug Products (Proposed §§ 208.91, 208.92, 208.94, 208.96, and 208.98)

Medication Guides are currently required under part 208 for certain prescription drug products that FDA determines pose a serious and significant public health concern, requiring distribution of FDA-approved patient information. Medication Guides contain information that FDA believes is necessary to a patient's safe and effective use of a prescription drug product. Once a prescription drug product has FDA-approved PMI, its current Medication Guide requirement (if any) would no longer be applicable (see also discussion in section V.J of this document). FDA would withdraw the current regulations governing Medication Guides in part 208 after all prescription drug products that had Medication Guides have FDA-approved PMI.

We believe it is important that patients continue receiving FDA-approved patient information for prescription drug products that we previously determined posed a serious and significant public health concern during the implementation of the final rule. Therefore, we propose that the provisions in current part 208 requiring Medication Guides for select prescription drug products would remain in effect as described in section V.J of this document.

For current part 208 to remain in effect until all prescription drug products that had Medication Guides have FDA-approved PMI, we propose that current §§ 208.1 and 208.3 be relocated to §§ 208.91 and 208.92, subpart C, respectively. Current §§ 208.20, 208.24, and 208.26 would be relocated to proposed §§ 208.94, 208.96, and 208.98, subpart D, respectively. The definitions in proposed § 208.92 would be revised for clarity and consistency with definitions in proposed § 208.20; however, the substantive meaning of the definitions would remain the same.

B. Removal of the Requirements for Patient Package Inserts (Proposed §§ 310.501 and 310.515)

PPIs for oral contraceptives and estrogen-containing drug products are required under §§ 310.501 and 310.515, respectively. PPIs provide detailed information to patients about the benefits and risks involved with using these prescription drug products and contain information to help patients use them safely and effectively. We have determined that once an oral contraceptive or estrogen-containing prescription drug product has FDA-approved PMI, PPIs would no longer be necessary for the safe and effective use of these products (see also discussion in section V.J of this document). FDA would withdraw the current regulations in §§ 310.501 and 310.515 for NDAs, BLAs, and ANDAs that have FDA-approved PPIs after all such prescription drug products have FDA-approved PMI.

We believe it is important that patients continue to receive FDA-approved patient information for oral contraceptives and estrogen-containing products during the implementation of PMI. Therefore, we propose that §§ 310.501 and 310.515 would remain in effect as described in section V.J of this document.

Under this proposed rule, when finalized, we would no longer accept voluntary submissions of PPI for prescription drug products. Prescription drug products used, dispensed, or administered on an outpatient basis would be required to have FDA-approved PMI, with the exception of excluded products identified in proposed § 208.10(d)).

C. Scope and Purpose (Proposed §§ 208.10 and 606.123)

Currently, Medication Guides are required only for prescription drug products that FDA determines pose a serious and significant public health concern requiring distribution of FDA-approved patient information. In contrast, when finalized, this proposed rule would require the creation and distribution of a new type of Medication Guide, called PMI, for any prescription drug product that is approved or submitted for approval under section 505 of the FD&C Act that is used, dispensed, or administered on an outpatient basis with the exception of excluded entities identified in proposed § 208.10(d). For the purposes of this proposed rule, a drug product also includes a biological product licensed under section 351(a) or (k) of the PHS Act. PMI would improve public health by providing patients with clear, concise, accessible, and useful written prescription drug product information delivered in a consistent and easily understood format to help patients use their prescription drug products safely and effectively.

PMI content would be based on information required in the PI as described in §§ 201.56, 201.57, and 201.80 (21 CFR 201.56, 201.57, and 201.80), and/or the circular of information described in § 606.122 (21 CFR 606.122). In cases where marketing of an application has been discontinued but approval of the application has not been withdrawn under 21 CFR 314.150 or section 505(e) of the FD&C Act, the applicant must continue to comply with all applicable statutory and regulatory requirements, including the requirements set forth in this proposed rule, if finalized.

Authorized dispensers would be required to provide patients with FDA-approved PMI, when such PMI exists, each time a prescription drug product is used, dispensed, or administered on an outpatient basis. This would ensure that patients receive the information to help them use their prescription drug products safely and effectively. Prescription drug products used, dispensed, or administered on an outpatient basis are those prescription drug products that are dispensed outside of an inpatient setting (which include a hospital or long-term care facility, such as a nursing home or rehabilitation facility). The most common outpatient settings are retail pharmacies and hospital ambulatory care pharmacies, where the patient takes the prescription drug product home and uses it. Outpatient settings also include those in which the prescription drug product is dispensed to a healthcare provider who administers it to the patient. This includes, but is not limited to, clinics, healthcare providers' offices, dialysis centers, and infusion centers, including those administering blood and blood component transfusions. In all of these outpatient settings, we believe that patients should be able to take home important information about the prescription drug product, such as information about potential side effects that may occur, when to notify a healthcare provider, or followup that may be required after receiving a prescription drug product.

PMI would not be required for prescription drug products used, dispensed, or administered by a healthcare provider in an emergency (for example, an emergency room visit), including a public health emergency setting, including natural and/or human-made disasters, or an inpatient setting (for example, a hospital or a nursing home). PMI would not be required for a product under Emergency Use Authorization, which may require patient or provider Fact Sheets. In these situations, a healthcare provider provides the patient or a patient's caregiver with information about the drug product and the potential side effects that may occur and also answers questions the patient may have. Further, in these situations and settings, the healthcare provider is responsible for monitoring the patient, as necessary, after the prescription drug product is used, dispensed, or administered. Finally, Emergency Use Authorizations are not FDA approved applications; therefore, products authorized under Emergency Use Authorizations would not require PMI.

With few anticipated exceptions, we propose to exclude manufacturers of preventive vaccines that do not have a Medication Guide from the requirement to create and distribute PMI. The Centers for Disease Control and Prevention (CDC) manages a comprehensive preventive vaccine program that includes providing information on preventive vaccines to patients. We have determined that the current system for developing and providing vaccine information statements (VISs) to patients meets the goal of PMI for these products. Under the National Childhood Vaccine Injury Act of 1986, the Secretary is required to develop and disseminate vaccine information materials for distribution by all U.S. healthcare providers (see section 300aa–26 of the National Childhood Vaccine Injury Act of 1986 (42 U.S.C. 300aa–1 to 300aa–34)). Healthcare providers must distribute the information to patients (or the parent or legal representative of a child) who receive vaccines under the National Vaccine Injury Compensation Program of 1986 (NVICP) (Pub. L. 99–660). Development and revision of VISs have been delegated to CDC. CDC also develops VISs for vaccines that are not covered by NVICP. VISs are available on the internet at *https://www.cdc.gov/vaccines/hcp/vis/current-vis.html.*

D. Definitions (Proposed § 208.20)

This proposed rule would provide definitions for the purposes of this rule for the terms *administered, applicant, authorized dispenser, dispensed, drug name, drug product, licensed healthcare provider, manufacturer, patient, Patient Medication Information, revision date,* and *used.* This proposed rule would also revise definitions from current part 208 for clarity and consistency;

however, the substantive meaning of those definitions would remain the same.

Specifically, this proposed rule would define *authorized dispenser* as an individual(s) or entity who is licensed, registered, or otherwise permitted by the jurisdiction in which the individual(s) or entity practices to provide prescription drug products in the course of professional practice. We believe that, in most instances, the authorized dispenser will be a pharmacist. However, an authorized dispenser may also include physicians, nurses, or other licensed healthcare providers legally permitted under State law to provide prescription drug products to patients.

This proposed rule would also define *Patient Medication Information* as a type of Medication Guide—a form of patient labeling—which meets the requirements set forth in this proposed rule. PMI would be labeling under section 201(m) of the FD&C Act.

E. Requirements for the Format of Patient Medication Information (Proposed § 208.30)

The proposed rule would establish the general format requirements for PMI (see proposed § 208.30). The proposed rule would require PMI to have a uniform format that will make it easier for patients to read, understand, and use PMI. The formatting of written patient prescription drug product information has a large effect on the ease of understanding and use of the information (Ref. 32). The formatting requirements are consistent with the guidelines from patient education experts (Refs. 32 and 33). These formatting requirements are intended to make it easier for patients to read and comprehend the important information contained in PMI and help them use their prescription drug products safely and effectively (Refs. 32 and 33).

Consistent with current FDA regulations (see § 201.15(c)(1) (21 CFR 201.15(c)(1))), the proposed rule would require that PMI be written in the English language; provided, however, that in the case of articles distributed solely in the Commonwealth of Puerto Rico or in a Territory where the predominant language is one other than English, the predominant language may be substituted for English (see proposed § 208.30(a)(1)).

FDA strongly encourages applicants to work with retailers and other organizations to ensure that PMI is accessible to individuals with limited English proficiency. To the extent an applicant, retailer, or other organization receives Federal financial assistance from HHS, they are required to take reasonable steps to provide meaningful access to their programs and activities by individuals with limited English proficiency under Title VI of the Civil Rights Act of 1964 and its implementing regulations.[2]

Currently, translations in languages other than English of written prescription drug information (including Medication Guides and Patient Package Inserts) are provided in numerous ways—by drug applicants, retailers, and other organizations. These organizations create written translations of medication information, and they also provide live oral sight translations by an interpreter (for example, via telephone) of medication information in multiple languages. For example, the American Society of Health-System Pharmacists provides more than 1,500 monographs covering prescription and nonprescription drugs in both English and Spanish.[3] Translations of PMI could similarly be made available by retailers and other organizations.

In accordance with current FDA regulations at § 201.15(c)(1) and proposed § 208.30(a)(1), when PMI is provided in a language other than English it must be distributed along with English language PMI, with the limited exception of articles distributed solely in the Commonwealth of Puerto Rico or in a Territory where the predominant language is one other than English (and PMI is provided in such predominant language).

FDA acknowledges the benefits of having translated prescription drug information for individuals with limited English proficiency. This proposed rule provides flexibility to allow for multiple approaches to provide access to PMI for individuals with limited English proficiency through a variety of different mechanisms. FDA seeks further information regarding what actions applicants and other organizations might take to make PMI accessible to individuals with limited English proficiency.

The proposed rule would require that PMI be provided to a patient in paper format and be legible and printed on a single side of an 8½ by 11-inch sheet of paper and not exceed one page (see proposed § 208.30(a)(2)). Studies show that patients prefer a simplified one-page format for written patient information and are more likely to read information that is short and concise (Refs. 34 and 35). Studies also show that patients understand more information when it is contained in a shorter document and are better able to understand information when it is presented in a simplified one-page format (Refs. 34, 36, and 37). In contrast, patients are often overwhelmed by and have difficulty understanding lengthy patient information materials (Refs. 35 and 38).

We have determined that written patient prescription drug product information can be appropriately provided in a single page. For example, FDA has successfully created one-page Medication Guides for extended-release and long-acting opioid analgesics (Ref. 39) and immediate-release opioid analgesics. As stated previously, this one-page format is also supported by feedback obtained from stakeholder input, advisory committees, workshops, and public hearings.

As discussed in section V.K of this document, proposed § 208.90 would allow for a waiver from one or more of the proposed requirements for PMI if we determine that any requirement is inapplicable, unnecessary, impracticable, or contrary to patients' best interests for a particular prescription drug product. We envision rarely granting a waiver to the one-page format requirement. FDA may consider an applicant's request for an extension from the specified implementation date to fully comply with the PMI requirements. Such requests will be evaluated on a case-by-case basis. Under this proposed rule, PMI would be stored electronically in a central repository managed by FDA (as discussed in section VI of this document). The proposed rule would require that PMI provided in electronic format be printable to ensure that all patients have access to the written patient prescription drug product information, including patients who do not have access to the electronic version of PMI (see proposed § 208.30(a)(3)). To maintain standardization for ease of use by patients, electronic and printed PMI must be identical and meet the format and content requirements specified in this proposed rule.

The proposed rule would require that all headings and subheadings (as required in proposed § 208.40(b) and (c)(2)) and that the title ''PATIENT MEDICATION INFORMATION'' (as required in proposed § 208.40(a)(5)) appear in bold type (see proposed § 208.30(a)(4)). The proposed rule would also require bold type for the drug name(s), phonetic spelling of the drug name(s), dosage form(s), and

[2] 42 U.S.C. 2000d, *et seq.;* 45 CFR part 80; *see also* Section 1557 of the Affordable Care Act, 42 U.S.C. 18116, which provides similar protections as those under Title VI in health programs and activities receiving Federal financial assistance.

[3] *https://www.ashp.org/products-and-services/database-licensing-and-integration/ashp-patient-medication-information.*

route(s) of administration listed at the top of the page on the line immediately below the title ''PATIENT MEDICATION INFORMATION'' (see proposed § 208.30(a)(4)). Bold headings would introduce each section and draw distinction between sections. We believe that the use of bold type would emphasize PMI headings and help patients scan for information contained in PMI (Ref. 40). Only PMI headings, subheadings, the title ''PATIENT MEDICATION INFORMATION,'' and the drug name(s), phonetic spelling of the drug name(s), dosage form(s), and route(s) of administration at the top of the page must appear in bold type. The drug name(s) used in other parts of PMI must not appear in bold. In general, bold text should not be used for any other information in the document.

The proposed rule would require the title ''PATIENT MEDICATION INFORMATION'' to appear in all uppercase letters. Using all uppercase letters for the title will alert patients to the purpose of the document. The proprietary name (if any) of the prescription drug product may be presented in all uppercase letters. Generally, no other words may be presented in all uppercase letters with the exception of commonly used acronyms (for example, GERD in place of gastroesophageal reflux disease) (see proposed § 208.30(a)(5)). However, when an acronym is used, it should be defined the first time it appears in PMI (for example, gastroesophageal reflux disease (GERD)). Other information should be composed of both uppercase and lowercase type or just lowercase type. The use of text set in all uppercase type is more difficult to read (Ref. 41). The proprietary name of the prescription drug product, if used, may be written in all uppercase type, which will prominently display the proprietary name so patients can easily identify and associate PMI with the correct prescription drug product. For drug products without a proprietary name, the nonproprietary name should be written in title case letters.

The proposed rule would require that the title ''PATIENT MEDICATION INFORMATION'' (as described above) and the drug name(s), phonetic spelling of the drug name(s), dosage form(s), and route(s) of administration beginning immediately below the title must appear centered at the top of the page (see proposed § 208.30(a)(6)). This will ensure that the title and purpose of the document are easy for patients to find.

The proposed rule would require that PMI be presented in a minimum of 10-point font with 1 point equal to 0.0138 inches (see proposed § 208.30(b)(1)). This size type is intended to make it easier for patients to read the important information contained in PMI (Ref. 33). This proposed requirement applies to all sections of PMI except the name and address of the manufacturer, packer, and/or distributor; the U.S. license number of the prescription drug product that is a biological product; the statement ''The content of this Patient Medication Information has been approved by the U.S. Food and Drug Administration;'' and the revision date.

The proposed rule would prohibit PMI from containing any reverse type (such as white or neutral color type on a darker color background), lightface, shading, condensed type, or narrow fonts (see proposed § 208.30(b)(2)). These effects can make reading more difficult for patients (Ref. 40).

The proposed rule would prohibit PMI from containing any colors other than black type to facilitate readability for patients (see proposed § 208.30(b)(3)). Black type on a white background maximizes contrast and therefore legibility of words (Ref. 40). Furthermore, certain colors and combinations of colors do not print clearly on paper (Ref. 41). This proposed requirement also considers feedback from stakeholders regarding pharmacies' printing limitations (for example, certain pharmacies are limited to printing in black and white).

Because PMI is a one-page document, the proposed rule would prohibit PMI from containing a page number (see proposed § 208.30(b)(4)). This would prevent patient confusion if the applicant submits PMI to FDA with other documents that may include page numbers.

We are proposing that pictograms and icons not be used in PMI for several reasons. For example, research indicates that different cultures may have different interpretation of pictograms and icons (Refs. 40 and 42). Pharmacies' printing limitations were also taken into consideration.

F. Requirements for the Content of Patient Medication Information (Proposed § 208.40)

We propose that PMI would highlight the most important information that patients need to know to help them use their prescription drug products safely and effectively. PMI is not intended to be a substitute for the PI described in §§ 201.56(d), 201.57, and 201.80 or the circular of information described in § 606.122 (while PMI would highlight the most important information, it is not intended to and would not include all the essential scientific information needed for the safe and effective use of the drug) or to be a replacement for patient counseling by a healthcare provider. PMI, while meant to help patients safely and effectively use prescription drug products, would not be considered to be adequate directions for use as described in 21 CFR 201.5. Rather, PMI would be provided to patients with prescription drug products that are used, dispensed, or administered on an outpatient basis to help them safely and effectively use the prescription drug product.

In determining specific headings and information to be included in PMI, we researched scientific literature, conducted studies examining several PMI prototypes, held public workshops and hearings, and obtained stakeholder input on what information patients need in order to use their prescription drug products safely and effectively. The proposed content of PMI would highlight essential information found in the PI that the patient needs to know about the prescription drug product and would include basic directions on how to use the prescription drug product. Some information included in the drug product's PI may not be regularly included in PMI. Detailed instructions for use that cannot be adequately conveyed in PMI would continue to be approved by FDA in other labeling (for example, in the PI or in the Instructions for Use for the drug product).

The proposed rule would require PMI to be written in terms that are likely to be read and understood by most individuals (see proposed § 208.40(a)(1)). The use of overly technical language may deter patients from reading and understanding the important information contained in PMI. Based on the National Adult Literacy Survey, nearly half of the U.S. adult population is functioning at or below an eighth-grade reading level (Ref. 43). Other studies have also found that the average American adult reads at an eighth-grade or ninth-grade reading level (Ref. 44). The Keystone Action Plan advocates that prescription drug product information intended for patients be written at a sixth-grade through eighth-grade reading level (Ref. 9).

We believe that the approaches taken will help to improve accessibility of medication information for all patients, including patients with low health literacy, who may be dispensed a prescription drug product in an outpatient setting. FDA seeks comment on whether the proposed format and content requirements support the accessibility of patient medication information for all intended users,

including patients with low health literacy.

FDA is aware that consumer testing, such as the testing of readability and comprehension, may be used to inform the development of written patient materials such as PMI and may improve the usability of these materials. We are not proposing to require consumer testing for PMI at this time, because FDA lacks empirical evidence demonstrating that consumer-tested PMI directly results in benefits to patients over non-consumer-tested PMI. However, FDA recognizes the potential value in consumer testing and is aware that some stakeholders are engaged in consumer testing of written patient materials for their drug products. We note that FDA carefully considered the question of whether consumer testing of PMI would be an appropriate requirement for this regulation, and we understand that some stakeholders advocate for the requirement of such testing to increase the potential usefulness of the PMI. In response to this proposal, we invite comment on this question, and in particular, the submission of empirical evidence supporting the value of such consumer testing. We also ask those in the public who would oppose a requirement of consumer testing to submit comments explaining their position on this issue. FDA will consider this option as a requirement in the final rule if compelling evidence concerning the value of consumer testing is submitted.

Rather than require consumer testing, FDA is considering the establishment of a publicly available database, potentially through a public-private partnership, of consumer-tested phrases and terms that would assist in the development of written patient materials, including PMI. FDA expects to implement the use of common terms and consistent descriptions as part of the patient labeling review process, when appropriate, across drug products to facilitate consumers' understanding of these phrases and terms across written materials, including PMI. FDA seeks comments on the development and maintenance of such a database.

The proposed rule would require that PMI must not be promotional in tone (see proposed § 208.40(a)(2)). As noted above, the primary purpose of PMI is to highlight the most important information that patients need to know to help them use their prescription drug products safely and effectively. This approach of conveying important information in an objective manner is consistent with the existing regulatory provision pertaining to the FDA-approved PI that states that a prescription drug product's PI must not be promotional in tone (§ 201.56(a)(2)). This proposed rule is not intended to address the use of other avenues, outside of PMI, to communicate to patients, including to provide promotional messaging.

The proposed rule would also require PMI to be scientifically accurate, not to be false or misleading in any particular, and to be based on and consistent with the prescription drug product's PI, as described in §§ 201.56, 201.57, and/or 201.80 or in the circular of information described in § 606.122 (see §§ 202.1 and 201.100(d)(1) and section 505 of the FD&C Act (see proposed § 208.40(a)(3)). The proposed rule would require that PMI for NDAs and BLAs be updated when new information becomes available that would cause PMI to become inaccurate, false, or misleading in accordance with § 314.70 (21 CFR 314.70) and § 601.12 (21 CFR 601.12) (see proposed § 208.40(a)(3)). This provision would require that PMI for ANDAs be updated when the PMI for the RLD is updated or the FDA-created template is updated (for ANDAs with withdrawn RLDs).

The proposed rule would require that the title ''PATIENT MEDICATION INFORMATION'' appear at the top of the page (see proposed § 208.40(a)(4)). This title would inform readers that the document has prescription drug product information intended for patients.

The proposed rule would require that the drug name(s) be listed at the top of the page on the line below the title, ''PATIENT MEDICATION INFORMATION'' (see proposed § 208.40(a)(5)). We propose that the phonetic spelling(s) of the proprietary name (if any) and the established name (or the proper name) must also be included to help the patient pronounce the name(s) of the prescription drug product. If the drug name is used again throughout the PMI, only the proprietary name (if any) would be used. Those prescription drug products not having a proprietary name would use the established name or the proper name.

The proposed rule would require the statement ''The content of this Patient Medication Information has been approved by the U.S. Food and Drug Administration'' to appear at the bottom of the page, followed by the revision date (see proposed § 208.40(a)(6)). The revision date would be the initial date the first PMI was approved or the date on which any changes have been made to PMI, whichever applies and is later, and would appear in numeric format (for example, Revised: 10/2025). This would alert patients to any revision to the PMI since the patient last received the information.

The proposed rule would require that the name and place of business of the manufacturer, packer, or distributor of the prescription drug product that is not a biological product appear in the PMI below the statement required in § 208.40(a)(6) and the revision date (see proposed § 208.40(a)(7)). The proposed rule would require the licensed manufacturer's name, address, and U.S. license number of the prescription drug product that is a biological product to appear in the PMI (the distributor's or marketer's name and address may also be included) (see proposed § 208.40(a)(7)). The authorized dispenser may include their name and place of business. While the manufacturer or distributor information may be available on the original carton or container for the product or in the prescribing information, patients generally do not receive the carton or container or the prescribing information when the prescription drug product is dispensed at a pharmacy. Thus, including this information on the PMI helps to ensure the patient receives it.

The proposed rule would require that any heading, subheading, or specific information (see proposed § 208.40(b) and (c)) that is clearly inapplicable to the prescription drug product be omitted from the PMI (see proposed § 208.40(a)(8)) because such heading or specific information is not required for the patient to safely or effectively use the prescription drug product. The omission of any required heading, subheading, or specific information would be indicated only in the absence of the required heading, subheading, or specific information in the PMI.

The proposed rule would require specific headings in the following order: ''[Insert drug name] is,'' ''Important Safety Information,'' ''Common Side Effects,'' and ''Directions for Use'' (see proposed § 208.40(b)). The use of headings helps to highlight specific information and helps patients locate information in the document and better understand it (Refs. 45 and 46). The proposed rule would require the headings to appear in a specified order and would ensure consistency in formatting for all PMI. This proposed requirement would help patients become familiar with both the type and location of relevant information in PMI. This will help them to quickly and accurately locate information about how to safely and effectively use the prescription drug product (Ref. 47).

The proposed rule would require specific information to be included under each required heading (see

proposed § 208.40(c)). We propose that the information in each section must be concise and based on and consistent with the prescription drug product's PI.

Under the heading, ''[Insert Drug Name] is,'' the proposed rule would require a concise summary of the approved outpatient indications and uses of the prescription drug product listed in the prescription drug product's PI (see proposed § 208.40(c)(1)). The information in this section would be consistent with the information found in the INDICATIONS AND USAGE section of the PI. FDA is aware that certain prescription drug products have a large number of approved indications and uses. Therefore, this section of PMI is not meant to list all approved indications and uses verbatim as described in the PI, but rather to summarize the approved outpatient indications and uses in language that is most useful for patients.

Under the heading ''Important Safety Information,'' the proposed rule would require specific subheadings in the following order: ''Warnings,'' ''Do not take,'' Serious side effects,'' and ''Tell your health care provider before taking'' (proposed § 208.40(c)(2)).

The proposed rule would require the subheading ''Warnings'' to be followed by a concise summary of serious warnings, including those that may lead to death or serious injury from the use of the prescription drug product (see proposed § 208.40(c)(2)(i)). The ''Warnings'' subheading must include a summary of the information found in the prescription drug product's boxed warning, if any, that is most relevant for patients to know for the safe and effective use of the prescription drug product.

The proposed rule would require the subheading ''Do not take'' to be followed by a statement of the circumstances (if any) in which the prescription drug product should not be used because the risk of use outweighs any benefit (see proposed § 208.40(c)(2)(ii)). The information in the ''Do not take'' subheading would be consistent with the most relevant information to patients found in the ''CONTRAINDICATIONS'' section of the PI. Because PMI is intended to aid patients on how to safely and effectively use their prescription drug product after it has been prescribed, patients need to be aware of contraindications (if any) associated with the prescription drug product.

The proposed rule would require the subheading ''Serious side effects'' followed by: (1) a listing of the clinically significant adverse reactions or risks associated with the use of the prescription drug product that are most relevant to the patient and (2) information on when to call a healthcare provider or when and how to obtain emergency help if certain clinically significant adverse reactions occur (see proposed § 208.40(c)(2)(iii)). The information under this subheading must be consistent with either: (1) the most relevant information to patients found in the ''WARNINGS AND PRECAUTIONS'' section for drug labeling that must meet the format and content requirements of §§ 201.56(d) and 201.57 or (2) the ''WARNINGS'' section and the ''PRECAUTIONS'' section for drug labeling that must meet the format and content requirements of § 201.80. Side effects that may not meet the preceding criteria may still be considered serious side effects when, based on appropriate medical judgment, they may jeopardize the patient and may require medical or surgical intervention to prevent one of the outcomes previously listed (see FDA Guidance for Industry, ''Adverse Reactions Section of Labeling for Human Prescription Drug and Biological Products—Content and Format,'' January 2006 (available at *https://www.fda.gov/media/72139/download*).)

The proposed rule would require the subheading ''Tell your health care provider before taking'' followed by a statement that identifies specific populations and conditions that may have clinically important differences in response to the prescription drug product or may change the recommendation for use of the prescription drug product (for example, pregnancy or lactation) (see proposed § 208.40(c)(2)(iv)).

Under the heading ''Common Side Effects,'' the proposed rule would require a statement of frequently occurring adverse reactions from the use of the prescription drug product (see proposed § 208.40(c)(3)). The listed common side effects would have to be consistent with the ''ADVERSE REACTIONS section'' of the prescription drug product's PI. Under this heading, the most common adverse reactions that would be listed are those that are likely to be caused by use of the drug product or that are meaningful to the patient in terms of seriousness and frequency. We propose that the listed common side effects must focus on the most clinically relevant and the important adverse reactions to inform the patient. In determining whether a less common adverse reaction should be included, consideration may be given to a combination of factors, which include the seriousness of an adverse reaction, the likelihood that the reaction could affect patients' adherence or continuation of therapy, and the importance of identifying the adverse reaction and treating it at an early stage (see FDA Guidance for Industry, ''Adverse Reactions Section of Labeling for Human Prescription Drug and Biological Products—Content and Format.'').

The proposed rule would require that the following statement follow the summary of adverse reactions: ''These are not all the possible side effects of [Insert Drug Name]. Call your health care provider if you have side effects that worsen or do not go away. You may also report side effects to FDA at [insert current FDA telephone number and web address for voluntary reporting of adverse reactions]'' (see proposed § 208.40(c)(3)). Including information in PMI about how to report side effects to FDA is consistent with our efforts to encourage patients and healthcare providers to report suspected adverse reactions to FDA.

Under the heading ''Directions for Use,'' the proposed rule would require the statement ''Use exactly as prescribed'' to appear first after the heading to emphasize the importance of taking the prescription drug product as directed by the healthcare provider (see proposed § 208.40(c)(4)). We propose that the statement ''Use exactly as prescribed'' must be followed by a summary of how the prescription drug product must be administered and the route of administration. This section of PMI would also contain basic directions for use and any special instructions on how to administer the drug (for example, whether it should be taken with food or taken at a period of time before or after eating certain foods, or what to do if a patient misses a scheduled dose). If applicable, this section would include a statement of special handling, storage conditions, and disposal information. The dosing and administration and the storage, handling, and disposal information must be consistent with the most relevant information to patients that is found: (1) in the ''DOSAGE AND ADMINISTRATION'' section of the PI and (2) in the ''HOW SUPPLIED/STORAGE AND HANDLING'' section for drug labeling that must meet the format and content requirements of §§ 201.56(d) and 201.57 or the ''HOW SUPPLIED'' section for drug labeling that must meet the format and content requirements of § 201.80.

We intend that detailed instructions for patients' use of drug products, known as ''Instructions for Use,'' will continue to be available as a separate document and approved by FDA, where

appropriate, for drug products with complicated administration instruction (for example, inhalers or injectables). We propose that PMI would direct patients to the FDA-approved Instructions for Use, when applicable.

G. Development of Patient Medication Information for New Drug Applications, Biologics License Applications, and Abbreviated New Drug Applications (Proposed § 208.50)

The proposed rule would require the applicant of an NDA or a BLA for a prescription drug product used, dispensed, or administered on an outpatient basis to create PMI (see proposed § 208.50(a)). PMI would be required for NDAs and BLAs pending or submitted on or after the effective date of the final rule, based on this proposed rule, and NDAs and BLAs that were approved by FDA before the effective date of the final rule, pursuant to the implementation schedule described in section V.J of this document. In certain circumstances, FDA may require more than one PMI for a prescription drug product, associated with a single PI, when one PMI cannot adequately convey the safe and effective use of the drug to patients. This may occur in instances where there are two or more formulations of a prescription drug product described in a PI. For example, more than one PMI would be needed where a product with a single PI has both an injection form and a pill form and the patient would benefit from separate PMI for the respective forms.

The proposed rule would require PMI for a prescription drug product approved or submitted for approval as an ANDA under section 505(j) of the FD&C Act that refers to a listed drug approved under section 505(c) of the FD&C Act for which FDA has approved PMI (see proposed § 208.50(b)(1)). The PMI for these ANDAs would be the same as the PMI approved for the RLD upon which its approval is based except for changes required: (1) because of differences approved under a suitability petition (see 505(j)(2)(C) of the FD&C Act and § 314.93 (21 CFR 314.93)) or (2) because the drug product and the reference listed drug are produced or distributed by different manufacturers (see section 505(j)(2)(A)(v) of the FD&C Act and § 314.94(a)(8)(iv)).

The proposed rule would also require PMI for a prescription drug product approved or submitted for approval as an ANDA under section 505(j) of the FD&C Act that refers to a listed drug approved under section 505(c) of the FD&C Act for which approval of the RLD has been voluntarily withdrawn and the approval of the RLD is withdrawn before the approval of PMI for the RLD (see proposed § 208.50(b)(2)). However, due to limitations of 505(j) of the FD&C Act and to ensure that all ANDAs that refer to an RLD have the same PMI, FDA would create a PMI template for these ANDAs. Except for permissible differences consistent with § 314.93 and § 314.94(a)(8)(iv), the PMI for these ANDAs would be the same as the content in the PMI template created by FDA.

FDA recognizes that there is a class of ANDAs that was approved under section 505(c) prior to the 1984 Hatch-Waxman Amendments to the FD&C Act. These pre-Hatch-Waxman ANDAs could be for products that are duplicates of a pre-1962 innovator drug product(s) that was subject to the Drug Efficacy Study Implementation (DESI) review and listed in a DESI notice, or they could be for similar or related products. These pre-Hatch-Waxman ANDAs did not rely on a specific listed drug as their basis of submission, but instead relied on the evidence of effectiveness that had been provided, reviewed, and accepted during the DESI process. The safety of these drugs had been determined on the basis of information included in the innovator new drug application(s) submitted prior to 1962 and by the subsequent marketing experience with the drug(s). In some circumstances these ANDAs have been treated similarly to ANDAs approved under section 505(j) of the FD&C Act in that they have followed changes in labeling made by the innovator product that was the subject of the DESI notice they relied on as their basis of submission. In other cases, some products have been treated similarly to other products approved under section 505(c) of the FD&C Act and have labeling that differs from the innovator product that was the subject of the DESI notice. In many cases, the innovator product(s) listed in the DESI notices are no longer marketed. FDA currently expects to address these ANDAs in the final rule in a similar manner as ANDAs approved under section 505(j) of the FD&C Act by requiring PMI for drugs covered by these ANDAs that either follows PMI created by an innovator drug product listed in the DESI notice they relied on as their basis of submission or, in appropriate circumstances, that follows a template created by FDA. FDA asks for comments on this proposal for this class of ANDAs.

H. Submission of Patient Medication Information for New Drug Applications, Biologics License Applications, and Abbreviated New Drug Applications (Proposed § 208.60)

The proposed rule would require NDA or BLA applicants (as described in this proposed rule) to submit PMI, along with the PI upon which the PMI is based, to FDA for approval (see proposed § 208.60(a)). For NDAs and BLAs submitted on or after the effective date of the final rule based on this proposed rule, PMI would be submitted as part of the application. For NDAs and BLAs approved before the effective date of the final rule or pending when the final rule becomes effective, the applicant would submit PMI to FDA in a prior approval supplement pursuant to § 314.70(b)(2)(v)(B) and § 601.12 or as an amendment as applicable. Section V.J of this document further explains when applicants would submit PMI to FDA for approval.

The proposed rule would also require ANDA applicants to submit PMI to FDA for approval after either: (1) PMI for the RLD is approved or (2) FDA has finalized the PMI template and provides notice of the template to the applicant, whichever applies (see proposed § 208.60(b)). Applicants of ANDAs submitted on or after the effective date of the final rule that rely on an RLD with an approved PMI or for which FDA has created a PMI template would be required to submit PMI to FDA as a part of the original ANDA. At the time the final rule becomes effective, applicants of pending ANDAs that reference an RLD for which there is no PMI will be required to submit an amendment once PMI is available for the RLD or once FDA has created a PMI template, if this occurs before the ANDA is approved. Applicants of ANDAs approved before the effective date of the final rule or before PMI is approved for their RLD or before FDA makes a template available, as applicable, would be required to submit a supplement with PMI to FDA, consistent with § 314.70. Generally, applicants would submit a supplement to FDA with PMI that is the same as that for the RLD or FDA-created template except for changes required: (1) because of differences approved under a suitability petition (see 505(j)(2)(C) of the FD&C Act and § 314.93) or (2) because the drug product and the reference listed drug are produced or distributed by different manufacturers (see section 505(j)(2)(A)(v) of the FD&C Act and § 314.94(a)(8)(iv)).

I. Providing Patient Medication Information to Patients (Proposed § 208.70)

Proposed § 208.70(a) would require authorized dispensers to provide FDA-approved PMI to patients (or their agents) every time a prescription drug product is used, dispensed, or administered on an outpatient basis when such PMI is available. Providing PMI when the prescription drug product is used, dispensed, or administered on an outpatient basis will help remind and reinforce for the patient the essential information the patient needs to know about the prescription drug product and the basic directions on how to use the product. This will also ensure that patients receive any updated information about their prescription drug product when it is available. It is not anticipated that PMI would be provided each and every time a prescription drug is used (for example, every time a patient is provided with a pill or capsule from a prescription) or administered (for example, each time a cream is applied), but rather the first time the prescription is used, dispensed, or administered and each time a prescription is dispensed (for example, when a prescription is refilled). Although authorized dispensers would be required to always have PMI available in paper format, this proposed rule is flexible in terms of distribution mechanisms. This proposed rule would allow for electronic distribution (in addition to paper format) and accommodates for future technological advances in providing PMI to patients.

Section 510 of the FD&C Act requires all persons engaged in manufacturing, preparing, issuing, compounding, or processing a drug to register with FDA and provide us with a list of drug products in commercial distribution. Under section 510(g)(1) of the FD&C Act, however, certain pharmacies are exempt from such registration and listing requirements. The distribution of PMI by a pharmacy does not limit this exemption. Accordingly, under proposed § 208.70(b), an authorized dispenser would not be subject to the registration and listing requirements under section 510 of the FD&C Act solely because of an action performed by the authorized dispenser to comply with this proposed rule.

J. Schedule for Implementing the General Requirements for Patient Medication Information (Proposed § 208.80)

1. Implementation Schedule for Applicants To Submit PMI to FDA for NDAs, BLAs, or Efficacy Supplements

FDA is proposing a 5-year implementation schedule for PMI. The proposed implementation schedule for PMI is summarized in table 1 of this document.

TABLE 1—IMPLEMENTATION SCHEDULE

NDAs, BLAs, and efficacy supplements	Time by which PMI must be submitted to FDA
Applications submitted on or after the effective date of the final rule[1]	Time of submission (part of application).
Applications pending at the time of the effective date of the final rule	No later than 1 year after the date of approval of the pending application.
Applications approved on or before the effective date and that have a Medication Guide required under part 208 or a PPI required under § 310.501 or § 310.515.	No later than 1 year after the effective date of the final rule.
Applications approved from January 1, 2013, up to and including the effective date of the final rule that do not have a Medication Guide required under part 208 or a PPI required under § 310.501 or § 310.515.	No later than 2 years after the effective date of the final rule.
Applications approved from January 1, 2008, up to and including December 31, 2012, that do not have a Medication Guide required under part 208 or a PPI required under § 310.501 or § 310.515.	No later than 3 years after the effective date of the final rule.
Applications approved from January 1, 2003, up to and including December 31, 2007, that do not have a Medication Guide required under part 208 or a PPI required under § 310.501 or § 310.515.	No later than 4 years after the effective date of the final rule.
Applications approved on or before December 31, 2002, that do not have a Medication Guide required under part 208 or a PPI required under § 310.501 or § 310.515.	No later than 5 years after the effective date of the final rule.

[1] Final rule refers to a final rule that may publish based on this proposed rule.

The proposed rule would require a staggered implementation schedule for applicants to submit PMI to FDA for NDAs, BLAs, and efficacy supplements (see proposed § 208.80(a)). As indicated in table 1 of this document, for the purposes of this rule, the time by which applicants would be required to submit PMI to FDA would primarily be based on when the NDA, BLA, or efficacy supplement was approved. If an NDA or a BLA has one or more approved efficacy supplements, the approval date of the efficacy supplement that triggers the earliest PMI submission would be used to determine the submission date. We propose that the final rule based on this proposed rule become effective 6 months after the date of publication in the **Federal Register**. The proposed rule would require applicants of NDAs, BLAs, or efficacy supplements submitted for approval on or after the effective date of the final rule to include PMI as part of the application submitted to FDA (see proposed § 208.80(a)(1)). The proposed rule would require the applicants of NDAs, BLAs, or efficacy supplements pending on the effective date of the final rule to submit PMI to FDA no later than 1 year after the date of approval of the pending application (see proposed § 208.80(a)(2)). A pending application's approval would not be delayed because of the new requirements for PMI.

The implementation schedule in proposed § 208.80(a)(3) would require applicants of NDAs and BLAs that have a current FDA-approved Medication Guide required under part 208 or an FDA-approved PPI required under §§ 310.501 or 310.515 to submit PMI to FDA no later than 1 year after the effective date of the final rule. Because these prescription drug products already have approved patient labeling, FDA believes that 1 year will be sufficient to convert the existing FDA-approved Medication Guide and FDA-approved required PPIs to meet the requirements of the final rule. This proposed rule does not modify or affect the REMS requirements. As previously discussed in sections V.A and V.B of this document, once a prescription drug product has FDA-approved PMI, the current requirements for Medication Guides and PPIs would no longer be applicable to such product.

Apart from applications that have an existing FDA-approved Medication Guide or FDA-approved PPI, the implementation schedule proposed in § 208.80(a)(4) through (a)(7) would generally require applicants to submit PMI for newer products first, followed by older products. Newer prescription drug products would generally have PMI at the earliest possible date because these prescription drug products may be less familiar to patients. Staggering the PMI implementation is intended to provide applicants with sufficient time to create PMI and submit it to FDA and would also allow FDA to best use our resources to approve PMI efficiently.

2. Implementation Schedule for Applicants To Submit PMI to FDA for ANDAs

The labeling for the ANDA drug product must be the same as the labeling for its RLD at the time of the ANDA's approval, as required in § 314.94(a)(8)), except for changes required: (1) because of differences approved under a suitability petition (see 505(j)(2)(C) of the FD&C Act and § 314.93) or (2) because the drug product and the reference listed drug are produced or distributed by different manufacturers (see section 505(j)(2)(A)(v) of the FD&C Act and § 314.94(a)(8)(iv)). Therefore, the proposed rule would require that applicants for which an ANDA is submitted for approval on or after the effective date of the final rule must submit PMI to FDA as part of the application if the PMI for the RLD is approved at the time the ANDA is submitted, or if FDA has finalized the PMI template and provided notice of the template to the applicant (see proposed § 208.80(b)(1)(i)). If PMI for the RLD is not approved or if FDA has not finalized the PMI template and provided notice of the template to the applicant, whichever applies, at the time the ANDA is submitted but such PMI is approved for the RLD or FDA finalizes the template and provides notice of the template to the applicant before the ANDA is approved, the applicant for the ANDA must submit PMI in an amendment to the pending application after the approval of the PMI for the RLD or after FDA finalizes the PMI template and provides notice of the template to the applicant, whichever applies (see proposed § 208.80(b)(1)(ii)). If PMI is approved for the RLD or if FDA finalizes the PMI template and provides notice of the template to the applicant after the ANDA is approved, the applicant must submit a supplement with the PMI consistent with § 314.70, after the approval of the PMI for the RLD or after FDA finalizes the PMI template and provides notice of the template to the applicant, whichever applies (see proposed § 208.80(b)(1)(iii)).

For ANDAs pending on the effective date of the final rule, the proposed rule would require applicants to submit an amendment with PMI if the PMI for the RLD is approved or if FDA finalizes the PMI template and provides notice of the template to the applicant, whichever applies, before the ANDA is approved (see proposed § 208.80(b)(2)(i)). If PMI for the RLD is approved or if FDA finalizes the PMI template and provides notice of the template to the applicant after the pending ANDA is approved, the ANDA applicant must submit a supplement with PMI to FDA consistent with § 314.70, after the approval of the PMI for the RLD or after FDA finalizes the PMI template and provides notice of the template to the applicant, whichever applies (see proposed § 208.80(b)(2)(ii)).

The proposed rule would require applicants of ANDAs approved on or before the effective date of the final rule to submit a supplement with a PMI package, consistent with § 314.70.

3. Implementation Schedule for Authorized Dispensers To Provide PMI to Patients

The proposed rule would require authorized dispensers to provide FDA-approved PMI, when such PMI is available, beginning 2 years after the effective date of a final rule based on this proposed rule (see proposed § 208.80(c)). Dispensers should check the FDA labeling repository at *https://labels.fda.gov* on a monthly basis for newly FDA-approved PMI or revised PMI. It is understood that dispensers may need a reasonable amount of time to download PMI after it is published; however, it is expected that they will update their systems on a monthly basis.

Although only a small percentage of prescription drug products would have approved PMI 2 years after the effective date of the final rule, most prescription drug products that previously had Medication Guides would have FDA-approved PMI at that point. Once FDA approves PMI for a prescription drug product that previously had a Medication Guide, dispensers would no longer need to follow the requirements for providing the Medication Guide under proposed § 208.96 (see current § 208.24).

K. Waivers (Proposed § 208.90)

The proposed rule would allow for waivers from one or more of the proposed requirements for PMI (for example, the format and content of PMI and submitting and distributing PMI) if we determine that any requirement is inapplicable, unnecessary, impracticable, or contrary to patients' best interests for a particular prescription drug product (see proposed § 208.90). Waivers could be initiated by FDA or requested by a person or entity that is covered by the final rule. FDA may consider an applicant's request for an extension from the specified implementation date to fully comply with the PMI requirements. Such requests will be evaluated on a case-by-case basis.

As an example, FDA proposes that a waiver or extension would be considered if FDA determined that complying with the requirements for PMI could contribute to a drug shortage or otherwise prevent patient access to the drug product.

As another example, FDA proposes that a waiver or extension would be considered if the CDC plans to use its delegated authority to develop and issue emergency use instructions for eligible medical countermeasures under section 564A(e) of the FD&C Act (21 U.S.C. 360bbb–3a(e)).

FDA considers the one-page requirement to be a key feature of PMI. We envision rarely granting a waiver to the one-page requirement (see proposed § 208.30(a)(2)). However, we may allow PMI to exceed one page, if necessary, for the safe and effective use of the prescription drug product.

FDA is seeking comment on possible PMI requirements for which waivers could be requested and the criteria that FDA might consider when evaluating such requests. Waivers or extensions requested by a person or entity covered by the final rule will be reviewed on a case-by-case basis. Requests for waivers or extensions and the rationale for the waiver or extension for PMI requirements for NDAs and BLAs would need to be submitted to the director of the FDA division responsible for reviewing the marketing application for the drug product. For ANDAs, the requests for waivers or extensions and the rationale for the waiver or extension would need to be submitted to the Director of the Office of Generic Drugs. For biological products, requests for waivers or extensions and the rationale for the waiver or extension would be submitted to the FDA application division in the office with product responsibility.

L. Medication Guides: Patient Medication Information for Blood and Blood Components Intended for Transfusion (Proposed § 606.123)

When finalized, this proposed rule would add proposed § 606.123 (Medication Guides: Patient Medication Information for blood and blood components intended for transfusion). The addition of the proposed requirement would ensure that every patient who receives blood or a blood component on an outpatient basis receives PMI.

The proposed rule would require establishments that collect blood and blood components for transfusion to create PMI, as described in proposed part 208, for distribution to the transfusion service (see proposed § 606.123(a)). The proposed rule would

require licensed blood establishments to submit PMI to FDA for approval.

The proposed rule would require transfusion services, as an authorized dispenser, to provide PMI to each patient (or the patient's agent) when blood or blood components are administered on an outpatient basis when such PMI is available (see proposed § 606.123(b)). Although the transfusion service must always have PMI available in paper format, the proposed rule is flexible in terms of distribution mechanisms. This proposed rule would allow for electronic distribution upon request and accommodates future technological advances in providing PMI to patients.

The proposed rule would allow for waivers from one or more of the proposed requirements for PMI (for example, the format and content of PMI, submitting, and distributing PMI) if we determine that any requirement is inapplicable, unnecessary, impracticable, or contrary to patients' best interests (see proposed § 606.123(c)). Waivers could be initiated by FDA or requested by a blood collection establishment or transfusion service. Requests for waivers or extensions and the rationale for the waiver or extension must be submitted to the FDA application division in the office with product responsibility. FDA is seeking comment on possible PMI requirements for which waivers would be requested and the nature of such requests.

In contrast to other prescription drug products, blood and blood components intended for transfusion are subject to the labeling requirements under §§ 606.121 and 606.122, including the requirement that a circular of information for prescribers be made available for distribution. We currently recognize a circular of information prepared jointly by the AABB (formerly known as the American Association of Blood Banks), the American Red Cross, America's Blood Centers, and the Armed Services Blood Program as acceptable.

We specifically invite public comments on the following topics with respect to PMI for blood and blood components:

1. Informational materials that are currently available to patients who receive blood or blood components for transfusion on an outpatient basis, including the adequacy of such information.
2. The difference in the proposed requirements for applicants that FDA should consider in finalizing the rule (*i.e.,* the requirement to submit PMI to FDA for approval).
3. The feasibility of industry jointly developing PMI documents for blood and blood components intended for transfusion on an outpatient basis and the timeframe needed to develop the documents.
4. The electronic storage of PMI for blood and blood components on the FDA website *https://labels.fda.gov.*

We also request public comments on the feasibility of blood transfusion services, as the authorized dispenser of blood and blood components, providing PMI to patients (or patients' agents) who are administered blood or blood components on an outpatient basis.

At this time, we are not proposing an implementation schedule for blood collection establishments to develop PMI and for applicants to submit it to FDA for approval. We propose that the final rule may include staggered implementation schedules for blood collection establishments and transfusion services because of the need to explore the feasibility of industry jointly developing PMI documents.

VI. Electronic Repository for Patient Medication Information

PMI for prescription drug products would be stored electronically in the FDA labeling repository at *https://labels.fda.gov* that currently holds PI, FDA-approved patient labeling, and carton and container labeling submitted to us under current requirements, such as labeling, listing information, and annual reports. PMI for blood and blood components will either be stored electronically in the FDA labeling repository (*https://labels.fda.gov*) or a link will be provided at *https://labels.fda.gov* to the site where they are stored electronically. The FDA labeling repository is searchable by proprietary name (if any), active ingredient, company name, National Drug Code number, application number or regulatory citation, and proprietary name and company. The labeling found in the repository will be compliant with section 508 of The Rehabilitation Act of 1973 requirements, which can help to provide broader access to patients.

The purpose of the electronic repository would be to provide a single online electronic data source that allows easy open access to PMI. Maintaining PMI in an electronic format would allow patients, healthcare providers, and pharmacies open access to up-to-date PMI.

VII. Proposed Effective Date

We propose that a final rule based on this proposed rule become effective 6 months after the date the final rule publishes in the **Federal Register**. Given the number of prescription drug products that will be impacted by this proposed rule, the constraints on our resources, and the need to provide applicants with sufficient time to create PMI and submit it to FDA, we understand that 6 months is not likely to be sufficient time to fully implement this rule. Thus, we are proposing to follow the implementation plan set out in section V.J of this document.

VIII. Preliminary Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Office of Information and Regulatory Affairs has determined that this proposed rule is a significant regulatory action as defined by Executive Order 12866, section 3(f)(1).

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because we find the cost of the proposed rule to be a substantial percentage of sales for small businesses, we find that the proposed rule will have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing "any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year." The current threshold after adjustment for inflation is $177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

A. Summary of Costs and Benefits

This proposed rule would require that human prescription drug products used, dispensed, or administered on an outpatient basis, including blood and blood components transfused in an

outpatient setting, be accompanied by a one-page product information document, or Medication Guide, known as Patient Medication Information (PMI). Manufacturers of these products would be required to create PMI according to standardized content and format requirements. PMI would be reviewed and approved by FDA and stored in an online, central repository accessible to the public. Firms would incur costs to develop PMI. FDA would incur costs to review PMI as well as to establish and maintain the online database. For a small subset of drug products, FDA would also incur costs to develop a template for PMI. Dispensers may face additional costs to print and distribute PMI. Firms that currently supply Consumer Medication Information (CMI) to pharmacies may also incur costs associated with switching from CMI to PMI. PMI would provide the public with FDA-approved labeling that is created specifically for patients. The public would benefit from this labeling with decreased search costs for information. The public may also benefit from a reduction in risk associated with their drug products, including blood and blood component products transfused in outpatient settings, due to the availability of PMI if the new labeling helps patients make better healthcare decisions.

In our primary analysis, we assume that all products subject to the rule would stay on the market. However, we observe that the costs of creating, updating, or submitting PMI could exceed the profits for certain low-revenue drug products. Some of these products would be eligible for a waiver or extension of the requirements of PMI, for example, if complying with the requirements could contribute to a drug shortage or otherwise impede patient access. For those products not eligible for a waiver or extension, firms may choose to discontinue marketing the drugs, which would lead to additional social costs under the proposed rule. We perform additional analyses to better understand how the costs and benefits of the rule would be affected by waivers and extensions or discontinuations of drug products.

The costs and benefits of the proposed rule are summarized in table 2. This table shows the estimated average annualized net costs of this rule, using both 7 and 3 percent annual discount rates over a 10-year evaluation period. We estimate that the present value of net costs over 10 years would range from $105.0 to $312.5 million, with a primary estimate of $192.8 million, at a 3 percent discount rate and from $89.0 to $263.6 million, with a primary estimate of $162.6 million, at a 7 percent discount rate. Annualizing these costs over 10 years, we estimate the cost would range from $12.3 to $36.6 million per year at a 3 percent discount rate, with a primary estimate of $22.6 million per year, and from $12.7 to $37.5 million per year using a discount rate of 7 percent, with a primary estimate of $23.2 million.

Table 2 also shows the estimated annualized benefits and other non-quantified benefits. The monetized benefit of this rule would result from decreased search costs for information pertaining to drug, blood, and blood component products received in outpatient settings. We estimate that the present discounted value of these potential benefits from PMI over 10 years would range between $127.5 million and $4.3 billion using a 3 percent discount rate, with a primary estimate of $1.6 billion; using a 7 percent discount rate, the present-value benefits from PMI would range between $101.0 million and $3.4 billion, with a primary estimate of $1.3 billion. Annualized over 10 years, we estimate that the benefit from PMI would range between $14.9 and $507.9 million per year, with a primary estimate of $188.0 million, using a 3 percent discount rate; with a 7 percent discount rate, we estimate the annualized benefit to range between $14.4 and $486.8 million, with a primary estimate of $180.5 million per year. In addition to these monetized benefits, patients may experience a reduction in risk associated with drug, blood, and blood component products if PMI leads them to make better, more informed healthcare decisions.

TABLE 2—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF THE PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized Monetized $m/year	$180.5	$14.4	$486.8	2020	7	10	
	188.0	14.9	507.9	2020	3	10	
Annualized Quantified					7		
					3		
Qualitative	Risk reduction from improved access to information.						
Costs:							
Annualized Monetized $m/year	23.2	12.7	37.5	2020	7	10	
	22.6	12.3	36.6	2020	3	10	
Annualized Quantified					7		
					3		
Qualitative							
Transfers:							
Federal Annualized Monetized $m/year					7		
					3		
From/To	From:			To:			
Other Annualized Monetized $m/year					7		
					3		
From/To	From:			To:			

Effects:
State, Local or Tribal Government: No effect.
Small Business: Potential for significant impact on the smallest firms.

TABLE 2—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF THE PROPOSED RULE—Continued

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Wages: No effect. Growth: No effect.							

In calculating the costs discussed above, we have netted out the cost savings that would stem from this proposed rule. PMI would replace the current Medication Guides and Patient Package Inserts; therefore, manufacturers would not need to create or submit updates to their Medication Guides and Patient Package Inserts, which would result in cost savings to those manufacturers.

B. Summary of Regulatory Flexibility Analysis

To determine the impact of the proposed rule on small entities that manufacture reference drug products, we compare the cost of the rule to the total U.S. sales, as reported by Dun and Bradstreet, of the small entities. For all such firms with 1,000 or fewer employees, we estimate the average cost of PMI to range between 0.2 and 1.0 percent of sales. The largest impact would be felt by the smallest firms; for firms with one to five employees, we estimate that the cost of PMI would range between 1.4 and 7.1 percent of sales. To determine the impact of the proposed rule on small entities that manufacture non-reference drug products, we estimate the average annualized cost of PMI and compare that to the firms' estimated receipts by firm size. For firms that manufacture non-reference products with 499 or fewer employees, we estimate the average cost of PMI to range between 0.02 and 0.05 percent of receipts. The largest impact would again be felt by the smallest firms; for such firms with 1 to 19 employees, we estimate the average cost of PMI would range between 0.04 and 0.10 percent of receipts. To determine the impact of the proposed rule on small entities that manufacture blood and blood component products for transfusion in an outpatient setting, we estimate the average annualized cost of PMI and compare that to the sales data for U.S. firms obtained from Dun and Bradstreet. We estimate that the annualized cost of PMI would represent less than one tenth of a percent of annual sales under any cost or discounting scenario for these firms. Given that we find the cost of the proposed rule to be a substantial percentage of sales for small businesses that manufacture drug products, the Agency concludes that this rule, if finalized, would have a significant adverse impact on a substantial number of small entities.

We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 48) and at *https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations.*

IX. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(h) and (k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

X. Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). A description of these provisions is given in the *Description* section of this document with an estimate of the annual reporting and third-party disclosure, including an estimate of the one-time reporting and one-time third-party disclosure. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the 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.

Title: Medication Guides: Patient Medication Information (part 208)—OMB Control Number 0910–0393—Revision.

Description: We are proposing to amend our regulations governing human prescription drug product labeling. The proposed rule would revise part 208 concerning Medication Guides and part 606 for blood and blood components intended for transfusion. With certain exceptions, the proposed rule would require applicants to create a new type of Medication Guide, called PMI, for human prescription drug products (for the purposes of this proposed rule, a drug product also includes a biological product licensed under section 351(a) and (k) of the PHS Act), used, dispensed, or administered on an outpatient basis. Blood establishments would also be required to create PMI for blood and blood components intended for transfusion administered on an outpatient basis. The goal of the proposed rule is to improve public health by providing clear, concise, accessible, and useful written prescription drug product information available in a consistent and easily understood format to help patients use their prescription drug products safely and effectively.

Patients need prescription drug product information that is clear, concise, and consumer-friendly. To improve how patients receive prescription drug product information, we are proposing to require that applicants of human prescription drug products used, dispensed, or administered on an outpatient basis and establishments that collect blood and blood components transfused in an outpatient setting create PMI in a one-page document with standardized format and content. All PMI would be based on and consistent with the PI and the labeling requirements under §§ 201.56, 201.57, 201.80, and 606.122. Additionally, PMI in electronic format would need to be printable and identical to PMI in paper format.

Applicants of NDAs and BLAs would be required to create PMI and submit it

to FDA for approval. While all blood establishments would be required to create PMI, only licensed establishments would be required to submit PMI to FDA. The proposed rule covers NDAs including 505(b)(1) and(2) applications and BLAs including interchangeable biosimilars and non-interchangeable biosimilars. Additional information to help with drafting biosimilar labeling is available in the final guidance for industry entitled ''Labeling for Biosimilar Products'' (available at *https://www.fda.gov/media/96894/download*). Any specific recommendations for labeling for interchangeable products will be provided in future guidance. We invite comments on whether interchangeable products would have to have their own PMI or whether they would copy the PMI of the reference product to which they would be interchangeable.

Applicants of ANDAs for a prescription drug product approved or submitted for approval that rely on an RLD with an FDA-approved PMI would be required to submit a PMI to FDA for approval. The PMI for these ANDAs would be the same as the PMI approved for the RLD upon which its approval is based, except for changes required or permissible differences pursuant to § 314.94(a)(8)(iv).

In addition, applicants of ANDAs that refer to a listed drug approved under section 505(c) of the FD&C Act for which approval has been voluntarily withdrawn before the approval of PMI for the RLD would be required to submit a PMI. However, because of the limitations of 505(j) of the FD&C Act and to ensure that all ANDAs that refer to an RLD have the same PMI, FDA would create a PMI template for these ANDAs. The PMI for these ANDAs would be the same as the PMI template that FDA created except for changes required or permissible differences pursuant to § 314.94(a)(8)(iv).

Description of Respondents: The respondents to this collection of information are applicants of NDAs and BLAs; applicants of ANDAs; and authorized dispensers of human prescription drug products used, dispensed, or administered on an outpatient basis, including authorized dispensers of transfusion services that provide blood or blood components for administration on an outpatient basis.

For the purposes of this analysis, we estimated the burden on applicants of ANDAs by estimating the number of ANDA products that reference an NDA RLD.

There are five human blood and blood component products intended for transfusion that could be administered on an outpatient basis that would need PMI: (1) whole blood, (2) red blood cells, (3) platelets, (4) plasma, and (5) cryoprecipitate antihemophilic factor. Based on past experience with development of information available for distribution with blood and blood components for transfusion (for example, circular of information), FDA assumes that a single PMI document would be developed for each blood or blood component. Thus, for the purposes of this analysis, FDA assumes that five PMI documents would be created initially for human blood and blood component products and considers this as part of the estimate for BLAs.

We estimate the burden associated with this collection of information as follows:

One-Time Burdens

If the proposed rule is finalized, it will impose a one-time burden for respondents with regard to both reporting and third-party disclosure. To minimize this burden on respondents, FDA is proposing a 5-year implementation schedule as shown in table 3 of this document that is proposed to be codified at § 208.80.

TABLE 3—ONE-TIME BURDEN [1]

21 CFR section and activity	Years in which burden occurs after the effective date of the final rule	Number of respondents	Number of responses per respondent	Total responses	Average burden per response	Total hours
One-Time Reporting for Applicants of Existing and Pending NDAs and BLAs To Create and Submit PMI To FDA						
PMI for NDAs and BLAs Submitted Under §§ 314.70 and 601.12 (NDAs and BLAs approved on or before the effective date of the final rule based on this proposed rule) (§§ 208.50 and 208.60, and 606.123(a)).	Year 1	1,669	0.32	529	320	169,280
	Year 2	1,669	0.32	529	320	169,280
	Year 3	1,669	0.32	529	320	169,280
	Year 4	1,669	0.32	529	320	169,280
	Year 5	1,669	0.32	528	320	168,960
Subtotal						846,080
PMI for Pending NDAs and BLAs Submitted Under §§ 314.60 and 601.2 (NDAs and BLAs pending on the effective date of the final rule based on this proposed rule) (§§ 208.50 and 208.60, and 606.123(a)).	Year 1	7	1	7	320	2,240
Subtotal						849,166
One-Time Reporting for Applicants of Existing and Pending ANDAs To Create and Submit PMI to FDA						
PMI for ANDAs Submitted Under § 314.97 (ANDAs approved on or before the effective date of the final rule based on this proposed rule) (§§ 208.50 and 208.60).	Year 1	840	1.48	1,240	27	33,480
	Year 2	840	1.48	1,240	27	33,480
	Year 3	840	1.48	1,240	27	33,480
	Year 4	840	1.48	1,240	27	33,480
	Year 5	840	1.48	1,240	27	33,480
Subtotal						167,400
PMI for Pending ANDAs Submitted Under § 314.96 (ANDAs pending on the effective date of the final rule based on this proposed rule) (§§ 208.50 and 208.60).	Year 1	13	4.54	59	27	1,593
Subtotal						168,993

TABLE 3—ONE-TIME BURDEN [1]—Continued

21 CFR section and activity	Years in which burden occurs after the effective date of the final rule	Number of respondents	Number of responses per respondent	Total responses	Average burden per response	Total hours
One-Time Reporting for Waivers for Applicants of NDAs, BLAs, and ANDAs Over a 5-Year Period						
Requests for Waiver (§§ 208.90 and 606.123(c))	Years 1 through 5.	76	1	76	4	304
One-Time Third-Party Disclosure						
Downloading and Integrating PMI §§ 208.70 and 606.123(b)		49,279	1	49,279	16	788,464
Total						1,806,927

[1] Numbers have been rounded to the nearest hundredth.

Applicants of NDAs and BLAs will incur a one-time regulatory burden for applications that are approved on or before or are pending on the effective date of the final rule based on this proposed rule associated with creating PMI and submitting PMI to FDA for approval as required under proposed §§ 208.50, 208.60, and 606.123(a). We also anticipate that applicants of ANDAs will incur a one-time regulatory burden associated with creating PMI and submitting PMI to FDA for approval as required under proposed §§ 208.50 and 208.60 for applications that are approved on or before or are pending on the effective date of the final rule. This one-time regulatory burden for all affected applicants with applications approved on or before the effective date would be distributed over a 5-year implementation period after the effective date of the final rule based on the proposed rule. The implementation schedule is shown in table 3 of this document and is proposed to be codified at § 208.80.

Proposed § 208.80(a) would require an implementation schedule for applicants of NDAs and BLAs approved on or before the effective date of the final rule (existing drug products) to submit PMI for applications on a staggered basis, beginning 1 year after the effective date of the final rule. The timeframe by which applicants would be required to submit PMI to FDA for approval would primarily be based on when the application or the application's efficacy supplement was approved. Table 3 of this document provides an estimate of the one-time reporting burden for existing drug products associated with creating PMI and submitting PMI to FDA in a supplement. Based on information available in our establishment and product listing database for drug and biological products, we estimate that 1,669 applicants of NDAs and BLAs (1,453 NDA applicants + 216 BLA applicants) will be affected by this proposed rule. Collectively, these respondents are responsible for submitting a labeling supplement with PMI for 2,644 existing drug products. The number of existing drug products was estimated based on an analysis of data from the Orange Book: Approved Drug Products With Therapeutic Equivalence Evaluations (available at *https://www.accessdata.fda.gov/scripts/cder/ob/default.cfm*) and the Purple Book: Lists of Licensed Biological Products With Reference Products Exclusivity and Biosimilarity Interchangeability Evaluation (available at *https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/TherapeuticBiologicApplications/Biosimilars/ucm411418.htm*) to determine the number of unique products on the market that are used primarily in outpatient settings. These applicants would submit a labeling supplement with PMI for approximately 528.8 products each year over a 5-year implementation period (a total of 2,644 products), beginning 1 year after the effective date of the final rule based on this proposed rule and continuing for 5 years (table 3 of this document).

Additionally, applicants of applications pending at the time the final rule becomes effective may need to amend their NDAs and BLAs to comply with the PMI requirements in proposed part 208. Based on our experience with labeling submissions, we have estimated that 5 percent of 134 NDAs and BLAs submitted under §§ 314.60 and 601.2 will be pending at the time the final rule based on this proposed rule becomes effective. Therefore, we assume that approximately seven applicants of NDAs and BLAs will submit amendments to their NDA or BLA to include PMI for seven pending applications on the effective date of the final rule (table 3 of this document).

Based on our experience with labeling submissions for medication guides and PPIs, we estimate that approximately 320 hours, on average, would be needed for applicants of NDAs and BLAs to create PMI and submit PMI to FDA for approval. This estimate subtotals 849,166 hours for applicants of NDAs and BLAs that are approved on or before or are pending on the effective date of the final rule (846,080 hours for NDAs and BLAs approved on or before the effective date of the final rule + 2,240 hours for NDAs and BLAs pending on the effective date of the final rule) (table 3 of this document).

Under proposed part 208, applicants of ANDAs approved on or before the effective date of the final rule (existing ANDAs) would be required to submit PMI to FDA in a supplement after the PMI is approved for the RLD product or after the PMI template that FDA created is provided, whichever applies. Table 3 of this document provides an estimate of the one-time reporting burden associated with existing ANDAs. Based on information available in our establishment and product listing database for drug and biological products, we estimate that 840 applicants of existing ANDAs will be affected by this proposed rule. Collectively, these respondents are responsible for submitting a labeling supplement with PMI for approximately 6,200 existing ANDAs (estimate based on data from the Orange Book from May 2018 of non-RLD ANDAs on the market) over a 5-year period, beginning 1 year after the effective date of the final rule based on this proposed rule and continuing for 5 years (approximately 1,240 per year).

Additionally, applicants of ANDAs pending at the time the final rule becomes effective would be required to submit PMI in an amendment after the PMI is approved for the RLD product or after the PMI template that FDA created is provided, whichever applies. Table 3

of this document provides an estimate of the one-time reporting burden associated with pending ANDAs. Using our experience with labeling submissions, we have estimated that 5 percent of the 1,186 ANDAs will be pending when the final rule based on this proposed rule becomes effective (59 pending ANDAs). We estimate that approximately 13 applicants of ANDAs will submit amendments to their ANDA to include PMI for 59 pending ANDAs.

Based on our experience with labeling and submissions, we estimate that approximately 27 hours, on average, would be needed for applicants of ANDAs to create PMI and submit PMI to FDA for approval. This estimate subtotals 168,993 hours for applicants of existing and pending ANDAs (167,400 hours for existing ANDAs + 1,593 for pending ANDAs) (table 3 of this document).

In some circumstances, an applicant may request or FDA may initiate a waiver under proposed § 208.90 or proposed § 606.123(c) of a PMI requirement, such as the content and format requirements. Based on our experience with labeling submissions, we estimate that 3 percent of the 2,529 applicants of existing and pending NDAs, BLAs, and ANDAs (1,669 applicants for existing NDAs and BLAs + 7 applicants of pending NDAs and BLAs + 840 applicants of existing ANDAs + 13 applicants of pending ANDAs) will request a waiver for a PMI requirement, approximately 76 applicants (table 3 of this document). We estimate that each applicant would submit one request, for a total of 76 requests. These requests would be submitted to us beginning 1 year after the effective date of the final rule and would be submitted throughout the 5-year implementation timeframe (table 3 of this document). The average burden per response is the estimated number of hours an applicant would spend creating and submitting the request to FDA. Based on our experience with labeling submissions, we estimate that approximately 4 hours, on average, would be needed per submission, subtotaling 304 hours (table 4 of this document).

To reduce the burden for authorized dispensers, FDA will submit PMI electronically for storage in a central repository. As a part of authorized dispensers' and transfusion services' normal business workflow, they will be able to download PMI from the central repository, integrate PMI into their existing software system, and provide PMI to patients as required under proposed §§ 208.70 and 606.123(b). As such, authorized dispensers and transfusion services will incur a one-time burden to download and integrate PMI into their existing software system. While a healthcare provider can administer or provide a prescription drug product directly to a patient, FDA expects authorized dispensers will generally be pharmacists at retail pharmacies in most instances. Based on an analysis of pharmacy ownership and the number of owners with multiple pharmacies, we expect that 44,318 pharmacies could incur the burden associated with these activities. Additionally, we have estimated that 4,961 transfusion services will incur the burden associated with these activities, totaling 49,279 respondents for this burden. The average burden per recordkeeping is the estimated number of hours an authorized dispenser would spend downloading PMI into their existing software system. FDA estimates that approximately 16 hours would be needed to download and integrate PMI into the existing software system, totaling 788,464 hours (table 3 of this document).

Reporting

Table 4 shows the estimated annual reporting burden associated with this collection of information.

TABLE 4—ESTIMATED ANNUAL REPORTING BURDEN [1] [2]

21 CFR section and activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
PMI for NDAs and BLAs (§§ 208.50(a) and 208.60(a), and 606.123(a))	108	1.1	119	320	38,080
PMI for ANDAs (§ 208.50(b) and 208.60(b))	251	4.73	1,186	27	32,022
Waiver Requests for PMI requirements (§§ 208.90 and 606.123(c))	1,489	1	1,489	4	5,956
Medication Guides Submitted with NDAs and BLAs (§ 208.94 (previously § 208.20))	57	1	57	320	18,240
Medication Guides Submitted as Supplements or Updates (§ 208.94 (previously § 208.26(a)))	108	1	108	72	7,776
Exemptions and Deferrals for Medication Guides (§ 208.98 (previously § 208.20))	1	1	1	4	4
Total					102,078

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Numbers have been rounded to the nearest hundredth.

Under proposed §§ 208.50(a), 208.60(a), and 606.123(a), applicants of NDAs or BLAs would be required to create PMI and submit PMI to FDA as part of the respective application. Based on our review of the annual Prescription Drug User Fee Act performance reports from 1993 to 2014, we estimate that 108 applicants of NDAs and BLAs will submit an NDA under § 314.50 or a BLA under § 601.2 for 119 new drug products annually, on average. Based on our experience with the information collection, we estimate that this activity will require 320 hours per submission. We calculate, therefore, an annual burden of 38,080 hours as reflected in table 4 of this document.

Under proposed §§ 208.50(b) and 208.60(b), applicants of ANDAs (new ANDAs) would be required to submit PMI to FDA as a part of the application. Accordingly, based on current data, we estimate that 251 ANDA applicants will submit PMI to FDA for approval, resulting in 1,186 submissions annually. Based on our experience with labeling submissions, we estimate that this activity will require an average of 27 hours per submission for a total of 32,022 hours annually as reflected in table 4 of this document.

Under proposed §§ 208.90 and 606.123(c), any covered entity may submit a request for a waiver. Covered entities would include applicants and authorized dispensers. Based on our experience with labeling submissions, we estimate that 3 percent of the 359 applicants (108 NDA applicants and BLA applicants + 251 ANDA applicants) of new drug products and new ANDAs will request a waiver from a PMI requirement, approximately 11 applicants submitting 1 NDA, BLA, or ANDA each. The average burden per response is the estimated number of hours an applicant would spend creating and submitting the request to FDA. Based on our experience with labeling submissions, we estimate that

approximately 4 hours, on average, would be needed per submission, subtotaling 44 hours. Additionally, under proposed § 208.90, authorized dispensers and under proposed § 606.123(c) transfusion services may request a waiver for any requirement related to providing PMI to patients. Based on our experience with the information collection, we estimate that 1,478 authorized dispensers and transfusion services (3 percent of 49,279 authorized dispensers and transfusion services) will each request 1 waiver from a PMI requirement. We estimate that the average burden per response is 4 hours. Therefore, we estimate that 1,489 covered entities/respondents (11 applicants of NDAs, BLAs, and ANDAs + 1,478 authorized dispensers and transfusion services) will request 1 waiver from a PMI requirement, totaling 5,956 hours (44 hours for NDA, BLA, or ANDA applicants + 5,912 hours for authorized dispensers and transfusion services), as reflected in table 4 of this document.

We propose to relocate current §§ 208.20 and 208.26(a) to proposed §§ 208.94 and 208.98. We have retained the estimates for current §§ 208.20 and 208.26(a) as previously approved by OMB under control number 0910–0393 as reflected in table 4 of this document.

Third-Party Disclosure

Table 5 shows the estimated annual third-party disclosure associated with this collection of information.

TABLE 5—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1] [2]

21 CFR section and activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Downloading PMI into Database (§§ 208.70 and 606.123(b))	49,276	12	591,312	0.5 (30 minutes)	295,656
Providing PMI to Patients (§§ 208.70 and 606.123(b))	93,697	45,924.63	4,303,000,000	0.02 (1 minute)	86,060,000
Medication Guide from Packer/Distributor to Authorized Dispenser (§ 208.96 (previously § 208.24(c)).	191	9,000	1,719,000	1.25	2,148,750
Medication Guide from Authorized Dispenser to Patient (§ 208.96 (previously § 208.24(e)).	88,736	5,705	506,238,880	0.05 (3 minutes)	25,311,944
Total					113,816,350

[1] There are no capital or operating and maintenance costs associated with this collection of information.
[2] Numbers have been rounded to the nearest hundredth.

Authorized dispensers, including transfusion services, would also be required to download updated PMI into their existing software system on a regular basis to ensure that patients receive the most up-to-date PMI. We anticipate that PMI would be updated in the central repository monthly. Therefore, authorized dispensers would need to download updated and new PMI from the central repository monthly. Consistent with our estimates to download and integrate PMI, we anticipate that 49,276 authorized dispensers could incur the burden associated with this activity. The average burden per recordkeeping is the estimated number of hours an authorized dispenser would spend downloading updated PMI into their existing software system. We estimate that 0.5 hours (30 minutes) would be needed to update PMI monthly, totaling 295,656 hours as reflected in table 5 of this document.

Proposed §§ 208.70(a) and 606.123(b) would require that authorized dispensers of human prescription drug products and transfusion services, respectively, provide FDA-approved PMI to patients when such PMI is available. Authorized dispensers and transfusion services must be capable of providing PMI in paper format to patients; however, they may provide PMI in electronic format to patients. Estimated printing costs will be equivalent to current printing costs, because dispensers already provide written information in paper format to patients. Further, we do not expect that dispensers will incur additional costs when printing PMI, because the length of PMI will be shorter than written information currently provided to patients. Because providing prescription drug product information to patients is currently a part of authorized dispensers' business practices and we are proposing that PMI be limited to one page, we anticipate time and effort for dispensers will be reduced.

Authorized dispensers and transfusion services may provide PMI in electronic format to patients when requested. Based on the normal course of their activities, many pharmacies may already have the contact information in patients' profiles. As a result, dispensers could expeditiously provide patients with PMI electronically.

Based on current data, we estimate that 88,736 pharmacies and 4,961 transfusion services could be affected by proposed §§ 208.70 and 606.123(b), respectively. These respondents would be responsible for providing to patients PMI for human prescription drug products used, dispensed, or administered on an outpatient basis or when patients receive transfusions on an outpatient basis. Collectively, these respondents are responsible for dispensing 4.3 billion prescriptions annually and 3 million transfusions annually. We estimate that it will take dispensers an average of 0.02 hours (1 minute) to provide PMI to patients for a total of 86,060,000 hours annually as reflected in table 5 of this document.

We propose to relocate current § 208.24(c) and (e) to proposed § 208.96. We have retained the estimates for current § 208.24(c) and (e) as previously approved under OMB control number 0910–0393 as reflected in table 5 of this document.

To ensure that comments on information collection are received, OMB recommends that written comments be submitted at *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The title of this proposed collection is ''Medication Guides: Patient Medication Information.'' All comments should be identified with the title of the information collection.

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3407(d)), we have submitted the information collection provisions of this proposed rule to OMB for review. These information collection requirements will not be effective until FDA publishes a final rule, OMB approves the information collection requirements, and the rule goes into effect. FDA will announce OMB approval of these requirements in the **Federal Register**.

XI. Federalism

We have analyzed this proposed rule in accordance with the principles set

forth in Executive Order 13132. We have determined that this proposed rule does not contain policies that 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. Accordingly, we conclude that the proposed rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

We are aware that States have laws or regulations that require pharmacists to counsel patients on the use of prescription drug products. We do not believe this proposed rule on PMI conflicts with such laws or regulations because this proposed rule would not affect any oral counseling requirements imposed by State laws or regulations. Nevertheless, we will continue to examine State laws for federalism purposes. We invite comments from interested persons, particularly with respect to State initiatives, to provide information to patients on prescription drug products used, dispensed, or administered on an outpatient basis.

XII. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the proposed rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Agency solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

XIII. References

The following references marked with an asterisk (*) 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.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. 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.

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List of Subjects

21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 208

Labeling, Prescription drugs, Reporting and recordkeeping requirements.

21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

21 CFR Part 606

Blood, Labeling, Laboratories, Reporting and recordkeeping requirements.

21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, the FDA proposes to amend 21 CFR parts 201, 208, 314, 606, and 610 as follows:

PART 201—LABELING

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 343, 351, 352, 353, 355, 358, 360, 360b, 360ccc, 360ccc–1, 360ee, 360gg–360ss, 371, 374, 379e; 42 U.S.C. 216, 241, 262, 264.

■ 2. In § 201.57, revise the last two sentences of paragraph (c)(18) to read as follows:

§ 201.57 Specific requirements on content and format of labeling for human prescription drug and biological products described in § 201.56(b)(1).

* * * * *

(c) * * *

(18) * * * Any FDA-approved patient labeling printed immediately following this section or accompanying the labeling is subject to the type size requirements in paragraph (d)(6) of this section, except for a Medication Guide to be provided to patients in compliance with §§ 208.70 and 208.96 of this chapter. Medication Guides for

distribution to patients are subject to the type size requirements set forth in §§ 208.30 and 208.94 of this chapter.

* * * * *

■ 3. In § 201.80, revise the last two sentences of paragraph (f)(2) to read as follows:

§ 201.80 Specific requirements on content and format of labeling for human prescription drug and biological products; older drugs not described in § 201.56(b)(1).

* * * * *

(f) * * *

(2) * * * Any FDA-approved patient labeling must be referenced in this section, and the full text of such patient labeling must be reprinted immediately following the last section of labeling or must accompany the prescription drug product labeling. The type size requirement for the Medication Guide set forth in §§ 208.30 and 208.94 of this chapter does not apply to the Medication Guide that is reprinted in or that accompanies the prescription drug product labeling unless such Medication Guide is to be detached and provided or distributed to patients in compliance with §§ 208.70 and 208.96 of this chapter.

* * * * *

■ 4. In § 201.100, add paragraph (g) to read as follows:

§ 201.100 Prescription drugs for human use.

* * * * *

(g) When a Medication Guide is required under part 208 or § 606.123 of this chapter, the drug must have an approved Medication Guide and be dispensed with a Medication Guide (as described in part 208 or § 606.123 of this chapter).

■ 5. Revise part 208 to read as follows:

PART 208—MEDICATION GUIDES

Sec.

Subpart A—General Provisions for Patient Medication Information

208.10 Scope and purpose.
208.20 Definitions.

Subpart B—General Requirements for Patient Medication Information

208.30 Format of Patient Medication Information.
208.40 Content of Patient Medication Information.
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Subpart C—General Provisions for Medication Guides for Prescription Drug Products

208.91 Scope and purpose.
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Subpart D—General Requirements for Medication Guides for Prescription Drug Products

208.94 Content and format of a Medication Guide.
208.96 Distributing and providing a Medication Guide.
208.98 Exemptions and deferrals.

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 357, 360, 371, 374; 42 U.S.C. 262.

Subpart A—General Provisions for Patient Medication Information

§ 208.10 Scope and purpose.

(a) *Scope.* Subparts A and B of this part set forth requirements for patient labeling for prescription drug products used, dispensed, or administered on an outpatient basis. This patient labeling is a type of Medication Guide called Patient Medication Information. Any prescription drug product that is approved or submitted for approval under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) or section 351(a) or (k) of the Public Health Service Act (42 U.S.C. 262(a) or (k)) and that is used, dispensed, or administered on an outpatient basis is required to have the Food and Drug Administration (FDA)-approved Patient Medication Information, with the exception of excluded entities identified in paragraph (d) of this section.

(b) *Purpose.* Patient Medication Information for prescription drug products required under this part provides concise, accessible, and useful written prescription drug product information for patients. Patient Medication Information must be delivered in a consistent and easily understood format to help patients use their prescription drug products safely and effectively.

(c) *Covered entities.* (1) Applicants of prescription drug products approved or submitted for approval under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) or section 351(a) or (k) of the Public Health Service Act (42 U.S.C. 262(a) or (k)) must have FDA-approved Patient Medication Information for each prescription drug product used, dispensed, or administered on an outpatient basis, with the exception of excluded entities identified in paragraph (d) of this section.

(2) Authorized dispensers are required to provide patients with FDA-approved Patient Medication Information each time a prescription drug product is used, dispensed, or administered on an outpatient basis when such Patient Medication Information exists.

(d) *Excluded entities.* Applicants of prescription drug products that are preventive vaccines that do not have a Medication Guide (as required under subparts C and D of this part) are not required to submit Patient Medication Information to FDA for approval for those products unless FDA determines that Patient Medication Information is required for safe and/or effective use of the product.

§ 208.20 Definitions.

The following definitions apply to this part:

Administered means the act of directly providing a prescription drug product to a patient by injection, inhalation, ingestion, application, or any other means by a licensed healthcare provider (or a licensed healthcare provider's agent) or by a patient (or a patient's agent) under the direction of a licensed healthcare provider (or a licensed healthcare provider's agent). In some circumstances, a product can be both administered and dispensed at the same time.

Applicant means all of the following:

(1) Any person who submits an application or abbreviated application or an amendment or supplement to their application under part 314 or part 601 of this chapter to obtain FDA approval of a new drug or biological product and,

(2) Any person who owns an approved application or an abbreviated application.

Authorized dispenser means an individual(s) or entity who is licensed, registered, or otherwise permitted by the jurisdiction in which the individual(s) or entity practices to provide prescription drug products in the course of professional practice.

Dispensed means the act of providing a prescription drug product to a patient (or a patient's agent) in either of the following ways:

(1) By a licensed healthcare provider (or a licensed healthcare provider's agent), either directly or indirectly, for administration by the patient (or the patient's agent) under or outside of the licensed healthcare provider's direct supervision.

(2) By an authorized dispenser (or an authorized dispenser's agent) under a

lawful prescription of a licensed healthcare provider.

Drug name means the proprietary name, if any, and the established name of the drug (as defined in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 352(e)(3)) or, for biological products, the proper name (as defined in § 600.3 of this chapter) including any appropriate descriptors.

Drug product means a finished dosage form (for example, tablet, capsule, solution), as defined in § 210.3 of this chapter, that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients. For the purposes of this part, *drug product* also includes a biological product licensed under section 351(a) and (k) of the Public Health Service Act (42 U.S.C. 262(a) and (k)).

Licensed healthcare provider means an individual who is licensed, registered, or otherwise permitted by the jurisdiction in which the individual practices to prescribe drug products in the course of professional practice.

Manufacturer means all of the following:

(1) For a drug product that is not a biological product, the manufacturer as described in § 201.1 of this chapter.

(2) For a drug product that is a biological product, the manufacturer as described in § 600.3(t) of this chapter.

Patient means any individual to whom a drug product is intended to be or has been used, dispensed, or administered.

Patient Medication Information means a type of FDA-approved Medication Guide—a form of patient labeling—that conforms to the specifications set forth in subparts A and B of this part.

Revision date means the date (month/year) on which Patient Medication Information was initially approved or the date on which any changes have been made to the Patient Medication Information, whichever applies and whichever date is later.

Used (in relation to prescription drug products and Patient Medication Information) means the act of a patient (or a patient's agent) directly applying a prescription drug product to the body of the patient by injection, inhalation, ingestion, application, or any other means.

Subpart B—General Requirements for Patient Medication Information

§ 208.30 Format of Patient Medication Information.

(a) Patient Medication Information must meet the following requirements:

(1) Patient Medication Information must be written in English; provided, however, that in the case of articles distributed solely in the Commonwealth of Puerto Rico or in a Territory where the predominant language is one other than English, the predominant language may be substituted for English.

(2) Patient Medication Information provided to a patient in paper format must be legible and printed on a single side of an 8½ by 11-inch sheet of paper. It must not exceed a single page in length.

(3) Patient Medication Information provided in electronic format must be printable and produce a document that is identical to the Patient Medication Information in paper format.

(4) The required Patient Medication Information headings, subheadings, title ''PATIENT MEDICATION INFORMATION,'' and drug name(s), phonetic spelling of the drug name(s), dosage form(s), and route(s) of administration must appear in bold, beginning on the line immediately below the title.

(5) The title ''PATIENT MEDICATION INFORMATION'' must be presented in all uppercase letters. The proprietary name (if any) may be presented in all uppercase letters. Generally, no other words may be presented in all uppercase letters with the exception of commonly used acronyms.

(6) The title ''PATIENT MEDICATION INFORMATION'' and the drug name(s), phonetic spelling of the drug name(s), dosage form(s), and route(s) of administration beginning immediately below the title must appear centered at the top of the page.

(b) Patient Medication Information must *not* contain any of the following:

(1) Letter type that is less than 10-point font (1 point = 0.0138 inches) for any section of Patient Medication Information. However, the manufacturer's, packer's, and/or distributor's name and place of business (and the U.S. license number of the prescription drug product that is a biological product), the statement ''The content of this Patient Medication Information has been approved by the U.S. Food and Drug Administration,'' and the revision date can be less than 10-point font.

(2) Reverse type, lightface, shading, condensed type, or narrow fonts.

(3) Colors other than black type.

(4) Page number.

§ 208.40 Content of Patient Medication Information.

(a) *General content requirements for Patient Medication Information.* Patient Medication Information must meet all general content requirements as follows:

(1) Patient Medication Information must be easily read and understood by the general population, including individuals with low literacy and comprehension levels.

(2) Patient Medication Information must not be promotional in tone.

(3) The content of Patient Medication Information must be scientifically accurate, must not be false or misleading in any particular, and must be based on and consistent with the Prescribing Information (PI) for the prescription drug product required under §§ 201.56, 201.57, 201.80, and 606.122 of this chapter and section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355). Patient Medication Information for new drug applications and biologics license applications must be updated when new information becomes available that would cause the Patient Medication Information to become inaccurate, false, or misleading in accordance with §§ 314.70 and 601.12 of this chapter.

(4) The title ''PATIENT MEDICATION INFORMATION'' must appear at the top of the page.

(5) The drug name(s) must appear immediately below the title ''PATIENT MEDICATION INFORMATION'' and must include the phonetic spelling of the proprietary name, if any, and the established name (or the proper name) of the prescription drug product. The drug name(s) must be followed by the dosage form(s) and route(s) of administration. If the drug name needs to be used again throughout Patient Medication Information, only the proprietary name (if any) must be used. Those prescription drug products not having a proprietary name must use the established name or the proper name.

(6) The statement ''The content of this Patient Medication Information has been approved by the U.S. Food and Drug Administration'' must appear at the bottom of the page followed by the revision date.

(7) The name and place of business of the manufacturer, packer, or distributor of a prescription drug product that is not also a biological product must be included in Patient Medication Information below the statement required in paragraph (a)(6) of this section and the revision date. The licensed manufacturer's name, address, and U.S. license number of a prescription drug product that is also a biological product must be included in Patient Medication Information below the statement required in paragraph (a)(6) of this section and the revision date. The name and place of business of

the authorized dispenser may also be included in Patient Medication Information.

(8) Any heading, subheading, or specific information required under paragraphs (b) and (c) of this section that is inapplicable must be omitted from Patient Medication Information.

(b) *Required headings for Patient Medication Information.* Patient Medication Information must contain these headings in the following order if not omitted under paragraph (a)(8) of this section: [Insert drug name] is, Important Safety Information, Common Side Effects, Directions for Use.

(c) *Specific content required under headings for Patient Medication Information.* Each heading must contain the specific information as follows if not omitted under paragraph (a)(8) of this section:

(1) *[Insert drug name] is.* A concise summary of the outpatient indications and uses for the prescription drug product listed in the prescription drug product's Prescribing Information (PI). The information in this section would be consistent with the information found in the INDICATIONS AND USAGE section of the PI.

(2) *Important Safety Information.* This heading must contain these subheadings in the following order if not omitted under paragraph (a)(8) of this section:

(i) *Warnings.* A concise summary of serious warnings from the use of the prescription drug product, including any that may lead to death or serious injury. The *Warnings* subheading must include a summary of the information found in the prescription drug product's boxed warning, if any, that is most relevant for patients to know for the safe and effective use of the prescription drug product.

(ii) *Do not take.* A statement of the circumstances (if any) under which the prescription drug product should not be used because the risk of use outweighs any benefit. The information in the *Do not take* subheading would be consistent with the most relevant information to patients found in the CONTRAINDICATIONS section of the PI.

(iii) *Serious side effects.* A listing of the clinically significant adverse reactions or risks associated with the use of the prescription drug product that are most relevant to the patient, and information on when to call a healthcare provider or when and how to obtain emergency help if certain clinically significant adverse reactions occur. The information in the *Serious side effects* subheading must be consistent with either:

(A) The most relevant information to patients found in the ''WARNINGS AND PRECAUTIONS'' section for drug labeling that must meet the format and content requirements of §§ 201.56(d) and 201.57 of this chapter; or

(B) The ''WARNINGS'' section and the ''PRECAUTIONS'' section for drug labeling that must meet the format and content requirements of § 201.80 of this chapter.

(iv) *Tell your health care provider before taking.* A statement that identifies specific populations and conditions (if any) that may have clinically important differences in response to the prescription drug product or may change the recommendation for use of the prescription drug product.

(3) *Common Side Effects.* A statement of frequently occurring adverse reactions (if any) from the use of the prescription drug product, followed by the statement ''These are not all of the possible side effects of [Insert Drug Name]. Call your health care provider if you have side effects that worsen or do not go away. You may also report side effects to FDA at [insert current FDA telephone number and web address for voluntary reporting of adverse reactions].''

(4) *Directions for Use.* The statement ''Use exactly as prescribed'' must appear first after this heading. This statement must be followed by how the prescription drug product must be administered and the route of administration. ''Directions for Use'' also must contain basic directions for use and any special instructions on how to administer the drug (for example, whether it should be taken with food or taken at a period of time before or after eating certain foods, or what to do if a patient misses a scheduled dose). If applicable, this section includes a statement of special handling, storage conditions, and disposal information. The dosing and administration and the storage, handling, and disposal information must be consistent with the most relevant information to patients found in:

(i) The ''DOSAGE AND ADMINISTRATION'' section of the PI; and

(ii) The ''HOW SUPPLIED/STORAGE AND HANDLING'' section for drug labeling that must meet the format and content requirements of §§ 201.56(d) and 201.57 of this chapter or the ''HOW SUPPLIED'' section for drug labeling that must meet the format and content requirements of § 201.80 of this chapter. Additional FDA-approved patient labeling must be referenced, when applicable.

§ 208.50 Development of Patient Medication Information for new drug applications, biologics license applications, and abbreviated new drug applications.

(a) *New drug applications and biologics license applications.* The applicant of a new drug application (NDA) or a biologics license application (BLA) for a prescription drug product used, dispensed, or administered on an outpatient basis must create Patient Medication Information in accordance with the requirements set forth in this part and other applicable regulations. In certain circumstances, FDA may require more than one Patient Medication Information for a prescription drug product, associated with a single PI, when one Patient Medication Information cannot adequately convey the safe and effective use of the drug to patients.

(b) *Abbreviated new drug applications.* (1) Except as provided in paragraph (b)(2) of this section, the applicant of a prescription drug product approved or submitted for approval under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) must have Patient Medication Information that is the same as that of the reference listed drug upon which its approval is based except for:

(i) Changes required because of differences approved under a suitability petition (see 505(j)(2)(C) of the Federal Food, Drug and Cosmetic Act and § 314.93 of this chapter); or

(ii) Changes permitted pursuant to § 314.94(a)(8)(iv) of this chapter.

(2) The applicant of a prescription drug product approved or submitted for approval under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) that refers to a listed drug approved under section 505(c) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(c)) for which approval has been voluntarily withdrawn before the approval of the Patient Medication Information for the reference listed drug must have Patient Medication Information that is the same as that of the Patient Medication Information template that FDA creates for the prescription drug product except for:

(i) Changes required because of differences approved under a suitability petition (see 505(j)(2)(C) of the Federal Food, Drug and Cosmetic Act and § 314.93 of this chapter); or

(ii) Changes permitted pursuant to § 314.94(a)(8)(iv) of this chapter.

§ 208.60 Submission of Patient Medication Information for new drug applications, biologics license applications, and abbreviated new drug applications.

(a) *New drug applications and biologics license applications.* The NDA or BLA applicant must submit to FDA for approval as part of the application the Patient Medication Information along with the PI upon which the Patient Medication Information is based. If Patient Medication Information is submitted after approval of the NDA or BLA, the Patient Medication Information, along with the PI upon which the Patient Medication Information is based, must be submitted to FDA for approval in a prior approval supplement pursuant to §§ 314.70(b)(2)(v)(B) and 601.12(f)(1) of this chapter.

(b) *Abbreviated new drug applications.* The abbreviated new drug application (ANDA) applicant must submit Patient Medication Information to FDA for approval after either Patient Medication Information for the reference listed drug is approved or FDA has finalized the Patient Medication Information template and provides notice of the template to the applicant, whichever applies. If Patient Medication Information is submitted after the original approval of the ANDA, Patient Medication Information must be submitted in a supplement to the ANDA consistent with § 314.70 of this chapter.

§ 208.70 Providing Patient Medication Information to patients.

(a) When a prescription drug product is used, dispensed, or administered to a patient (or the patient's agent) on an outpatient basis, the authorized dispenser of a prescription drug product for which Patient Medication Information is required under subparts A and B of this part must provide FDA-approved Patient Medication Information to each patient (or the patient's agent). Authorized dispensers may provide Patient Medication Information to the patient electronically; however, paper distribution must always be available.

(b) An authorized dispenser is not subject to section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360) (which requires the registration of those that engage in the manufacture, preparation, propagation, compounding, or processing of drugs and the listing of certain drugs in commercial distribution) solely because of an action performed by the authorized dispenser under this part.

§ 208.80 Schedule for implementing the general requirements for Patient Medication Information.

(a) *Implementation schedule for applicants to submit Patient Medication Information for NDAs and BLAs.* NDA and BLA applicants must submit to FDA Patient Medication Information that conforms to the requirements in subparts A and B of this part. If an approved NDA or a BLA has one or more approved efficacy supplements, use the NDA, BLA, or efficacy supplement approval date that triggers the earliest submission for the following implementation schedule:

(1) For products for which an NDA, a BLA, or an efficacy supplement is submitted for approval on or after [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], a Patient Medication Information must be submitted to FDA as part of the application.

(2) For products for which an NDA, a BLA, or an efficacy supplement is pending on [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], a supplement or, if appropriate, an amendment, with Patient Medication Information must be submitted to FDA no later than 1 year after the date of approval of the pending application.

(3) For products with an FDA-approved Medication Guide (as required under subparts C and D of this part) or an FDA-approved patient package insert (as required under § 310.501 or § 310.515 of this chapter) for which an NDA or a BLA has been approved on or any time before [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], a supplement with Patient Medication Information must be submitted to FDA no later than [DATE 1 YEAR AFTER EFFECTIVE DATE OF FINAL RULE WILL BE ADDED]. Once the product with an FDA-approved Medication Guide (as required under subparts C and D of this part) or an FDA-approved patient package insert (as required under § 310.501 or § 310.515 of this chapter) has FDA-approved Patient Medication Information, the Medication Guide requirements (under subparts C and D of this part) and the patient package insert requirements (§§ 310.501 and 310.515 of this chapter) are no longer applicable to such product.

(4) For products without an FDA-approved Medication Guide or an FDA-approved patient package insert for which an NDA, a BLA, or an efficacy supplement has been approved any time from January 1, 2013, up to and including [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], a supplement with Patient Medication Information must be submitted to FDA no later than [DATE 2 YEARS AFTER EFFECTIVE DATE OF FINAL RULE WILL BE ADDED].

(5) For products without an FDA-approved Medication Guide or an FDA-approved patient package insert for which an NDA, a BLA, or an efficacy supplement has been approved from January 1, 2008, up to and including December 31, 2012, a supplement with Patient Medication Information must be submitted to FDA no later than [DATE 3 YEARS AFTER EFFECTIVE DATE OF FINAL RULE WILL BE ADDED].

(6) For products without an FDA-approved Medication Guide or without an FDA-approved patient package insert for which an NDA, a BLA, or an efficacy supplement has been approved from January 1, 2003, up to and including December 31, 2007, a supplement with Patient Medication Information must be submitted to FDA no later than [DATE 4 YEARS AFTER EFFECTIVE DATE OF FINAL RULE WILL BE ADDED].

(7) For products without an FDA-approved Medication Guide or without an FDA-approved patient package insert for which an NDA, a BLA, or an efficacy supplement has been approved on or before December 31, 2002, a supplement with Patient Medication Information must be submitted to FDA no later than [DATE 5 YEARS AFTER EFFECTIVE DATE OF FINAL RULE WILL BE ADDED].

(b) *Implementation schedule for applicants to submit Patient Medication Information for ANDAs.* ANDA applicants must submit to FDA Patient Medication Information that conforms to the requirements in subparts A and B of this part and other applicable regulations.

(1) For products for which an ANDA is submitted for approval on or after [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], Patient Medication Information must be submitted to FDA as follows:

(i) If the Patient Medication Information for the reference listed drug is approved at the time the ANDA is submitted or if FDA has finalized the Patient Medication Information template and provides notice of the template to the applicant, whichever applies, Patient Medication Information must be submitted to FDA as part of the application.

(ii) If the Patient Medication Information for the reference listed drug is not approved or if FDA has not finalized the Patient Medication Information template and provided notice of the template to the applicant, whichever applies, at the time the ANDA is submitted but such Patient Medication Information is approved for the reference listed drug or FDA

finalizes the template and provides notice of the template to the applicant before the ANDA is approved, the applicant for the ANDA must submit Patient Medication Information in an amendment to the pending application after the approval of the Patient Medication Information for the reference listed drug or after FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant, whichever applies.

(iii) If the Patient Medication Information for the reference listed drug is not approved or if FDA has not finalized the Patient Medication Information template and provided notice of the template to the applicant, whichever applies, before the submitted ANDA is approved, a supplement with the Patient Medication Information must be submitted to FDA, consistent with § 314.70 of this chapter, after the approval of the Patient Medication Information for the reference listed drug or after FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant, whichever applies.

(2) For products for which an ANDA is pending on the [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], Patient Medication Information must be submitted as follows:

(i) If the Patient Medication Information for the reference listed drug is approved or if FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant before the ANDA is approved, an amendment to the pending application with Patient Medication Information must be submitted to FDA after the approval of the Patient Medication Information for the reference listed drug or after FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant, whichever applies.

(ii) If the Patient Medication Information for the reference listed drug is approved or if FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant after the pending ANDA is approved, a supplement with Patient Medication Information must be submitted to FDA, consistent with § 314.70 of this chapter, after the approval of the Patient Medication Information for the reference listed drug or after FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant, whichever applies.

(3) For products for which an ANDA has been approved on or any time before [EFFECTIVE DATE OF FINAL RULE WILL BE ADDED], a supplement with Patient Medication Information must be submitted to FDA, consistent with § 314.70 of this chapter, after the approval of the Patient Medication Information for the reference listed drug or after FDA finalizes the Patient Medication Information template and provides notice of the template to the applicant, whichever applies.

(c) *Implementation schedule for authorized dispensers to provide Patient Medication Information to patients.* Authorized dispensers must begin to provide FDA-approved Patient Medication Information as required under this section on [DATE 2 YEARS AFTER EFFECTIVE DATE OF FINAL RULE WILL BE ADDED] and must continue to provide FDA-approved Patient Medication Information thereafter. Once a product with an FDA-approved Medication Guide (as required under subparts C and D of this part) has FDA-approved Patient Medication Information, the requirements for providing a Medication Guide (under § 208.96) are no longer applicable for such product.

§ 208.90 Waivers.

On its own initiative or in response to a request from a covered entity, FDA may waive any Patient Medication Information requirement on the basis that the requirement is inapplicable, impracticable, or contrary to a patient's best interests (for example, impedes patient access to the drug product). FDA may consider an applicant's request for an extension from the specified implementation date to comply fully with the Patient Medication Information requirements. Written requests for waivers must be submitted to the director of the FDA division responsible for reviewing the marketing application for the drug product. For ANDAs, the requests for waivers and the rationale for the waiver would need to be submitted to the Director of the Office of Generic Drugs. For biological products, requests would be submitted to the FDA application division in the office with product responsibility.

Subpart C—General Provisions for Medication Guides for Prescription Drug Products

§ 208.91 Scope and purpose.

(a) Subparts C and D of this part set forth requirements for patient labeling for human prescription drug products, including biological products, that FDA determines pose a serious and significant public health concern requiring distribution of FDA-approved patient information. It applies primarily to human prescription drug products used on an outpatient basis without direct supervision by a health professional. Subparts C and D of this part apply to new prescriptions and refill prescriptions.

(b) The purpose of patient labeling for human prescription drug products required under this part is to provide information when FDA determines in writing that it is necessary to patients' safe and effective use of drug products.

(c) Patient labeling will be required if FDA determines that one or more of the following circumstances exists:

(1) The drug product is one for which patient labeling could help prevent serious adverse effects.

(2) The drug product is one that has serious risk(s) (relative to benefits) of which patients should be made aware because information concerning the risk(s) could affect a patient's decision to use or to continue to use the product.

(3) The drug product is important to health, and patient adherence to directions for use is crucial to the drug's effectiveness.

(d) Drug products described in § 208.10 must comply with subparts A and B of this part according to the implementation plan in § 208.80. Once a drug product has FDA-approved Patient Medication Information, the requirements for Medication Guides under subparts C and D of this part are no longer applicable.

§ 208.92 Definitions.

The following definitions apply to subparts C and D of this part:

Authorized dispenser means an individual who is licensed, registered, or otherwise permitted by the jurisdiction in which the individual practices to provide prescription drug products in the course of professional practice.

Dispensed means the act of providing a prescription drug product to a patient (or a patient's agent) by either of the following ways:

(1) By a licensed healthcare provider (or a licensed provider's agent), either directly or indirectly, for administration by the patient (or the patient's agent) or outside the licensed provider's direct supervision.

(2) By an authorized dispenser (or authorized dispenser's agent) under a lawful prescription of a licensed healthcare provider.

Distribute means the act of delivering, other than by dispensing, a drug product to any person.

Distributor means a person who distributes a drug product.

Drug product means a finished dosage form (for example, tablet, capsule, solution) that contains a drug substance, generally, but not necessarily, in association with one or more other ingredients. For the purposes of this part, drug product also includes a biological product licensed under section 351(a) and (k) of the Public Health Service Act (42 U.S.C. 262(a) and (k)).

Licensed healthcare provider means an individual who is licensed, registered, or otherwise permitted by the jurisdiction in which the individual practices to prescribe drug products in the course of professional practice.

Manufacturer means all of the following:

(1) For a drug product that is not also a biological product, both the manufacturer as described in § 201.1 of this chapter and the applicant as described in § 314.3(b) of this chapter.

(2) For a drug product that is also a biological product, the manufacturer as described in § 600.3(t) of this chapter.

Medication Guide means FDA-approved patient labeling conforming to the specifications set forth in subparts C and D of this part and other applicable regulations.

Packer means a person who packages a drug product.

Patient means any individual to whom a drug product is intended to be, or has been, used, dispensed, or administered.

Serious risk or serious adverse effect means an adverse drug experience, or the risk of such an experience, as that term is defined in §§ 310.305, 312.32, 314.80, and 600.80 of this chapter.

Subpart D—General Requirements for Medication Guides for Prescription Drug Products

§ 208.94 Content and format of a Medication Guide.

(a) A Medication Guide must meet all of the following conditions:

(1) The Medication Guide must be written in English, in nontechnical, understandable language, and shall not be promotional in tone.

(2) The Medication Guide must be scientifically accurate and must be based on, and must not conflict with, the approved professional labeling for the drug product under § 201.57 of this chapter, but the language of the Medication Guide need not be identical to the sections of approved labeling to which it corresponds.

(3) The Medication Guide must be specific and comprehensive.

(4) The letter height or type size must be no smaller than 10 points (1 point = 0.0138 inches) for all sections of the Medication Guide, except the manufacturer's name and address and the revision date.

(5) The Medication Guide must be legible and clearly presented. Where appropriate, the Medication Guide must also use boxes, bold or underlined print, or other highlighting techniques to emphasize specific portions of the text.

(6) The words ''Medication Guide'' must appear prominently at the top of the first page of a Medication Guide. The verbatim statement ''This Medication Guide has been approved by the U.S. Food and Drug Administration'' must appear at the bottom of a Medication Guide.

(7) The brand name and established or proper name of the drug product must appear immediately below the words ''Medication Guide.'' The established or proper name must be no less than one-half the height of the brand name.

(b) A Medication Guide must contain those of the following headings relevant to the drug product and to the need for the Medication Guide in the specified order. Each heading must contain the specific information as follows:

(1) The brand name (*e.g.,* the trademark or proprietary name), if any, and the established or proper name. Those products not having an established or proper name must be designated by their active ingredients. The Medication Guide must include the phonetic spelling of either the brand name or the established name, whichever is used throughout the Medication Guide.

(2) The heading ''What is the most important information I should know about (*name of drug*)?'' followed by a statement describing the particular serious and significant public health concern that has created the need for the Medication Guide. The statement must describe specifically what the patient should do or consider because of that concern, such as weighing particular risks against the benefits of the drug, avoiding particular behaviors (*e.g.,* activities, drugs), observing certain events (*e.g.,* symptoms, signs) that could prevent or mitigate a serious adverse effect, or engaging in particular behaviors (*e.g.,* adhering to the dosing regimen).

(3) The heading ''What is (*name of drug*)?'' followed by a section that identifies a drug product's indications for use. The Medication Guide must not identify an indication unless the indication is identified in the INDICATIONS AND USAGE section of the professional labeling for the product as required under § 201.57 of this chapter. In appropriate circumstances, this section may also explain the nature of the disease or condition the drug product is intended to treat, as well as the benefit(s) of treating the condition.

(4) The heading ''Who should not take (*name of drug*)?'' followed by information on circumstances under which the drug product should not be used for its labeled indication (its contraindications). The Medication Guide must contain directions regarding what to do if any of the contraindications apply to a patient, such as contacting the licensed provider or discontinuing use of the drug product.

(5) The heading ''How should I take (*name of drug*)?'' followed by information on the proper use of the drug product, such as:

(i) A statement stressing the importance of adhering to the dosing instructions, if this is particularly important;

(ii) A statement describing any special instructions on how to administer the drug product, if they are important to the drug's safety or effectiveness;

(iii) A statement of what patients should do in case of overdose of the drug product; and

(iv) A statement of what patients should do if they miss taking a scheduled dose(s) of the drug product, where there are data to support the advice, and where the wrong behavior could cause harm or lack of effect.

(6) The heading ''What should I avoid while taking (*name of drug*)?'' followed by a statement or statements of specific, important precautions patients should take to ensure proper use of the drug, including:

(i) A statement that identifies activities (such as driving or sunbathing) and drugs, foods, or other substances (such as tobacco or alcohol) that patients should avoid when using the medication;

(ii) A statement of the risks to mothers and fetuses from use of the drug during pregnancy if specific, important risks are known;

(iii) A statement of the risks of the drug product to nursing infants if specific, important risks are known;

(iv) A statement about pediatric risks if the drug product has specific hazards associated with its use in pediatric patients;

(v) A statement about geriatric risks if the drug product has specific hazards associated with its use in geriatric patients; and

(vi) A statement of special precautions if any, that apply to the safe and effective use of the drug product in other identifiable patient populations.

(7) The heading ''What are the possible or reasonably likely side effects of (*name of drug*)?'' followed by:

(i) A statement of the adverse reactions reasonably likely to be caused by the drug product that are serious or occur frequently.

(ii) A statement of the risk, if there is one, of patients' developing dependence on the drug product.

(iii) For drug products approved under section 505 of the Federal Food, Drug, and Cosmetic Act, the following verbatim statements: ''Call your doctor for medical advice about side effects. You may report side effects to FDA at 1–800–FDA–1088.''

(8) General information about the safe and effective use of prescription drug products, including:

(i) The verbatim statement ''Medicines are sometimes prescribed for purposes other than those listed in a Medication Guide'' followed by a statement that patients should ask health professionals about any concerns and a reference to the availability of professional labeling;

(ii) A statement that the drug product should not be used for a condition other than that for which it is prescribed or be given to other persons;

(iii) The name and place of business of the manufacturer, packer, or distributor of a drug product that is not also a biological product, or the name and place of business of the manufacturer or distributor of a drug product that is also a biological product, and in any case, the name and place of business of the dispenser of the product may also be included; and

(iv) The date, identified as such, of the most recent revision of the Medication Guide, placed immediately after the last section.

(9) Additional headings and subheadings may be interspersed throughout the Medication Guide, if appropriate.

§ 208.96 Distributing and providing a Medication Guide.

(a) The manufacturer of a drug product for which a Medication Guide is required under this part must obtain FDA approval of the Medication Guide before the Medication Guide may be distributed.

(b) Each manufacturer who ships a container of drug product for which a Medication Guide is required under this part is responsible for ensuring that Medication Guides are available for distribution to patients by either:

(1) Providing Medication Guides in sufficient numbers to distributors, packers, or authorized dispensers to permit the authorized dispenser to provide a Medication Guide to each patient receiving a prescription for the drug product; or

(2) Providing the means to produce Medication Guides in sufficient numbers to distributors, packers, or authorized dispensers to permit the authorized dispenser to provide a Medication Guide to each patient receiving a prescription for the drug product.

(c) Each distributor or packer that receives Medication Guides or has the means to produce Medication Guides from a manufacturer under paragraph (b) of this section must provide those Medication Guides or the means to produce Medication Guides to each authorized dispenser to whom it ships a container of drug product.

(d) The label of each container or package, where the container label is too small, of drug product for which a Medication Guide is required under this part must instruct the authorized dispenser to provide a Medication Guide to each patient to whom the drug product is dispensed and must state how the Medication Guide is provided. These statements must appear on the label in a prominent and conspicuous manner.

(e) Each authorized dispenser of a prescription drug product for which a Medication Guide is required under this part must, when the product is dispensed, provide a Medication Guide directly to each patient (or to the patient's agent) unless an exemption applies under § 208.98.

(f) An authorized dispenser or wholesaler is not subject to section 510 of the Federal Food, Drug, and Cosmetic Act, which requires the registration of producers of drugs and the listing of drugs in commercial distribution, solely because of an act performed by the authorized dispenser or wholesaler under this part.

§ 208.98 Exemptions and deferrals.

(a) FDA on its own initiative or in response to a written request from an applicant may exempt or defer any Medication Guide content or format requirement—except those requirements in § 208.94(a)(2) and (6)—on the basis that the requirement is inapplicable, unnecessary, or contrary to patients' best interests. Requests from applicants should be submitted to the director of the FDA division responsible for reviewing the marketing application for the drug product, or for a biological product, to the FDA application division in the office with product responsibility.

(b) If the licensed provider who prescribes a drug product subject to this part determines that it is not in a particular patient's best interest to receive a Medication Guide because of significant concerns about the effect of a Medication Guide on the patient, the licensed provider may direct that the Medication Guide not be provided to the particular patient. However, the authorized dispenser of a prescription drug product subject to this part must provide a Medication Guide to any patient who requests information when the drug product is dispensed, regardless of any such direction by the licensed provider.

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG

■ 6. The authority citation for part 314 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 355a, 355f, 356, 356a, 356b, 356c, 356e, 360cc, 371, 374, 379e, 379k–1.

■ 7. In § 314.70, revise paragraph (b)(2)(v)(B) and add paragraph (c)(6)(iv) to read as follows:

§ 314.70 Supplements and other changes to an approved NDA.

* * * * *

(b) * * *

(2) * * *

(v) * * *

(B) If applicable, any change to Medication Guides required under part 208 of this chapter, except for changes in the information specified in §§ 208.40(a)(4), (7), and (8), and (c)(3) of this chapter, and § 208.94(b)(8)(iii) and (iv) of this chapter; and

* * * * *

(c) * * *

(6) * * *

(iv) Addition of Patient Medication Information for a drug approved under an ANDA if the proposed Patient Medication Information is the same as that approved for the reference listed drug or the same as the Patient Medication Information template finalized by FDA, whichever applies, except for permissible differences consistent with § 314.94(a)(8)(iv).

* * * * *

PART 606—CURRENT GOOD MANUFACTURING PRACTICE FOR BLOOD AND BLOOD COMPONENTS

■ 8. The authority citation for part 606 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 355, 360, 360j, 371, 374; 42 U.S.C. 216, 262, 263a, 264.

■ 9. Add § 606.123 to subpart G to read as follows:

§ 606.123 Medication Guides: Patient Medication Information for blood and blood components intended for transfusion.

Medication Guides: Patient Medication Information (as described in part 208 of this chapter) must be provided to a patient who is administered blood or blood components on an outpatient basis unless a waiver is granted.

(a) Blood establishments must make Patient Medication Information (as described in part 208 of this chapter) available for distribution to the transfusion service. Licensed blood establishments must submit Patient Medication Information to FDA for approval (as described in part 208 of this chapter).

(b) When blood or blood components are administered on an outpatient basis, the transfusion service must provide Patient Medication Information to each patient (or the patient's agent). The transfusion service may provide Patient Medication Information to the patient electronically; however, paper distribution must always be available.

(c) On its own initiative or in response to a written request from a blood collection establishment or transfusion service, FDA may waive any Patient Medication Information requirement on the basis that the requirement is inapplicable, unnecessary, impracticable, or contrary to a patient's best interests. Written requests for waivers must be submitted to the FDA application division in the office with product responsibility.

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

■ 10. The authority citation for part 610 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360c, 360d, 360h, 360i, 371, 372, 374, 381; 42 U.S.C. 216, 262, 263, 263a, 264.

§ 610.60 [Amended]

■ 11. Amend § 610.60 by removing paragraph (a)(7).

Dated: May 19, 2023.

Robert M. Califf,

Commissioner of Food and Drugs.

[FR Doc. 2023–11354 Filed 5–30–23; 8:45 am]

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